Note from the Attorney General's Office:

1914 Op. Att'y Gen. No. 14-862 was clarified by 2004 Op. Att'y Gen. No. 2004-025.

678.

RAILROAD POLICEMEN'S BOND—WHERE TO BE FILED—FILING FEE.

The original bond of a railroad policeman should be filed in the county in which the official headquarters of the policeman are located. By official headquarters is meant the county in which his ordinary official duties are chiefly performed. This county must be one of those in which he is directed to act. The clerk who approves the original bond may charge 25c for his services.

COLUMBUS, OHIO, January 2, 1914.

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

GENTLEMEN:—I have your inquiry of October 11, 1913, in which you ask:

> "In what county or counties should the bonds of railroad policemen required by section 12819, as amended in vol. 103 O. L., page 533, be filed? If required to be filed in only one county or certified copies be filed in each of the counties in which such policemen have jurisdiction?
>
> "What, if any, fees may the clerk of courts charge such policemen for filing such bonds or certified copies thereof?"

Section 9150 et seq., make provisions for the appointment, qualification, powers, duties and liabilities of these policemen, section 9151 providing that:

> "Before entering upon the duties of his office, each policeman so appointed shall take and subscribe an oath of office, which shall be endorsed on his commission. A certified copy of such commission, with the oath, shall be recorded in the office of the clerk of the common pleas court in each county through or into which the railroad runs for which such policeman is appointed, and intended to act. Policemen so appointed and commissioned severally shall possess and exercise the powers and be subject to the liabilities of policemen of cities in the several counties in which they are authorized to act while discharging the duties for which they are appointed."

Section 12819 of the General Code, as amended, (103 O. L. 533), makes it a felony to carry concealed weapons, subject to the following proviso:

> "Provided further that it shall be lawful for deputy sheriffs and specially appointed police-officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed if they first give bond to the State of Ohio, to be approved by the clerk of the court of common pleas,

in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

You will note that the provision last quoted is very vague as to the filing of the bond, and but very little light is thrown upon it by section 9151 just referred to. I think, however, that the latter section gives the policeman jurisdiction in those counties for which he is appointed—that is to say, he has no jurisdiction in any county in which the railroad runs excepting in those counties for which he is appointed by the railroad. A certified copy of his commission, however, must be recorded in each county in which he is to act. From this I infer that it would be proper for his bond, or a copy thereof to be filed in these counties. Section 12819 does not, however, require more than one bond, and therefore it would seem that this bond should be coextensive with his territorial jurisdiction. This view obviates the necessity of his filing a separate bond for each county.

The question that then arises is: In which county should this original bond be filed: There is really no method of statutory construction that will enable us to answer this question, but I am of the opinion that such original bond should be filed in the county in which the official headquarters of the policeman are located. By official headquarters, as used in this sense, I mean the county in which the railroad directs him to spend most of his time—the place where it expects to find him when it calls him into special service,—the county in which his ordinary official duties are chiefly performed. This county, of course, must be one of those in which he is directed to act. This bond should be approved by the clerk of the courts of that county, and a copy of it should be filed with the certified copy of his commission in each of the other counties. This, I think, will be in harmony with the spirit of the law, as it was the manifest intention of the legislature that the citizens of each county should be able easily to ascertain who the bondsmen are, in order that action may readily be brought against them in case of injury from the unlawful use of the weapons carried by the officer.

I know that many of these policemen are stationed for very little time at any one place, but I think that the railroad company should have no difficulty in determining which of these places are the proper headquarters, of such policemen.

Section 2900 of the General Code contains the following language with reference to the fees of the clerk of courts:

* * * "the clerk shall charge and collect the fees provided in this and the following section, and no more: * * * taking an undertaking, bond or recognizance, twenty-five cents."

This would seem to carry with it the right of clerk who approves the original bond to charge twenty-five cents for his services. As the copy does not need to be approved, and is merely filed by the clerk, it is my opinion that he is entitled to no fee for filing the copy, but that he is entitled to twenty-five cents for approving and filing the original.

This construction received added force from the fact that there does not seem to be any necessity for filing a separate bond for each county, and if such copy is filed, it is merely as a matter of public information.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

679.

BUDGET—BALANCES OF 1913 APPROPRIATION—RECEIPTS AND BALANCES—APPROPRIATIONS COVERING CONTRACTS—SCHOOL FUND—SINKING FUND—UNIVERSITY FUND.

1. *The balance standing to the credit of the various departments February 1, 1914, will not lapse by reason of the repeal of the 1914 appropriation bill, and the passage in lieu thereof of the 1914 bill which is now being written.*

2. *Where the departments are given the right to use their receipts and balances for their uses and purposes, the receipts of such departments should be placed to the credit of the activity from which they are derived, and not to the credit of the general fund.*

3. *An appropriation lapses after a period of two years whether a contract has been let or not. It does not affect the appropriation so far as its lapsing at the end of two years is concerned.*

4. *In handling the sinking fund, school fund, the form of appropriation by sections and by reference to the different funds involved, while possibly subject to some technical criticism, is in substantial compliance with the constitution.*

COLUMBUS, OHIO, December 31, 1913.

HON. W. O. HEFFERMAN, *State Budget Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of December 12th, requesting my opinion upon the following questions:

"1. Will the balances standing to the credit of the various departments February 15, 1914, lapse by reason of the repeal of the 1914 Appropriation Bill and the passage in lieu thereof of the 1914 Budget Bill which is now being written?

"2. Where departments are given the right to use their receipts and balances for their uses and purposes, should not the receipts of such departments be placed to the credit of the activity from which they are derived and not to the credit of the general fund?

"3. What is the status of an appropriation made for the purpose of construction of buildings, etc., at the end of an appropriation period when contracts have not been let?

"4. When they have been let?

"5. Shall I divide the 1914 Budget Bill into sections, showing in the first section appropriations from the general fund and in the second section appropriations of receipts and balances, etc.?

"6. How shall I handle the sinking fund, school and universities fund?"

Your first question requires consideration of what is known as the "1913 Appropriation Bill," passed by the last session of the general assembly, in connection with what you have called the "1914 Appropriation Bill." I understand that the design is to repeal the latter but not the former. These two bills are found in 103 Ohio Laws, 611 and 627, respectively I quote from "section 1" of both of these bills, the language of the said sections being identical, excepting as to the items appropriated:

"That the following sums, for the purposes hereinafter specified, be and the same are hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund not otherwise appropriated * * *"

The constitution of Ohio, article 2, section 22, provides that,

"No appropriation shall be made for a longer period than two years."

If there had never been any legislation under this provision, it seems to me it would be regarded as indicating that the legislature, in appropriating, must specify the period of time, not exceeding two years, during which the appropriation, i. e. the setting aside of the money in the treasury subject to withdrawal, shall exist; in other words, the language of the constitution on its face seems to imply that the legislature would not be complying with its mandate with formal perfection unless it should designate the date at which each appropriation, made by it, is to lapse.

But this, seemingly, has never been done; at least, it is not done by section 1 of the two bills involved in the present inquiry. That section designates neither the time at which the appropriation shall commence nor the time at which it shall lapse.

As a matter of practice, extending over a period of more than fifty years in this state, appropriations have been regarded as commencing at the date of the passage of the law and as lasting until the expiration of the period of two years from that date.

In other words, the succeeding legislatures have seemingly construed in the practical way article 2, section 22, as if it read "and every appropriation shall be made for a period of two years;" which, of course, is palpably not what it means. I suppose it would be more accurate to say that the legislature has interpreted the constitution as permitting it to appropriate money from the state treasury without stating the length of time during which the appropriation shall last, and without designating also the date from which the appropriation shall run; and as supplying, in the event of such an appropriation, the date of commencement, from the passage of the bill, and the date of lapse, from the constitutional limitation itself measured from the bill's passage.

Whatever criticism might have been originally lodged against this loose legislative practice, it has become too firmly established to be ignored now; in fact, it constitutes such a long-continued and consistent legislative interpretation of the constitution that, in my opinion, the constitution itself must be construed in accordance with it.

Section 1, then, of both bills, standing alone, in deference to the legislative practices to which I have referred, has the effect of appropriating the specific sums mentioned in each bill to the specified uses and purposes therein referred to, for periods beginning, as to the first bill, on May 9, 1913, and extending to May 9, 1915, and, as to the second bill, for precisely the same period, viz.: May 9, 1913, to May 9, 1915.

Before leaving section 1, however, I wish to point out that as to such items under each as are not for the current expenses of the state government and institutions, the above mentioned dates, by reason of the initiative and referendum provisions of our constitution, do not apply, the commencement and termination of the two year period in such cases being ninety-two days later than the dates above mentioned.

Also, in this connection, I beg to point out that all the appropriations for the year 1913 are not found in the law at 103 Ohio Laws 611; what is known as the

1913 Partial Appropriation Bill is found in 103 Ohio Laws 43. Its first section is exactly like that already quoted. It was approved, however, February 28, 1913, and as to those items thereof which are for defraying of the current expenses of the state departments and institutions, its appropriations are for a period of time beginning on that date and ending February 28, 1915.

We come now to the consideration of section 2 of the respective bills above referred to. Section 2 of the 1913 partial bill reads:

> "The moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 15, 1913, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid."

Section 2 of the 1913 general bill reads as follows:

> "That the moneys appropriated in the preceding section shall be available to pay liabilities incurred on and after February 16, 1913, but shall not in any way be expended to pay liabilities or deficiencies existing prior to February 16, 1913, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid."

Section 2 of the 1914 appropriation bill is exactly like section 2 of the 1913 bill, except that the date mentioned is February 16, 1914.

There are no other provisions of the three bills referred to in any way reflecting upon the mater of time. Section 264, General Code, has no bearing upon any question submitted by you.

It is to be observed, as to each of these three sections designated "Section 2," that there is no posterior limitation of time therein. The legislature has carefully safeguarded the expenditure of any of the sums appropriated in the discharge of liabilities created prior to the dates named; but the legislature has not prohibited the expenditure of the sums appropriated for the payment of liabilities created after any given date. For aught that appears in the above quoted language of sections 1 and 2 of the three bills, the sums appropriated in the 1913 general bill, for example, may be expended in the discharge of liabilities incurred at any time within the two year period of the appropriation; that is, at any time up to May 9, 1915.

As I understand it, it has been the practice of the department of the auditor of state to regard the sums appropriated under provisions like these (which are the standard provisions in use for a number of years) as being available for expenditure in the discharge of liabilities incurred at any time after the date named in the typical "Section 2" until the lapse of the appropriation itself.

In this instance I am satisfied that the practice conforms to the law. If the legislature intended to impose any posterior limitation upon the expenditure of money appropriated for a given period, it would have so stated in explicit language.

In this connection, however, I desire to call attention to the title of the 1913 partial appropriation bill, which reads:

> "An act to make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1913, and the first quarter of the fiscal year ending February 15, 1914."

In this respect the so-called partial bill differs from both of the so-called general bills, the title of both of which is as follows: "An act to make general appropriations."

The extent to which the title of an act may be used in the interpretation of the provisions found in the body thereof cannot be defined by any hard and fast principal of law. There is a general rule to the effect that the title is no part of the act and is not to be looked to, save for the purpose of resolving ambiguities apparent upon the face of the act itself.

In the case of the partial appropriation bill I incline to the view, however, that the title may be looked to, not for the purpose of resolving an ambiguity in section 2, but rather for the purpose of supplying a provision as to which section 2 is wholly silent, namely: the posterior limitation upon the incurring of liabilities to be met out of the appropriations made. My justification for so employing the title in this instance lies not only in the deficiency of section 2 in this particular, but also in the fact that the legislature has evidently entertained some design in choosing for the title of its general bills language different from that employed by it in the title of the partial bill.

On this ground, then, I am inclined to the view that the appropriations made by the 1913 partial bill, while, as already stated, they do not lapse until February 28, 1915, cannot be used to pay liabilities incurred after the end of the first quarter of the fiscal year ending February 15, 1914.

Having regard to all the foregoing considerations, I am of the opinion that, as a general rule, the repeal of the 1914 general bill will not have the effect of lapsing the balances of specific appropriations made in the 1913 general bill and in the 1913 partial bill, respectively, which said balances will continue to be available for expenditure until May 9, 1915, and February 28, 1915, respectively, in the payment of current liabilities incurred; in the case of the 1913 general bill, at any time during the period mentioned, and, in the case of the 1913 partial bill at any time up to February 15, 1914.

As to the partial bill, the balances, if any remaining unexpended on February 16, 1914, can be used thereafter in the payment of liabilities incurred prior to that date only.

But it would not be safe to adhere to this general rule universally. I call attention to the item "Publication of Highway Maps," in the appropriation to the commissioners of public printing, at page 615 of the general bill for 1913; the amount therein appropriated is $7,000; and there is no partial appropriation for this purpose. In the bill for the year 1914 is found the following: "Publication of highway maps, unexpended balance."

Again, I call your attention to the item found at page 616 of the general bill for 1913: "geological survey receipts, balance and $6,700." There is no similar appropriation in the partial bill; but in the general bill for the year 1914 is found the following: "geological survey, receipts, balance and $7,000."

Here are two instances in which the general assembly, in the 1914 bill, passed on the same day in which the 1913 bill was passed, has reappropriated or attempted to reappropriate the balance of an appropriation made in the 1913 bill. That is to say, the legislature first enacted that a certain sum should be appropriated generally for a certain purpose, which, by implication only, would set the sum aside for a period of two years; then, the legislature reappropriates the balances of the same appropriation for the same purpose, and for the same period, but with the limitation that no part of the balances shall be used to defray expenses incurred prior to February 16, 1914. In other words, the general assembly seemed to have had the idea that it was necessary in these instances to reappropriate the balances of the former appropriation, although both appropriations, technically having regard to the settled practice in this state, began and ended at precisely the same time.

The exact legislative intent here is almost impossible to ascertain, but, with a view to safety, I would suggest that the 1914 bill seems to have such a bearing

upon the two appropriations above mentioned as that the repeal of it might be deemed sufficient to lapse the balances remaining in the two appropriations on February 16, 1913. However, such lapsing would take place at that time, or thereafter, if at all, and not at the date of the passage of the repealing bill, if passed before that time.

Yet, on the other hand, the 1914 bill, if it appropriates any balances at all, appropriates them as of the date when it became a law, and not as of February 16, 1914. In a technical view of the case, the effect of the 1914 appropriation bill upon that of 1913 might be regarded as in itself a repeal *pro tanto* of the corresponding items of the 1913 bill, in this particular. To illustrate: the 1913 bill appropriates as of a certain date a certain sum, for the publication of highway maps; while the 1914 bill appropriates for this purpose the "unexpended balance," without designating what unexpended balance is meant. At the time the 1914 bill became effective, the unexpended balance of the next preceding appropriation for this purpose was the entire $7,000 appropriated in the 1913 bill. If this is the true meaning of the 1914 appropriation in this instance, then the $7,000 appropriated for this purpose should not have been used at all during the year 1913, but, according to the tenor of section 2 of the 1914 bill, could only be used to pay liabilities incurred on and after February 16, 1914.

Still in the technical view of the case, this $7,000 appropriation is really the only one to which the phrase "unexpended balance" in the 1914 bill can refer; for the 1912 appropriation, found in 102 O. L. 399, contained no item to the use of the printing commission for printing highway maps.

It is obvious, therefore, that, to take a technical view of the particular appropriation to which I have called attention would be to produce an impossible result in the practical sense. I am, therefore, led to the conclusion, already expressed, that, although the 1914 bill, as a whole, took effect, as already stated, and with respect to its appropriations for current expenses, etc., on May 9, 1913, yet, with respect to these specific appropriations, it will not take effect until February 16, 1914. And still, with respect to these two appropriations only, for present purposes, the effect which it will have on that date, if unrepealed, will be to reappropriate the balances of the 1913 appropriations then remaining to the credit of the respective departments concerned. It would seem to follow, then, that the repeal of the 1914 bill might possibly be regarded as having the effect of lapsing the two particular appropriations, which, apparently, it was the intention of the general assembly should not be available for the use of the two departments concerned after the date named without such reappropriation.

My advice is, therefore, that if the 1914 appropriation bill is repealed, the effect of that repeal will be the lapse of balances of 1913 appropriations remaining to the credit of the commissioners of public printing for the publication of highway maps, and to the credit of the geological survey, in its general account, on that date, as well as all other balances, if any, of 1913 appropriations, attempted, apparently, to be reappropriated for 1914 by the bill for that year.

So that it would be advisable, in framing a substitute for the 1914 bill, to reappropriate such balances in such substitute or budget bill. I venture to recommend the reappropriation of the balances as such, rather than the corresponding increase of the specific sums allowed to the departments concerned, upon the supposition that the balances of the 1913 appropriations are not available to them, for the reason that the point which I have been discussing is involved in considerable doubt; and if the balances are not reappropriated as such, it might thereafter be contended that they did not require reappropriation and much confusion might ensue. So as to avoid all such confusion, it is in my judgment advisable to reappropriate in the budget bill the balances of former specific appropriations reappropriated by the 1914 appropriation bill, instead of merely regarding such balances

as lapsed by the repeal of the 1914 appropriation bill, and allowing a corresponding increase in the amount appropriated for the use of the departments involved by the budget bill itself.

What I have said with respect to the reappropriations of balances of 1913 specific appropriations applies also, of course, to "Receipts and Balances," of which appropriations there are numerous instances in both bills. The first of these is the "receipts and balances" of the serum fund of the Ohio state board of agriculture. (See 103 O. L., 612, 629.) Construing the two bills as they stand together, in the manner in which I have already interpreted them, it appears that the general assembly did not intend its 1913 appropriation of receipts and balances to this account to run longer than to and including February 16, 1914, when its second appropriation was to become operative; therefore, the repeal of the second appropriation would lapse the entire fund on February 16, 1914. Hence, if it is desired to make another appropriation of receipts and balances on this account, it should be carried into the budget bill as such; for the repeal of the 1914 bill will lapse the balance in the serum fund on February 16, 1914.

The same is true generally of all appropriations for receipts and balances, *included both in the* 1913 *bill and the* 1914 *bill;* but it applies only to such appropriations when found in both bills; for example, there is an appropriation in the 1913 bill to the commissioners of public printing, another to the executive department, another to the state highway department, and perhaps still others, which consist of reappropriations of balances of 1912 appropriations; but there are no appropriations of balances on these accounts in the 1914 bill; the repeal of the 1914 bill would not lapse such appropriations of balances in the 1913 bill.

I think the foregoing comments cover in a general way the subject-matter of your first question.

Your second question cannot be answered categorically. It is true, as a general proposition, that the legislature of this state has, for a period of a number of years, been erroneously appropriating some receipts and balances from the general revenue fund. The erroneous idea which has possessed succeeding general assemblies and the department of the auditor of state during succeeding administrations has been that there have been only four funds in the state treasury, viz.: general revenue fund, sinking fund, school fund, and university fund. This idea is now and always has been incorrect; but the legislature has for so long persisted in this error, in spite of its own positive enactment to the contrary, as will be hereinafter pointed out, as to legalize in practical effect the method of appropriating which it has followed.

That is to say, anticipating a moment, although during the entire life of the state board of pharmacy, for example, the receipts of that board, when paid into the state treasury, should not have been credited to the general revenue fund, but should have been kept in a separate fund to the credit of the board, available for its uses and purposes, when appropriated from that fund, and not from the general revenue fund; yet, during all this time, the general assembly has been appropriating to this board its "receipts and balances" *from the general revenue fund.* (See, for example, the 1913 appropriation bill, section 1 of which appropriates all the items thereafter referred to from the "general revenue fund;" and one of the items of which, found on page 624, is the "receipts and balances" of and to the Ohio board of pharmacy.)

Numerous other instances might be mentioned and may be inferred from the subsequent discussion in this opinion. The conclusion of the whole matter is that there is here presented, in a technical sense, a species of legalized wrong, which, so long as the erroneous course was persisted in, must, for obvious reasons be regarded as lawful in every way. That is to say, I could not, in the face of the legislative history come to the conclusion that the appropriation for the Ohio board

of pharmacy, for the year 1913, is void, and that there is in the state treasury, to the credit of this board, but unappropriated, and therefore not available, a large amount of money which has accumulated during the years in which the legislature has been erroneously appropriating the receipts and balances of this department from the general revenue fund. So to hold would be technically correct; but the technicality would have to give way to the substance of things.

But though, from the viewpoint of substantial right, the legal effect of the past acts of the general assembly must be sustained, it does not therefore follow that in proceeding to arrange the fiscal affairs of the state upon a new basis, and to begin for the first time the habit of scientific and businesslike appropriation and expenditure, the legislature should persist in this legal error. I think the enactment of the contemplated budget bill should be the occasion for the legislature to accommodate its appropriations to its revenue statutes. For mere consistency's sake, if for no other reason, the general assembly should, at the time it embarks upon a new policy of so great importance as that in the formulation of which you have a part, either amend its statute law, so as to eliminate therefrom all reference to special funds in the state treasury, and so as to require all receipts of all departments to be paid into the general revenue fund, either expressly or by inference, or, if it does not do this, it should make its future appropriations from the funds which its general statutes create.

As already intimated, it is not every appropriation of "receipts and balances" that is improperly made from the general revenue fund. Some departmental receipts do go into the general revenue fund. The test for determining whether or not a given kind of receipts belongs in the general revenue fund, and should be appropriated therefrom, is furnished by the statute providing for the collection of the receipts in question itself.

The following is a list of the funds which ought to be separately kept in the state treasury, other than the general revenue fund, according to the statutes, with reference to the special statute creating the fund in each case:

The bureau of inspecion and supervision fund—section 287, G. C.

The public audit expense fund—section 288, G. C.

(It is here to be remarked that ever since the bureau of inspection and supervision of public offices has been operating there has been made to the bureau an annual appropriation of "receipts and balances" from the general revenue fund. The statutes cited show on their face that the bureau has at its command two funds, both separate and apart from the general revenue fund, and that there should be made for its annual support two separate appropriations from different sources; one for the purpose of the general maintenance of the bureau, and the other for the purpose of bearing the expenses of the inspection and supervision of the respective districts.)

The sinking fund—sections 386 et seq. and 7575, G. C.

Maintenance fund of the department of public service (public utilities) commission—section 606, G. C.

The banking fund—section 735, G. C.

Maintenance of office of state fire marshal fund—section 841, G. C.

(The unexpended surplus in this fund is to be paid annually to the general revenue fund. But the fund itself is in the state treasury, and, in my opinion, annual appropriations of receipts and balances from this source of revenue are necessary in order to authorize the expenditure of the state fire marshal's maintenance fund. This, apparantly, has not been the practice, as there is no appropriation for this department in either of the current appropriation bills. In the past, all the money which has been expended by the state fire marshal's office has been unlawfully expended, and in the future the state fire marshal should be given

an appropriation of his receipts and balances before he can, under section 2 of article 22 of the constitution, lawfully draw upon it.)

The agricultural fund. (See section 1085, G. C.; also section 16 of the agricultural commission act, 103 Ohio Law, 308, therein designated as section 1094, G. C. An attempt has been made to change the name of this fund so as to place it in the general revenue fund. In my opinion, however, this attempt is unsuccessful; "an agricultural division of the general revenue fund" is not a part of the general revenue fund itself. More terminology cannot change the substance of things. The section in question expressly states that the state agricultural fund shall be at the disposal of the agricultural commission; it expressly separates the so-called "division" of the general revenue fund from the remainder of the fund. It may be safely said that whatever moneys are in the general revenue fund may be expended without transfer for any purpose, in the discretion of the legislature. Money which is held for the uses and purposes of a particular department is *ipso facto* not in the general revenue fund, terminology to the contrary notwithstanding.

(In the same connection, see section 6377, General Code, which of itself is sufficient to continue the "state agricultural fund" as such. Also see section 63 of the agricultural commission act, 103 Ohio Law, 318, which speaks of the "agricultural fund" as such. See also the commercial fertilizer analysis fund, section 78 of the agricultural commission act, 103 O. L., 321. Formerly these moneys constituted a part of the agricultural fund, but by the language of the section cited seem to be a separate fund. The agricultural commission is, seemingly, not given authority to retain these fees outside of the state treasury, but, under the general provision of section 24 of the General Code, must pay them in as received weekly. Once in the state treasury, they cannot be paid out again, save under appropriation; and the appropriation in such instance should be from the fund created by the license fees.)

State medical board fund—section 1277, G. C.

State board of pharmacy fund—section 1312 and section 1313, G. C.

Fish and game commission funds—section 1460, G. C.

State military fund—section 5265, G. C.

(This fund is peculiar, in that it is to be set aside by the auditor of state from the general revenue fund in the first instance. When once set aside, however, [and the duty to do this is a continuing one, not dependent upon the making of an appropriation] it is separated from the general revenue fund, and, as the section itself states, is to be "a continuous fund and available only for the support of the organized militia." This being the case, it is clearly no part of the general revenue fund; and appropriations for the state armory fund and the maintenance of the Ohio national guard should be made from the state military fund, and not from the general revenue fund. To hold that the state military fund is still in the general revenue fund would be to vitiate all of section 5265, General Code.)

State highway fund, derived from automobile licenses—section 6309, as amended 103 O. L. 765.

State common school fund—section 7575, G. C.

Miami University fund—section 7924.

Ohio University fund—section 7925.

Ohio normal school fund—section 7926, G. C.

Miami normal school fund—section 7927, G. C.

Ohio State University fund—section 7929, G. C.

(The auditor of state has erroneously grouped all these funds together in a single fund; but the general assembly has observed the distinction by appropriating separately from each of these funds from year to year. *See* 103 O .L. 18.)

Agricultural college script fund—section 7972, G. C.
Wilberforce university fund—section 7986, G. C.
Bowling Green normal school fund—103 O. L. 843.
The Kent normal school fund—103 O. L. 843.
State highway fund, produced by application of 75% of one mill tax—103 O. L. 155.
Main market road fund, produced from same source—103 O. L. 155.
The fund for the blind—103 O. L. 833.
State liquor license fund—103 O. L. 236.

I would not undertake to say that I have, in the foregoing enumeration, exhausted all the funds in the state treasury. The legislation enacted by the last session of the general assembly was so voluminous that it is possible that some funds other than those already referred to were created by it which have escaped my attention. I do not hesitate, however, to lay down the general principle that, wherever the legislature, in providing for the means of raising revenue of any kind, has required that the revenue produced by that means shall be paid into the state treasury to the credit of a fund for the use of a particular department, or for a particular purpose, or has required that the moneys derived from the source in quesion shall be used for a certain purpose, the revenue so produced cannot, under any circumstances, be regarded as being within the general revenue fund; for if it were regarded as in the general revenue fund, then it could be used for any purpose, and its appropriation and expenditure would not be limited to any designated purposes.

How far the general assembly has departed from this, to me, very clear principle may be illustrated by a reference to 103 Ohio Laws, 635, an item of the 1914 appropriation, wherein there is appropriated to the state highway department, *as if from the general revenue fund,* "the proceeds of all money collected under the one-half mill levy, as provided for by house bill 134, etc." As already pointed out, the general assembly, while ignoring many of the special funds above mentioned, has generally conceded the separation of funds produced by separate tax levies from the general revenue fund. (See 103 O. L. 18, 857). But even that deference to the principles of its own legislation was denied in the case of the attempted appropriation of the half mill levy for road purposes.

In view, then, of the confusion and lack of consistency with which the general assembly has in the past treated the funds in the state treasury, in making its appropriations, and in view of your direct questions on the point, being the second, fifth and sixth questions asked in your letter, I beg to advise and recommend that the 1914 budget bill treat the proceeds of the above named funds, and others which may be discovered in like situation, as constituting separate funds in the state treasury, and not as constituting parts of the general revenue fund; that the auditor and treasurer of state, respectively, carry separate accounts for each of the funds in question; and that the appropriations made in the state budget bill, now contemplated, be made from the proper funds in each case, and not from the general revenue fund. This can be done, as suggested in your fifth question, by dividing the budget bill into sections, each section constituting an appropriation from a single fund in the state treasury. A model for this purpose can be found in the two laws last cited, viz.: 103 Ohio Laws, 18 and 857.

Before leaving this subject, however, permit me to point out again that in every appropriation of "receipts and balances" which you may find in the 1914 appropriation bill should be made otherwise than from the general revenue fund. The receipts of many of the departments are, by express provision of law, required to be paid into the general revenue fund, and should be appropriated therefrom, if it is desired to appropriate them as such; also the statute law is silent as to the exact disposition of the receipts of some of the departments which

are required to be paid generally into the state treasury; and in such cases section 270, General Code, requires that when so paid into the state treasury, such receipts shall be credited to the general revenue fund. I shall not burden this opinion with a list of receipts of these kinds, but content myself with saying that, if the statutes providing for the exaction of the revenue in question do not require, as do the statutes above cited, when paid into the state treasury, that such moneys shall constitute a separate fund, etc., the receipts become a part of the general revenue fund.

Coming now to the consideration of your third question, I assume that by "the end of an appropriation period" you mean the expiration of two years from and after the passage of the appropriation bill, beyond which, under the constitution, as above quoted, the appropriation may not live. It is my opinion that after the expiration of the two year period, the appropriation, under the circumstances mentioned in your second question, must necessarily lapse. An appropriation for a particular improvement carries with it the authority to the officer designated to make the improvement and to enter into contracts for that purpose. The relation of the appropriation to the authority to contract is discussed by Judge J. R. Swan, in the leading case of State vs. Medbery, 7 O. S. 522. His discussion is based, not only upon article II, section 22, of the constitution of 1851, but upon other sections of the constitution related to it in respect to their subject-matter, particularly section 3 of article VIII. In his opinion will be found the following language:

> "The sole power of making appropriations of the public revenue is vested in the general assembly. It is the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued. No claim against the state can be paid, no matter how just or how long it may have remained overdue, unless there has been a specific appropriation made by law to meet it. Article 2, section 22. * * * * *
>
> "The discretion of each general assembly for the period of two years in respect to the amount of expenditures, except in some special cases relating to salaries, is without limit and without control; but each must provide revenue and set apart a sufficient amount by a law operative within the same two years, to pay all expenses and claims.
>
> "This is the general system provided by the constitution. * * * Under it all the claims which are authorized, or which can accrue within each of the two years, and their payment, form one governmental and financial transaction; so that at the end of each of the two fiscal years the expenditures authorized and liabilities incurred have been provided for by revenue, adjusted by the executive officers, and out of the revenue previously set apart and appropriated, are paid. * * *

The facts involved in that case were substantially as follows: the general assembly passed an act attempting to authorize the board of public works to let a contract for keeping the public works in repair, for any term of years not exceeding five. In pursuance of this supposed authority, the board of public works entered into a contract with Medbery & Company to keep a certain section of the canals of the state in repair, for a period of five years, for the sum of $27,500 per annum. During the second year of the life of the contract a succeeding session of the general assembly repudiated, or attempted to repudiate the proceedings, and in its appropriation act directed the board of public works to expend the moneys appropriated to its use without regard to the contract with Medbery & Company; and gave to the latter, and those in a similar situation, a right of action against the state for such damages as they might be entitled to.

The case before the court, then, was an action for damages brought against the state itself, under the special authority above referred to. The petition set forth the contract, averring performance until the 22d day of April, 1857; readiness to perform from that time forward; breach by the state; laid the damages at $50,000—the amount of the future profits of the contract; and prayed judgment accordingly.

The attorney general, on behalf of the state, interposed a general demurrer to the petition, which was overruled by the common pleas court, whose decision was assigned for error in the supreme court. This decision was reversed and the contractors were denied recovery of any damages. (It is to be observed that they were not suing on account of work already performed; nor did the performance of the work which they had completed extend beyond the biennial period.)

The portion of the opinion which deals with the facts of the case contains, among other things, the following language:

> "While each general assembly is required to provide revenue and make appropriations for the period of two years, leaving no debt or liability behind, the general assembly existing when these contracts were made, and who, it must be maintained, had the constitutional power by law to authorize them, have undertaken, by contracts in behalf of the state, to bind the state by present obligations to pay specific amounts of money to certain citizens for services and materials to be furnished as well during the above mentioned two years, as during the period of three years thereafter. It is the three years thereafter—the liability created against the state the moment these contracts were signed, for the specific sums promised, for the repairs of those three years—the volunteering on the part of that general assembly to provide for the repair of the canals during those three years, without the power of making appropriations to meet the liability thus authorized and entered into—it is these peculiar characteristics of the contracts which render them inconsistent with the system of finance and expenditure provided by the constitution. * * *
>
> "The question before us is, whether a contract binding the state to pay specific sums of money at a future period, without revenue provided or appropriations made to meet it, is such a contingent liability as may be entered into under this financial system, and the provisions of the constitution relating to debts. * * *
>
> These contracts, by their own force, bind the state to pay to individuals, a certain amount of money, through the period of five years. The moment these contracts were executed, they created a present obligation on the part of the state to pay money at a future period. * * * We are at a loss to perceive how these contracts can be taken out of the definition of contingent debts, "(which, in a previous part of the opinion the court had held could not be created under the constitution)."

Again Judge Swan says:

> "We say further, that as to the fact that repairs beyond two years would probably be needed, and expenditure therefor required, and for an amount probably equal to that designated in these contracts, and then paid, we answer, that whether the repairs would or would not be needed, and the amount of the expenditure and their payment were questions to be determined by the successors of the general assembly who are supposed to have authorized these contracts not only determined that the expen-

diture should be made, and fixed the amount beyond the control of their successors, but have also, in so doing, created a present liability against the state to pay specific sums of money at such a period that they could not by appropriations provide for payment. Their authority to provide, without revenue or appropriations, for the repair of the canals beyond two years, by contracts creating a present obligation, clearly cannot be justified. * * * *"

Discussing the case from another point of view Judge Swan says, in part, that:

"These contracts run for five years. The general assembly existing when these contracts were made provided no revenue and made no appropriations to meet the gross amount.

"If these contracts are valid no subsequent general assembly could withhold a tax or revenue, or decline to make appropriations to meet their specific amount. The legislative discretion of every subsequent general assembly is tied, and their responsibility for the expenditure avoided; * * *

"The constitution provides that the sessions of the general assembly shall be held once in two years. The members are elected for two years, and the constituency every two years canvass at the ballot box the official conduct of each representative.

"Each general assembly determine the amount of revenue to be raised by taxation, and are required by the constitution to provide for raising sufficient to meet the expenditures which they authorize, and thus become officially responsible for the amount of the appropriations. And in order to make this responsibility direct and practical * * * the constitution prohibits any appropriation to be made for a period beyond two years.

"This last provision is the key-stone of the whole system; for, as the amount of the taxes depends entirely upon the amount of the appropriations, if the general assembly had no power or discretion to determine the amount of appropriations, or if the amount were fixed by law of their predecessors, so that they could not disturb it, they would evade all responsibility for the amount of the taxes, however oppressive and grievous they might be."

The broad principle running through this important decision is that a contract cannot be entered into by an officer of the state which cannot be paid out of the proceeds of appropriations already made. It follows from this, I think, that if the appropriation is itself the authority for making the contract, as in the case of most public improvements undertaken by the state, the authority to make the contract does not survive the appropriation itself; nor, on the other hand, does the mere fact that the appropriation carries with it the implied authority to make the contract preserve the life of the appropriation beyond the constitutional period and until the contract is made and satisfied.

Accordingly, I am of the opinion, in answer to your third question, that an appropriation made for the purpose of the construction of buildings, etc., lapses at the end of the period of two years after it is passed (and in this case, under the present constitution, after the expiration of ninety days from the date of the filing of the law in the office of the secretary of state, appropriation for such purposes not being among those which go into immediate effect). With the lapse of the appropriation, under these circumstances, the authority to enter into the contract

likewise expires, and the policy of the entire improvement becomes a matter to be considered *de novo* by the succeeding session of the general assembly, which alone can determine whether the improvement shall proceed.

The answer to your fourth question is not to be found directly in the case of State vs. Medbery, supra, because, while that case involved the validity of a contract on account of which payment was sought after the expiration of two years from the time of the initial appropriation, yet the contract was one which, by its very terms, could not be completed within two years. The distinction between contracts which cannot be completed within a certain time and contracts which probably will not be completed within a like length of time, on account of practical conditions, is a well understood one and need not be commented upon. In the case you submit the contract, payable out of a specific appropriation, has been let within the life of the appropriation itself, but the work is not completed at the expiration of the two year period.

Here, care must be taken to distinguish between the effect of this state of facts upon the contract and its effect upon the life of the appropriation. I incline to the view, although an expression of opinion thereon is not required by your letter, that a contract made under such circumstances is valid when entered into, and that its binding force and effect as to subsequent transactions under its terms are not affected by the expiration of the two year period. That is to say, the contractor is entitled to proceed with the performance of the work done by him after the expiration of the two year period, and he will be entitled in law and in morals to payment of his claim for so much of the contract price as has not been paid to him. Putting it in another way, the state would be indebted to the contractor for the work performed by him under his previously let contract after the expiration of the two year period.

But this is not equivalent to saying that the appropriation itself, or so much of it as remains unexpended after the expiration of the two year period, is to continue in force. The language of the constitution is so explicit as to the life of an appropriation as to permit of no interpretation whatever; the requirement is that no appropriation shall be made for a longer period than two years. This cannot be construed as being subject to an exception to the effect that where contracts have been entered into, payable out of a given appropriation, the appropriation is thereby continued beyond the period of two years and until the state's liability is discharged. The word "appropriation" in its exact sense (and I am not aware of any shades of meaning which might be applied to it) signifies the setting apart of public moneys for a specified purpose, coupled with authority to expend for that purpose. The authority to draw money from the treasury for a given object is of the very essence of the appropriation. It is this authority which cannot extend beyond the period of two years, as well as the mere ministerial act of the auditor and treasurer in carrying the appropriation on their respective books for that period of time.

So, when an appropriation is made, for example, to the state board of administration, for the construction of a certain building, there is inherent in the appropriation the idea that the board has authority to draw upon the general revenue fund of the state to the amount indicated, for the purpose specified. This authority can only last for two years. In like manner, the authority of the auditor and treasurer to carry the appropriation account on their respective books terminates at the end of two years.

Looking at it in still another way, the requirement of article II, section 22, of the constitution, which I have been discussing, is coupled with a positive prohibition against money being drawn from the treasury of the state except in pursuance of a specific appropriation made by law. The thing prohibited is not the making of contracts, which, by their operation under proper contingencies, may ultimately

require the drawing of money from the state treasury, but the actual drawing of money itself. So that, while the scope of the more stringent regulation includes the less stringent one, and while, because money cannot be drawn out of the treasury without a specific appropriation, it necessarily *follows* that no officer can contract, except for official salaries, without the authority of an appropriation, (State vs. Medbery, supra.) it does not therefore follow that if the officer has contracted against a specific appropriation, properly made, the constitution is thereby satisfied and the appropriation remains at all times available to pay the contract.

On the contrary, I am clearly of the opinion that there is no condition imaginable which can prolong the life of an appropriation beyond the constitutional period of two years; and that when the end of the constitutional period transpires before work under a lawful contract is completed, and the succeeding session of the general assembly makes no appropriation for the completion of the work the contractor, whatever may be his rights and remedies in the premises, cannot compel the executive officers of the state to make further payments on account of his contract and the work done under it, nor to answer to him in damages.

Accordingly, in formulating the budget bill which you have in mind, you should proceed, in my judgment, upon the assumption that unexpended balances of an appropriation invariably must lapse at the end of the constitutional period, whether contracts have been let payable therefrom or not.

Your fifth question has already been answered, in discussing your second question.

You ask how you shall "handle the sinking fund, school and universities fund," in your sixth question. I have already referred you to the appropriation bills passed by the last session of the general assembly making the general appropriations from some of these funds. These appropriations, as already remarked by me, are proper in form. They are not very specific; that is, the appropriation in 103 O. L. 859, of the estimated amount of the entire proceeds of the Ohio State University fund, for the year 1914-1915, is "to be applied to the uses and purposes of the Ohio State University according to law;" and this is the case with all the other appropriations made in the same bill. I cannot answer your sixth question without knowing what policy is to be adopted respecting the expenditures to be made from these funds. If the whole funds are to continue to be turned over in bulk, and without specification, to the institutions entitled to them, and if the common school fund is to continue to be appropriated in the general manner in which it has been appropriated in the past, the budget bill need not contain any reference to these funds or appropriations whatever, as they are sufficiently taken care of for the years 1914-1915, by the bill to which I have referred. If, however, it is desired to be more specific in the creation of appropriation accounts payable out of these funds, or if it is desired to change the period of time for which the appropriation shall be made, then these changes may be made repealing and re-enacting the bill referred to, either as a separate bill or as part of the budget bill. In any event, however, the form of appropriation by sections and by reference to the different funds involved, while possibly subject to some technical criticism, is, in may judgment, in substantial compliance with the constitution.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

680.

ABSTRACT OF TITLE.

Deed from Mary T. Schenck and husband to state of Ohio.

COLUMBUS, OHIO, January 13, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt, under date of January 6, 1913, of abstract of title and deed from Mary T. Schenck and husband to the state of Ohio, for the following described real estate, which your board desires to acquire for use in connection with the Ohio Hospital for Epileptics at Gallipolis, to-wit:

> "Situated in the northeast quarter of section No. twenty-nine (29) township No. four (4) range No. fourteen (14) Gallia county, Ohio, being survey No. thirty (30) of said section by Edward Tupper, surveyor, and bounded and described as follows: Beginning at the northwest corner of lot No. four (4); surveyed lots of said section No. twenty-nine (29) in Gallipolis township, Gallia county, Ohio, thence with the east line of survey No. 14 and 15, four (4) chains to the northeast corner of lot No. 15, thence with the line of Anna B. Kating, N. 23 degrees W. 5 chains and 25 links to a point formerly marked by a span oak 20 inches in diameter, standing on the top of large rock; thence north 10 chains and 50 links to a point formerly witnessed by a black oak 20 inches in diameter S. 61 degrees, W. 23 links, thence S. 68 degrees, E. 21 chains and 37 links to a point formerly marked by a sugar tree 18 inches in diameter; thence S. 11 degrees, E. 52 links to a point formerly marked by a sugar tree 18 inches in diameter on old corner; thence S. 47 degrees, W. 9 chains and 10 links to a point formerly marked as "a chestnut oak on a point;" thence S. 9½ degrees, W. 8 chains and 80 links to the north line of lot No. 4 above mentioned, thence along the north line of survey No. 4, west 10 chains to place of beginning, containing 28.69 of land.

I have carefully examined the abstract and although there are some defects in the early history of the title, as disclosed by the abstract, I do not deem them of sufficient importance to warrant disapproval of the title. There are no liens against said real estate except the taxes due December, 1913, and June, 1914. Subject only to payment of these taxes, I am of the opinion that the present owner has a good and indefeasible title to said real estate in fee simple.

The deed is duly signed, acknowledged and witnessed, and is sufficient in form to convey to the state of Ohio a title in fee simple, and I advise that you accept the same.

Abstract and deed are herewith enclosed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

681.

SATURDAY HALF-HOLIDAY—PRESENTMENT AND PAYMENT OF INSTRUMENTS—LAW NOT CHANGED BY AMENDMENT OF SECTION 5978, GENERAL CODE.

Section 8190 *of the General Code is not in any way affected by section* 5978 *as amended in* 103 *Ohio Laws, page* 566. *Consequently the law concerning the presentment and payment of instruments falling due on Saturday remains the same as before section* 5978 *was amended.*

COLUMBUS, OHIO, December 17, 1913.

HON. EMERY LATTANNER, *Supt. Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 22, 1913, asking for an opinion on the question raised by Mr. Clarence G. Herbruck, of Canton, Ohio, in a letter to you under date of October 29, 1913, which letter is as follows:

"I am writing your department for an opinion upon the question involving section 5978 of the General Code, relating to the Saturday half-holiday, as amended by the last general assembly, and as found on page 556, volume 103, of the laws of Ohio. The point upon which I desire your opinion, which, by the way is of interest to the banks of Ohio, is on the question of protecting negotiable instruments on Saturday; and in presenting the matter it is necessary to refer to several other sections of the General Code.

"Section 8190 of the General Code provides, among other things, that negotiable instruments, falling due on Saturday, are to be presented for payment on the next succeeding business day, except that at the option of the holder, instruments payable on demand may be presented for payment before 12:00 o'clock, noon, on Saturday, then that entire day is not a holiday. So far as I am able to ascertain, there has been no judicial interpretation of this statute in our state, but I have construed the statute heretofore that, for the purpose of holding endorsers, presentation of negotiable instruments, falling due on Saturday, must be made on the next succeeding business day, except as stated in the statute, that instruments payable on demand may, at the option of the holder, be presented before Saturday noon. I do not believe that there can be any question about this interpretation in the absence of the new statute, amended last spring. This amendment in substance provides that nothing in that section (5978) or any other, or any decision of any court, shall in any manner affect the validity of or render void or voidable, any check, bill of exchange, order, promissory not, due-bill, mortgage, or any writing obligatory, made, signed, negotiated, transferred, assigned or paid by any person, persons, corporations or bank, upon said half holiday, *or any other transaction had thereon.* The question has arisen in my mind as to whether this amendment does not compel the presentation of negotiable paper on Saturday, and if not paid, to be protested on that day.

"The banks throughout the state have held all time paper over until the following Monday or business day for presentment, and protest, and have generally done the same with checks and other demand paper (if being optional with the holder of this kind of paper), but in view of

this amendment there has been some doubt as to whether the banks are not compelled to present negotiable paper on Saturday, when that is the maturity date, and protest the same on that day, if not paid.

"Can your department give us any enlightenment upon this amended section of the Code? I call your particular attention to the last phrase of the section, which says 'or any other transaction had thereon.' To what does that phrase refer?"

Section 8190 of the General Code reads:

"Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that, at the option of the holder, instruments payable on demand may be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

Section 5978 of the General Code, before it was amended read as follows:

"Every Saturday of each year shall be a one-half legal holiday for all purposes beginning at twelve o'clock noon and ending at twelve o'clock midnight."

Section 5978, General Code, as amended in 103 O. L., page 566, reads:

"Every Saturday afternoon of each year shall be a one-half legal holiday for all purposes, beginning at twelve o'clock noon and ending at twelve o'clock midnight. Nothing however, in this section or any other, or any decision of any court, shall in any manner affect the validity of or render void or voidable any check, bill of exchange, order, promissory note, due bill, mortgage or other writing obligatory made, signed, negotiated, transferred, assigned or paid by any person, persons, corporation or bank upon said half holiday, or any other transaction had thereon."

The writer of the letter quoted above calls especial attention to these words of section 5978 as amended:

"Nothing, however, in this section or any other, or any decision of any court, shall in any manner affect the validity of or render void or voidable any check, bill of exchange, order, promissory note, due bill, mortgage or other writing obligatory made, signed, negotiated, transferred, assigned or paid by any person, persons, corporation or bank upon said half holiday, or any other transaction had thereon."

and seems inclined to think that inasmuch as under the above section the payment of negotiable paper on Saturday afternoon would be void or voidable, it is the bank's duty to present negotiable paper on Saturday, when that is the maturity date, and protest the same on that date if not paid.

With this conclusion I cannot agree. The fact that the legislature after declaring Saturday afternoon a legal half holiday, saw fit to say that in the event that certain business was transacted on such half holiday it would not be void or voidable, did not by any means have the effect of making it necessary

to carry on such business on that day. To so hold would be to make and unmake the law in the same paragraph.

What the legislature did in amending section 5978 of the General Code was simply this: It allowed Saturday afternoon to remain a legal half holiday the same as was provided in the original section, and then made a further provision that should certain transactions be carried on on Saturday afternoon, they should not be void or voidable on that account. And it is, therefore, my opinion that section 8190 of the General Code is not, in any way, affected by section 5978 as amended in 103 O. L., page 566, and that the law concerning the presentment and payment of instruments falling due on Saturday remains the same as before section 5978 was amended.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

682.

VILLAGE COUNCIL—POWER TO FIX SALARIES AND APPROVE BONDS OF EMPLOYES OF VILLAGES—VILLAGE BOARDS OF PUBLIC AFFAIRS HAVE THE POWER TO EMPLOY PERSONS TO DO THE WORK OF THE VILLAGE.

1. *The clerk of the board of trustees of public affairs is to be elected by the board and his salary is to be fixed by council.*

2. *The village clerk may not be clerk of the board of trustees of village affairs and receive compensation therefor, as these offices are incompatible.*

3. *The village council has the right to fix the salary of those persons employed to make repairs, read water meters, make connections and perform other work in connection with the waterworks department. The board and not the council has the right to designate who these employes shall be.*

COLUMBUS, OHIO, December 15, 1913.

HONORABLE NELSON J. BREWER, *Solicitor for Euclid Village, Cleveland, Ohio.*

Under favor of December 10, 1913, you request my opinion as follows:

> "Sections 4357 to 4362 of the General Code prescribe the powers and duties of boards of trustees of public affairs in villages.
>
> "If a clerk is to be provided for the board, must the council of the village fix his compensation and bond? Section 4360 provides the board may elect a clerk who shall be known as the clerk of the board of trustees of public affairs. What I wish to know is, whether or not the council or the board fixes the compensation of the clerk, and whether the council may designate the person who shall act as clerk. May the village clerk also be clerk of the board of trustees of public affairs and receive compensation therefor?
>
> "Does the board of trustees or the council of the village provide for the compensation and bonds of employes who have charge of making repairs, reading water meters, making connections and performing other work in connection with the department; and may the council designate who the employes shall be?"

You first inquire:

> "Whether the clerk of the board of trustees may be appointed by council, and whether the council or the board must fix the compensation and bond of such clerk."

These questions seem to be controlled by sections 4360 and 4219 of the General Code. These sections are as follows:

> Section 4360: "The board of trustees of public affairs shall organize by electing one of its members president. It may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."
>
> Section 4219: "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with the sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

Under section 4360 of the General Code, it is clear that the clerk is to be elected by the board of trustees of public affairs, and nowhere is council given authority to designate the person to fill this position.

Under section 4219 of the General Code, council is required to fix the compensation and bonds of all officers, clerks and employes in the village government, except otherwise provided by law, and since no other provision is made by law for the fixing of compensation and bond of the clerk of the board of trustees, I am of the opinion that the same must be fixed by council.

You next inquire:

> "Whether the village clerk may also be clerk of the board of trustees of village affairs and receive compensation therefor?"

Section 4284 of the General Code provides that the clerk of a village shall examine and audit the accounts of all offices and departments. He is furthermore obligated by this section to prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments. I am of the opinion that this provision imposes upon the clerk of a village obligations of supervision and control over a position such as that of clerk of the board of trustees of village affairs. It is without question the duty of such a clerk to keep the books and accounts of the board, and since in this connection he is subject to the supervisory control of the clerk of the village, the officers are incompatible and may not be held by one and the same individual at the same time.

You last inquire:

> "Whether the board of trustees or the council of the village provide for the compensation and bonds of employes who have charge of making repairs, reading water meters, making connections and performing other work in connection with the department, and whether the council may designate who the employes may be."

I am of the opinion that these employes, being employes in the village government, and not being otherwise provided for in this respect, are subject to the terms of section 4219, General Code, above quoted, requiring their compensation and bonds to be fixed by council.

Under section 4361 of the General Code, however, as the same appears in 103 O. L., page 561, the board of trustees of public affairs are given powers of management, conduct, and control of the matters under their jurisdiction, and are required to appoint necessary officers, employes and agents. The board is furthermore given the powers possessed by the director of public service in cities in these connections.

Since the power of appointment is conferred on the board, it is not within the power of council to designate who such employes shall be. The procedure is that patterned after the management of public works in cities by the director of public service and contemplates that the employments and positions shall be fixed by the board, that the compensation and bonds affixed to these positions shall be determined by council, and that the incumbents of these positions shall be determined by the board.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

683.

ELIGIBILITY OF WOMEN TO HOLD CERTAIN OFFICES IN OHIO—WOMEN ONLY TO HAVE CONTROL OF INSTITUTIONS TAKING CARE OF WOMEN AND CHILDREN—WOMEN NOT ELIGIBLE TO APPOINTMENT AS EXAMINERS OF TRAINED NURSES.

The intention of the constitutional amendment adopted in reference to women holding certain offices in the state of Ohio was to place women upon such boards and at the heads of such departments and institutions as exercise control over the physical and moral welfare of women and children who are being cared for as wards of the state; consequently would not allow women to be appointed as members of the state board for examination and registration of trained nurses, such as was contemplated in house bill No. 105, *known as "a bill to provide for the examination and registration of trained nurses in Ohio."*

COLUMBUS, OHIO, December 16, 1913.

HONORABLE JAMES NYE, *Member House of Representatives, Toledo, Ohio.*

DEAR SIR:—I have your letter of November 7, 1913, asking whether the constitutional amendment recently adopted making women eligible to hold certain appointive offices will allow women to be appointed as members of a state board for examination and registration of trained nurses, such as was contemplated in house bill 105—Mr. Schaefer, 80th general assembly.

The constitutional amendment adopted at the November, 1913, election, to which you refer, reads as follows:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both."

House bill 105, known as "a bill to provide for the examination and registration of trained nurses in Ohio, made provision for the appointment by the governor of the state board of examiners of nurses, consisting of five members. It would have been the the duty of the board appointed under this act to examine applicants for registration and to award certificates of registration to the successful applicants.

The question now asked is:

> "Is this such a board as "involves" the interests and care of women and children or both?"

I think not. While it is true that the question to whom shall be given the privilege of acting as a nurse does concern women and children, yet it does not concern them to any greater extent than do other questions of state and municipal government. To open the door to women under such a broad interpretation of the statute would undoubtedly mean that women must be considered eligible to hold office on every board and in every department and institution in Ohio, inasmuch as the correct management of all such boards, departments and institutions is, at all times, of vital interest to the women and children of the state. It is evident that such a holding would reach far beyond the purpose of the amendment, and should not be entertained.

The intention of the amendment was, I think, rather to place women upon such boards and at the head of such departments and institutions as exercise control over the physical and moral welfare of women and children who are being cared for as wards by the state or any political subdivision thereof. And with this view of the amendment in mind, I must conclude that women are not eligible for appointment as members of such board, as provided for in house bill 105.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

684.

PRISONER—PLEADING GUILTY SAME AS CONVICTED.

The legislature using the word "convicted" in section 13708 *meant it as a substitute for the words "has pleaded or been found guilty" as used in section* 13706, *and the court has no authority to suspend the sentence of defendant who has pleaded guilty.*

COLUMBUS, OHIO, December 3, 1913.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—On November 29th you wrote me inquiring substantially as follows:

> "One Robert Bennett Geyer was indicted for arson at the October term, 1913, of the common pleas court of Muskingum county, and having entered a plea of guilty as charged in the indictment, was sentenced by Hon. Alfred A. Frazier to the Ohio Penitentiary to serve an indeterminate sentence.
>
> "This sentence was suspended by the court under section 13706, General Code, and description of the prisoner and employment papers, etc., have been forwarded to this institution as in all regular probation cases so that we might issue to the prisoner a certificate of probation. This, I have

refused to do in this case for the reason that section 13708 provides that a person convicted of arson shall not have the benefit of probation. The prisoner's attorney, Mr. Secrest, of New Concord, Ohio, and Judge Frazier are of the opinion that inasmuch as the prisoner pleaded guilty to arson he is not 'convicted' of that crime, and is, therefore, entitled to be placed on probation.

"Kindly advise me at the earliest possible moment if my position is correct as the case is being held in abeyance pending your decision."

Section 13706 and 13708, General Code, read as follows:

Section 13706: "In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

Section 13708: "No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall have the benefit of probation."

Your question resolves itself into this: What is the meaning of the word "convicted" as used in section 13708?

Counsel for the defendant Geyer contends that this word as here used means "found guilty by a jury," and inasmuch as his client plead guilty he has not been "convicted' within the meaning of the section, and is, therefore, not precluded from receiving a suspended sentence.

This contention is, I think, one that raises a distinction without a difference.

While it is true that penal statutes must be strictly construed, this strict construction

"is not the exact converse of literal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible. * * * *· * Nor does it preclude the application of common sense to the terms made use of in the statute to avoid an absurdity which the legislature ought not to be presumed to have intended. * * * The rule * * * is not violated by allowing words to have their full meaning, or even the more extended of two meanings, where such construction better harmonizes with the context."

(Sutherland on Statutory Construction, pages 437-441.)

Sections 13706 and 13708 were originally sections 1 and 2 of an act passed May 9, 1908, entitled: "an act to provide for probation of persons convicted of felonies and misdemeanors." If the word "convicted" in this act is to be construed as meaning "found guilty by a jury," then this title is misleading, as section 1 of the act makes provision for suspension of sentences in certain cases when the defendant has "pleaded or been found guilty."

Again, section 1 allows the court to suspend sentences when the defendant has pleaded to or been found guilty of all crimes for which sentences to the penitentiary may be imposed with certain exceptions, and these exceptions are enumerated in section 2 immediately following. Is it not, then, reasonable to presume that in enumerating in section 2 the crimes excepted, the legislature viewed the defendant as standing in the same position before the court as in the preceding section, and that the word "convicted" used in the title and in section 2 of the act was merely used as synonomous with the words "has pleaded or been found guilty" as used in section 1?

I think so, and believe that the legislature was warranted in using the word "convicted" in that sense.

In State vs. Knowles 98 Mo., 429, the court held "it matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue of law or fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted."

The United States vs. Watkinds, 6 Fed., 152, the court, defining the word "conviction" said:

> "The term 'conviction,' as its composition (convinco, convictio) sufficiently indicates, signifies the act of convincing or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are (1) by plea of guilty and (2) by verdict of a jury."

In Com. vs Miller, 6 Pa., Super. Ct., 35-39, we find the court using the following language:

> "With respect to some purposes and consequences the words 'convicted' and 'conviction' when used in a statute mean no more than the judicial ascertainment of guilt by verdict or plea."

Bishop in his work on statutory crimes, section 348, says: "a plea of guilty by the defendant constitutes a conviction of him."

Authority after authority could here be quoted showing that when a defendant pleads guilty he is said to be "convicted," and I am, therefore, of the opinion that the legislature in using the word "convicted" in section 13708 meant it as a substitute for the words "has pleaded or been found guilty" used in section 13706, and that the court has no authority to suspend the sentence of a defendant who has pleaded guilty to the crime of arson.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

685.

BANKS AND BANKING—BRANCH BANKS—BANKS NOT PERMITTED TO HAVE A BRANCH.

A bank organized under section 9703, General Code, is not permitted to have a branch under the provisions of this statute, and cannot purchase a bank having a branch and continue to operate the branch of the bank purchased.

COLUMBUS, OHIO, December 9, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letters of October 22, 1913, and December 6, 1913, in the last of which you specifically inquire:

> "A bank now having a branch bank is desirous of selling both institutions to another bank having no branch. The question arises—can the bank purchasing the old bank with the branch, maintain this branch? It is the intention, of course, to consolidate the main office—sold—with the bank purchasing both."

I also have a statement in which the specific transaction is stated as follows:

> "The Forest City Savings & Trust Co., Cor. W. 25th and Detroit Ave., would like, if proper arrangements can be made, to purchase the West Cleveland Banking Co., located at Detroit and 101st street, and continue it as a branch. The West Cleveland has a capital of $100,000. The Forest City propose to increase their capital by $50,000, giving the increase to the stockholders of the West Cleveland, taking over their assets and liabilities."

In your letter of October 22d, you state:

> "Now the question arises as to what will be the effect when one bank purchases another bank which has a branch. Will the new bank which took over the old bank and *branch, be permitted to maintain the branch?*"

It will be noticed that the statement in your letters of October 22d and December 6th is somewhat different from the statement above set forth which is copied from a letter, or copy of one, written to you on October 19, 1913, by Mr. Charles R. Dodge.

Assuming that the actual facts are as taken from Mr. Dodge's letter, which is that the Forest City Bank proposes to buy the West Cleveland Bank, and continue it as a branch, it will be observed that to buy a bank and continue it as a branch of the buying bank, is quite different from buying a bank which already has a branch and endeavoring to maintain the branch as an adjunct to the buying bank.

The facts as set forth in Mr. Dodge's letter, to my mind, clearly bring the matter within the rule laid down in my opinion to you of June 16, 1913, to which you refer in your letter of October 22, and I can see no reason why, if an existing bank, organized under favor of section 9703 of the General Code, may not establish a branch, how it can be authorized to do so by purchasing another bank and use it as a branch, or by purchasing another bank which already has a legally established branch, and using such branch of the selling bank as a branch of the buyer.

I feel that my opinion of June 16, 1913, was correct, think it covers your present inquiry and adhere to its conclusions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

686.

COMPULSORY COMPENSATION ACT—FORMATION OF MUTUAL INSURANCE COMPANIES BY EMPLOYERS—INSURANCE COMMISSIONER SHOULD SUPERVISE FORMATION OF SUCH ASSOCIATION.

The question of the right of employers to form mutual insurance companies for the purpose of furnishing compensation to injured and the dependents of killed employes, under the provisions of section 22 of the compulsory compensation act, and the manner in which such association is to be operated, should be taken up with the insurance commissioner of this state.

COLUMBUS, OHIO, December 15, 1913.

HON. WALLACE D. YAPLE, *Chairman, The Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of November 18, 1913, you ask whether there is any authority for the organization of mutual insurance companies for the purpose of furnishing compensation to injured and the dependents of killed employes, under the provisions of section 22 of the compulsory compensation act.

The section which you cite contains a proviso permitting employers, under certain conditions, directly to pay compensation to their employes. This proviso reads as follows:

> "And provided further, that such employes who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in this act, or such employers as maintain benefit funds or departments or *jointly with other employers* maintain mutual associations, of such said financial ability or credit, to which their employes are not required or permitted directly or indirectly to contribute, providing for the payment of such compensation and the furnishing of such medical, surgical, nursing and hospital services and attention and funeral expenses, may, upon a finding of such facts by the state liability board of awards elect to pay individually or from such benefit fund department or association such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes."

Section 23 provides that employers who comply with the provisions of the foregoing section shall not be liable to respondants in damage at common law or by statute, except as otherwise provided in the act, for injury or death of any employe, etc.

Section 26 provides that employers failing to comply with the provisions of section 22 shall not be entitled to the benefits of the act, and shall be liable under the conditions set forth in the section last cited.

Under section 28, if any employer defaults in payment of premiums, the amount due shall be collected in the manner prescribed in said section.

In my judgment the only employers of five or more workmen exempt from direct contribution to the state insurance fund are those who arrange, under the rules of the board and the laws of Ohio, to pay compensation directly to their employes, or through the intervention of benefit funds, or mutual associations make such payments. The question is, however, whether there is any authority for the organization of mutual insurance companies under this act. Under the provisions of section 22, heretofore quoted, I hold that the words "mutual associations" mean such associations as are wholly and completely provided and sustained and kept up by one or more employers. In other words, the employers must bear the sole expense of these mutual associations. They are not permitted to contribute to some mutual association maintained, wholly or in part, by any person, firm, co-partnership or corporation other than themselves, as a separate entity and the employe must not be permitted or required to contribute to the support of such said mutual association.

The question of the right of the employers to form such associations, and the manner in which it is to be operated, should be taken up with the insurance commissioner of this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

687.

OFFICES INCOMPATIBLE—CORONER AND MEMBER OF THE GENERAL ASSEMBLY.

Under the provisions of article II, section 4 of the constitution of Ohio, a member of the general assembly cannot hold the office of coroner and at the same time serve as a member of the general assembly. These offices are incompatible.

COLUMBUS, OHIO, January 7, 1914.

HON. G. J. C. WINTERMUTE, *State Representative, Celina, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 5th, wherein you advise that there is a vacancy in the office of coroner of Mercer county, and that the commissioners have appointed you to fill the unexpired term of the former coroner, and that so far you have declined to qualify until you were sure of the legality of holding the office of coroner while being a member of the general assembly.

Section 2823, General Code, provides for the election biennially in each county of a coroner.

Section 2824, General Code, provides for the bond and oath of office.

Section 2829, General Code provides for the filling of a vacancy by a suitable person who is likewise required to give bond and take oath of office.

Section 2866, General Code, provides for the fees of the coroner.

Section 4 of article II of the constitution provides as follows:

"No person holding office under the 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."

Since from the statutes above set forth it is clear that the office of coroner is a lucrative office under the authority of this state, and since section 4 of article II prohibits the person holding such an office from having a seat in the general assembly. I am of the opinion that you cannot hold the office of coroner and likewise serve at the same time as a member of the general assembly.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

688.

BANKS AND BANKING—INTERPRETATION OF SECTION 744-6, G. C., KNOWN AS "THE KENNEDY PRIVATE BANK ACT."

Under the construction of section 744-6 G. C., when the assets of a private bank equal or exceed the liabilities, it does not necessarily follow that the bank is so solvent, as the owner, if an individual, may have creditors who will have the right to share in the assets of the bank in common with the depositors. If the bank should be a partnership, the ordinary rule of partnership will apply.

COLUMBUS, OHIO, December 20, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of September 9, 1913, asking opinion of me in which you say:

> "Referring to section 744-6 of the General Code being section 6 of house bill 46, known as the Kennedy private bank act, it says:
> "The depositors in any bank shall have first lien on the assets of such bank, in case it is wound up, to the amount of their several deposits, and for any balance remaining unpaid such depositors shall share in the general assets of the owner, or owners, alike with the general creditors."

Section 15 of the act, being section 744-13 of the General Code, reads as follows:

> "This act shall go into effect July 1, 1914.
> "By the terms of the quoted section the preceding section will not take effect until July 1, 1914, and the examinations made prior to that date, section 744-6, may not be considered. Am I correct in this construction? If I am, then this important consideration follows; that when the assets of a private bank equal or exceed the liabilities, it does not necessarily follow that the bank is so solvent, as the owner, if an individual may have creditors who will have the right to share in the assets of the bank, in common with the depositors. If the bank should be a partnership the ordinary rule of partnership will apply."

You are entirely correct in your construction of section 15 of the act in question (103 O. L., 379) as to the time when the provisions of section 6 of the act,

noted by you, go into effect. Section 15 provides generally that the act shall go into effect July 1, 1914. By way of exception however, this section provides that in certain particulars therein named, the act shall have earlier operation; but there is nothing in the section which puts the foregoing provisions of section 6 into operation before July 1, 1914.

You are likewise correct in your conclusions with respect to the suggested consequences of the construction just noted as to the time when the provisions of section 6 go into effect. In the absence of statute affecting the question, the relation between a bank and a general depositor is but the ordinary relation of debtor and creditor.

> "Covert vs. Rhodes, 48 O. S., 66-71.
> "Bank vs. Brewing Co., 50 O. S., 151.
> "Railroad Co., vs. Bank, 54 O. S., 60-71.
> "A general depositor is merely a general creditor of the bank, and is not entitled to any priority of payment over other creditors, in case of an assignment for the benefit of creditors, or of bankruptcy.
> "Bank of Blackwell vs. Dean, 9 Okl. 626.
> "Schnelling vs. State, 57 Neb. 562.
> "Orms vs. Baker, 74 O. S., 337-346."

Of course, the rules just noted do not apply to deposits fradulently received by a bank after knowledge on its part of insolvency; but the ordinary depositor stands in no better situation than any other general creditor of the bank. Your inquiry is one with reference to private banks, and it follows that until the provisions of section 6 of this act go into operation, the question as to the solvency of a private bank, with respect to the interest of depositors, suggests that not only their claims, but those of other general creditors should be taken into consideration in determining such question.

If a bank is conducted by a partnership, the ordinary rules applicable to such relation apply with respect to the questions suggested by your inquiry. The partners and each of them are liable for the firm or bank debts, and, on the other hand, the individual creditors of a partner may reach his interest in the bank; but in case of insolvency where there are distributable assets both of the bank and the partners, the individual assets of a partner are to be first applied to the debts of his individual creditors, and the bank assets are first to be applied to the payment of bank debts.

> "Rodgers vs. Meranda, 7 O. S., 179.
> "Page vs. Thomas, 43 O. S., 38."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

689.

BANKS AND BANKING—BOARDS OF DIRECTORS—CONSTITUTING A QUORUM.

The constitution of Ohio prescribes that a majority of bank directors is necessary to constitute a quorum, and in this connection it is to be observed that the majority required is a majority of the whole number, and remains the same even though there may be vacancies in the membership of the board.

COLUMBUS, OHIO, December 19, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of July 21, 1913, you wrote me asking my opinion as follows:

> "The question has been put to me as to what constitutes a quorum of directors of a bank. I replied that I thought any board of directors could fix the number of a quorum. The reply of the bank is that within the discretion of the board, they might provide as small a number as two or three, which would constitute a quorum and they would be enabled thus to conduct the affairs of the bank in the absence of a large part of the board. Hence, I would appreciate an early reply to this question."

There is no special statutory provision prescribing the number necessary to constitute a quorum of a board of bank company directors. Section 8664, General Code, applying to corporations generally, provides:

> "A majority of the directors of a corporation for profit and such a number of the trustees as the regulations of a corporation not for profit may provide, shall form a board."

In the absence of special statute applying to bank companies with respect to the question at hand, the section of the General Code just noted controls, and fixes the number necessary to constitute a quorum of a board of bank directors, to wit: a majority of the whole number of such directors.

> "Dicason vs. Grafton Saving Bank Co., 6 G. C. (n. s.) 333."

Moreover, with reference to banking companies organized under the Thomas banking act, sections 9702 et seq., General Code, it will be noted that section 9727, General Code, provides that the corporate powers, business and property of banking companies formed under the chapter of which the section noted is a part, shall be exercised, conducted and controlled by a board of directors consisting of not less than five nor more than thirty members thereof. Section 9714, General Code, provides as follows:

> "In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

In the enactment of this section the legislature, with respect to the question at hand, by necessary intendment had reference to the provisions of section 8664, General Code, as controlling.

The rule at common law likewise prescribed a majority of the board of directors as necessary to constitute a quorum, but in the absence of controlling statutes it would be competent for the corporation to prescribe in its regulations that a greater or less number than a majority of the directors shall constitute a quorum.

"Sargent vs. Webster, 13 Met. (Mass.) 497.
"Edgerly vs. Emerson, 23 N. H. 555.
"Lane vs. Brainerd 30 Conn. 565.
"Bank of Maryland vs. Ruff, 7 G. & J. (Md.) 448."

In this state however, as before noted, the question is controlled by statute which prescribes a majority of the directors as necessary to constitute a quorum, and in this connection, it is to be observed that the majority required is a majority of the whole number, and remains the same even though there may be vacancies in the membership of the board.

"Erie Ry. Co., vs. Buffalo, 180 N. Y. 192, 197."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

690.

BANKS AND BANKING—FINANCIAL CONDITION OF A BANK—EXAMINATION OF OFFICERS AND AGENTS TO ASCERTAIN THE FINANCIAL CONDITION OF A BANK—METHOD OF CONDUCTING SUCH AN EXAMINATION.

Officers and directors of a bank cannot be required to furnish a sworn statement in writing and to their net and gross worth either by virtue of or independent of the examination contemplated and prescribed for in sections 725-728, G. C., but such officers and their agents may be examined under oath in order to find out the financial condition of the bank.

COLUMBUS, OHIO, December 8, 1914.

HONORABLE EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of July 22, 1913, in which you ask my opinion as follows:

"Can you construe the statutes so that this department has the right to require a written statement, under oath, from officers and directors of banks as to what their gross and net worth is.

"We are attempting to go into the matter of directors and officers loans, with a view of determining their security and ability to pay. This is the only method that I have at hand."

Pertinent to the inquiry made by you I note that section 724, General Code, provides:

"At least twice each year and also when requested by the board of directors or trustees thereof, the superintendent of banks, or an examiner appointed for the purpose, shall thoroughly examine the cash, bills, collat-

erals or securities, books of account and affairs of each bank, savings bank, safe deposit and trust company, savings and loan society or association incorporated under any law in this state. * * *"

Sections 725-728, General Code, inclusive, provide as follows:

Section 725: "For the purpose of such examination, the superintendent of banks or such examiner may administer oaths to and examine any officer, agent, clerk, customer, depositor or share holder of such corporation, company, association or society touching its affairs and business."

Section 726: "The superintendent of banks may summon in writing under his seal any such officer, agent, clerk, customer, depositor, share holder or any person resident of the state to appear before him and testify in relation thereto. Whoever, being so summoned, neglects or fails to appear at the time and place specified in the summons, or, having appeared, refuses to be sworn or refuses to answer any pertinent and legal question, shall forfeit and pay one hundred dollars to be recovered with costs by the superintendent of banks and paid into the state treasury to the credit of the banking fund."

Section 727: "If a person summoned to appear before the superintendent of banks and give testimony under the provisions of this chapter neglects or refuses to answer any pertinent or legal question that may be put to him by the superintendent touching the matter under examination, the superintendent shall apply to the probate court or court of insolvency of the county in which such inquiry is conducted to issue a subpoena to such person to appear before him."

Section 728: "Upon such application, the probate judge or judge of the court of insolvency shall issue a subpoena for the appearance of such person or persons forthwith before him to give testimony. Whoever, being so subpoenaed, fails to appear, or appearing, refuses to testify, shall be subject to like proceedings and penalties for contempt as witnesses in actions pending in the probate court or court of insolvency."

I am unable to find that the foregoing statutory provisions or any others sanction any authority on your part to require of officers and directors of banks a sworn statement in writing as to their net and gross worth, either by virtue of or independent of the examination contemplated and provided for in the sections just noted.

It is to be presumed that the statutory provisions, authorizing the examination of the officers and agents of banks or other persons relative to the affairs of such banks and the conduct of their business, were enacted in the light of general provisions directing the manner in which the testimony of witnesses may be obtained and the oath to be administered to such witnesses.

Sections 11520 and 11521, General Code, provide as follows:

Section 11520: "Before testifying the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth."

Section 11521: The testimony of witnesses may be taken:

"1. By affidavit;
"2. By deposition;
"3. By oral examination."

It is clear that neither the use of affidavits nor depositions is contemplated in the statutory provisions relating to bank examinations. It follows, therefore, that the only examination contemplated and authorized by the provisions relating to such matters is one to be conducted orally upon an oath administered according to the provisions of section 11520.

This conclusion is strengthened by the language of sections of the Code relating to the examination of banks. These provisions clearly contemplate that the person to be examined shall appear in person before the officer conducting the examination and there testify in relation to the affairs of such bank. Furthermore, provision is made for compelling such personal attendance of the person to be examined, both by the penalty of money forfeiture and of punishment as for contempt, through the agency of a probate court or court of insolvency to which the superintendent of banks is authorized to apply in case the person whose testimony is sought neglects to appear in answer to summons, or neglects or refuses to answer any pertinent and legal question put to him.

Touching the purpose you have in mind prompting the inquiry made, you, or an examiner appointed by you, may examine on oath, any bank officer or director concerning its affairs and business, and if it appears that the funds of the bank have been loaned to any such officer or director, I see no reason why he may not be examined as to his gross and net worth.

In examining an officer or director as to the affairs of the bank, he undoubtedly could be asked concerning his knowledge as to the financial responsibility of any person to whom the bank has made a loan which was outstanding and unpaid, and no reason is apparent why the same inquiry could not be made of such officer or director when it appears that such loan has been made to him. In both cases the inquiry would be one touching the affairs and business of the bank itself.

Of course, the questions of the examiner and the answers of the officer or director could be transcribed in writing as made, and if the officer or director examined saw fit to do so, the same could be signed by him. In such case, however, the oral evidence of the officer or director would be the material fact and matter, and the written transcript of his evidence and his signature as well would be but evidence of his testimony, and the sanction as to the truth of the testimony of such officer or director would only be the oath administered before his testimony was taken, such oath to be administered by the officer conducting the examination, whether it be yourself or an examiner appointed for the purpose.

Sworn statements of officers and directors as to their gross and net worth, made in the form of affidavits, might serve your purpose in ascertaining the security of loans made to such officers or directors, but as the use of such written instruments is not contemplated in the statutory provisions giving you authority to examine into the affairs of banks, it follows that the truth of the statements made in such written instruments would not be secured by the sanction of the penalty imposed by statute for perjury.

"State vs. Budd, 65 O. S., 1, 4."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

691.

LIQUOR LICENSE BOARD—SALOONS IN TOWNSHIP REGULATED BY POPULATION.

Where Monroe township, Perry county, under the federal census of 1910 *has a population of* 2625, *said county may have five saloons.*

COLUMBUS, OHIO, December 23, 1913.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In your letter of November 11th you submit the following for an opinion thereon:

> "Monroe township, Perry county, under the federal census of 1910, had a population of 2625 which under the new license law entitled said township, being wet territory, to five saloons.
>
> "Late in the fall, 1913, the village of San Toy was erected by incorporation out of parts of Monroe township and another township. The population of the new territory was taken by the incorporators in order to ascertain in which township to bring their proceedings for corporation which developed that the San Toy territory was taking a population of 306 from the adjoining township. The incorporation of San Toy having become perfected prior to the announcement of saloon licenses on the 5th of November, the local board of Perry county, acting under instructions from this board issued one license in the village of San Toy, and one in the township of Monroe at Congo.
>
> "This board in giving such instructions preceeded upon the theory that in the absence of an official census of Monroe township, that the only safe course to pursue was to grant one license in San Toy and the minimum number of one license in Monroe township.
>
> "Will you, therefore, kindly advise this board whether our action in instructing the local board of Perry county as aforesaid was correct or whether we should have granted the remaining three licenses in Monroe township to which the township is evidently entitled, although there are no official figures of population except as above stated."

Section 44 of the liquor license law provides:

> Section 44. "In determining the maximum number of licenses which shall be granted in any municipal corporation or township of the state, the license commissioners shall be governed in determining the population of said political subdivision by any official census which shall have been taken therein within the year next preceding that for which licenses shall be granted. If no such official census of the population has been taken, the board shall be governed by the latest estimates of the United States census bureau."

You will note from a cursory reading of section 44 that if no official census of the population of a political subdivision has been taken therein, then the next year preceding that for which the license shall be granted, the *board shall be governed* by the latest estimates of the United States census bureau.

As I understand from your question, there has been no official census taken in Monroe township within the year next preceding the license year, and it is evi-

dent that the provisions regarding the United States census applies. It is my understanding that the United States census bureau in making estimates base the same upon the last federal census, adding thereto the proper average rate of increase for the subdivision, and not taking into account any additions, subtractions or formation of new municipalities since the date of the last decennial census.

Your inquiry presents a peculiar situation owing to the fact that the village of San Toy is composed of parts of Monroe and the adjacent township. Notwithstanding this fact I am inclined to the view that the latest estimate of the United States census bureau fixes the official census of the population of Monroe township, as provided by section 44, supra. Of course, since under the constitution and the law each municipality of 500 or less is entitled to one saloon, the municipality of San Toy should be accorded its one saloon.

In your question you state that Monroe township under the federal census of 1910 had a population of 2625, which under the new license law would entitle said township to five saloons. You do not say that the population of Monroe township is as figured by estimation of the United States census bureau. That estimate is the one that governs in the absence of the official census spoken of in said section 44. But in any event since under the 1910 census they would have been entitled to five saloons, the township would not be entitled to any less at the present time, and since in granting the one saloon to the village of San Toy, which takes in a part of Monroe township, and which takes from the township the population of 306, according to your statement, the remainder of the township would still be entitled to at least four saloon licenses, because after taking the 306 from the population of 2625, as shown by the census of 1910, there would still remain a population of 2319 in the rest of the township.

I am inclined to the view that the estimate of the census bureau would govern you, and fix the population of Monroe township, and that you could accord the number of licenses based upon said estimate; and there is no question in my mind that inasmuch as you have given one license to the village of San Toy that four other licenses could be given to the remainder of Monroe township and still be safely within the limitation fixed by the law and the constitution.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

692.

LIQUOR LICENSE—POWER OF MAKING SALES UNDER SALOON LICENSE—SALOON LICENSE CAN ONLY COVER ONE PLACE OF BUSINESS—SALOONIST NOT PERMITTED TO SELL DRINKS IN A RESTAURANT WITH WHICH HE HAS NO CONNECTION.

1. *Where the proprietor of a saloon conducts the same in a building fronting on one street and running back in the rear to a frontage on another street, and operates a bar upon both frontages, each of which has its separate entrance, and there are several rooms between both bars, under the liquor license law the same party could not operate both bars, and this would be especially true if the intervening rooms were not held and occupied by the proprietor in connection with his business or domicile.*

2. *Where the proprietor of a saloon adjoins a separate building operated as a restaurant by a different proprietor, there being an opening or passage way in the partition wall between the two buildings, liquor being sent or carried through the said opening to the guests of the restaurant, the proprietor of the saloon would not be entitled to make such sales under his liquor license.*

COLUMBUS, OHIO, October 28, 1913.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—You submit for an opinion the following questions sent you by the Hamilton county liquor licensing board:

> "There the proprietor of a saloon conducts the same in a building fronting on one street and running back in the rear to a frontage on another street, and operates a bar upon both frontages, each of which has its separate entrance, and there being several rooms between the two bars, can both bars operate under one license?"

Section 19 of the new liquor licensing act provides among other things that:

> "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license, * * *"

Section 21 of the act provides, among other things, that:

> "Each applicant shall state: * * *
>
> "(b) The premises where the business of selling intoxicating liquors is to be carried on, including the street and number where there is such street or number.
>
> "(c) The fact that the applicant is not in any way interested either as owner or part owner in a business, or a stockholder of a corporation engaged in the business, conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage."

Section 23 of the act provides, among other things that:

"Each licensee shall post in a conspicuous place *within the enclosure or room* where the liquors are sold the license certificate issued to him by the county board. * * *"

Section 36 of the act provides:

"No licensee under a saloon license shall, during the then current year, remove his *place of business to a place* other than that set forth in the application upon which the license was granted, without the consent of the county board."

Section 51 of the act provides:

"Any licensee who knowingly fails or neglects to keep conspicuously posted at all times within the enclosure or room wherein is conducted the business of trafficking in intoxicating liquors the license certificate required under this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding twenty-five dollars."

Joyce on intoxicating liquors, section 293, says:

"One license will not authorize the person or persons licensed to conduct the business in more than one place, or generally at any other than that specified in his license or application therefor."

"Citing Commonwealth vs. Holland, 104 Ky. 323."

Of course where the statute requires that the sale shall be made on the specific premises licensed (and this is the case with our license law) a sale off such premises is illegal. The difficult question frequently is, what constitutes a sale on or off the licensed premises?

In the case of St. Louis vs. Gerardi, 90 Mo. 640, decided by the supreme court of Missouri, the syllabus reads as follows:

"The proprietor of the Planters House in St. Louis, Mo., having procured a license to keep a dram shop at 111 North Fourth street, which was the main street entrance to the hotel, kept three separate bars where liquors were sold on the ground floor of the hotel, screened off by partitions, having direct and immediate connection by door-ways, all of which were accessible to the guests without going out of the hotel, and all of which bars were located on the premises occupied for hotel purposes, and a part of the Planters House.

"*Held.* That keeping the three bars did not violate the ordinance of the city providing that no person to whom a license should issue should keep a dram shop at any other place than the place designated."

Morton C. J. in that case said:

"The place at which the dram shop was to be kept was the Planters House, and a bar is only a means of carrying on the business, and where it is kept at the place designated, the mere fact of the licensee erecting more than one bar at such place, so connected as they were in the present instance, would not render him liable to the penalty of the ordinance

in question. We can see no reason why a dram shopkeeper, for his own convenience as well as of his customers, might not at the place where he is authorized to conduct the dram shop, erect a bar from behind which to sell beer, another to sell wine, another to sell whiskey, brandy, gin, etc. The rooms in which the bars in this instance were located were all on ground floor of the Planters House, the place at which defendant was licensed to keep a dram shop, only separated by screened partitions with doors to pass from one to the other."

In Commonwealth vs. McCormick, 150 Mass., 270, it was held that a license to sell in a "one and a half story building" imported an authority to sell anywhere in such building.

In Hochstandler vs. State, 73 Alabama, 24, where a licensee had two rooms connected by an arch way, and a bar in each room, it was held that his license, though issued for a *place* covered sales at both bars.

In the case of Sanders vs. Elberton, 50 Ga., 178, it was held that the question whether two rooms in a particular house in which it is proposed to sell spirituous liquors are in truth two distinct places is a question of fact, and in that case the supreme court of Georgia said:

"It is not clear to us that in this case there is not an effort to get permission to set up two liquor shops under one license. These two rooms under the admitted facts are so situated as in a very fair sense to make two different places. They open on different streets, *there is no communication existing between them,* and they are on different stories. We think it was no abuse of the exercise of the sound judgment of the council to conclude that each was a different place, and that the fact of one firm being the owner of both did not alter the case. * * * How far the admitted facts make these two rooms different places the council has determined as a question of fact. We see nothing in the case to justify the conclusion that this decision is an abuse of power."

Under our license law, the licenses are issued to traffic in intoxicating liquors. The applicant can have only one license, and cannot be interested in a like business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage. He is required to keep his license certificate conspicuously posted in the enclosure or room where the liquors are sold, and a failure so to do renders him guilty of a misdemeanor. In his application he is required to state the *premises* where the business is to be carried on, including the street and number where there is any such.

If the applicant receives a saloon license then, under the constitutional definition, he would have a license for a *place* where intoxicating liquors are sold or kept for sale as a beverage in quantities of less than one gallon, and the constitution provides that such "places" shall be limited in number according to the population.

It is my opinion, following the doctrine in the case of Sanders vs. Elberton, *supra,* that the question whether or not two rooms may constitute one place or two places, is a question of fact to be determined by the proper tribunal, and, in direct answer to your question, I think it would be the province of the liquor licensing board, from all the facts presented to it, to determine whether or not in the case instanced there was one or two places. If the board determines that as a matter of fact two businesses were to be conducted, one in each part of the building fronting on either street, and that the presence of the several rooms between the two rooms so divided the building as to render the rooms at each

end of the building entirely separate from each other, then a license should only be granted for one place and the description of the premises in the license should be limited to the enclosure or room in which the particular separate business would be conducted; but if they found as a matter of fact that the building was used as one room; that the business conducted was one business; by one proprietor; that access to all parts of the entire building was easy and that patrons had access to all parts of said building room, no matter which street entrance they used, the board would be justified in holding that one place of business was to be conducted and the premises would then consist of the entire building room and could be so designated in the license. Each case must be decided upon its own particular facts.

It was held in the case of Thomas vs. Arie, 122 Iowa, 538, that where a person obtained a license for a room fronting on two streets he could not divide the room by a permanent partition so as to make one room face on one street and the other room face on the other street, and then maintain a bar in each room.

So too, the supreme court of Illinois in the case of Malkan vs. City of Chicago, 217 Ill., 471, held that a license to operate a saloon in a certain *building* does not authorize the operation of two saloons in different rooms in it, there being no connection between the two rooms inside of the walls of the building. In fact it is generally held that a license to operate a saloon in one place will not authorize the sale of intoxicating liquors at another place also under the same license.

Of course, under our own law (and attention is called to the fact that in many states licenses may be issued to the same party for a number of saloons) one person can only have one license and can only be interested in one place where intoxicating liquors are sold.

Black on intoxicating liquors, paragraphs 127, 145 and 150, in dicussing the question comments on the fact that a liquor license is not a contract granting a licensee rights which he is entitled to enjoy wherever the place, but it is a permit only which must be strictly construed, and the one who holds it acquires only the privilege which a strict interpretation of the statutes authorizing the issuance of the license will afford.

The licensing board, granting applications where there is some question as to the extent of the premises in which the business is to be carried on, should bear in mind that it is a constitutional prohibition for a person to be interested in more than one place. The board should further bear in mind that under the provisions of section 23 and 51 of the liquor license law a licensee must keep his license certificate conspicuously posted and that this provision necessarily implies that it should be readily seen by any person coming into the place of business of the licensee. Our license law does not require that a particular description be given of the particular room in which the business is sought to be carried on. It only requires the applicant to "state the *premises* including the street and number where there is such." The *place* where the licensee is allowed to sell is determined by the description thereof as contained in the license, although the board is not authorized to grant a license that would cover two places of business. In the question asked, everything depends on whether or not there is, in fact, but one place of business conducted in said building, and it would take more facts than appear in the question to arrive at a definite conclusion as to that fact. I would say, however, that if the several rooms between the two bars constitute such a division of the building as to leave two different and wholly separated rooms that then both rooms could not operate under one license even though the business conducted would be by the same licensee. To hold otherwise would violate not only the spirit but the letter of the law. The licensee would then be maintaining two places, each independent of the other in every material sense necessary to be considered; nor do I think that it was ever intended under our license law that

one could be granted a license for a building and then cut that building up into separate and independent rooms, the number of the same limited only by the capacity of the building, and conduct an independent place in each of said rooms for the sale of liquors as a beverage.

In conclusion, therefore, my advice to the board would be that unless the two bars referred to in your question were both operated as one place, as well as one business, such licensee would not be protected by his license, and this would be especially so if the intervening rooms were not held and occupied by the proprietor in connection with his business or his domicile.

You further desire my opinion upon the following question:

> "Where the proprietor of a saloon adjoins a separate building operated as a restaurant by a different proprietor, there being an opening or passage way in the partition wall between the two buildings, liquor being sent or carried through the said opening to the guests of the restaurant, would the proprietor of the saloon be entitled to make such sales under his license?"

The application of the principles set forth in the authorities referred to in the first question justifies the conclusion that where the proprietor of a saloon makes sales in a restaurant adjoining said saloon in a separate building, which said restaurant is conducted by a different proprietor, there being an open passage way in a partition wall between the two buildings and the liquor being sent or carried through said opening to the guests in a restaurant, since the sale is then made in the restaurant, it is a different place from that covered by the license, and said sale would be illegal.

The question itself presupposes that the proprietor of the saloon makes the sale in the adjoining room, and of course since this would be in an entirely different place than the one for which he has a license, as well as in a room occupied by an entirely different business there would be no protection to the proprietor of the saloon by reason of the fact that he held a license. It is a rule of law so familiar as to be trite that the permission of a license is strictly limited to the premises as stated in the license. It may be, however, that the question intends to inquire whether or not the fact that the proprietor of the saloon delivers liquor to a guest in the restaurant would constitue a sale in the restaurant? Such a question would open a wide field. Where a particular sale is made and when it is finally completed, is sometimes a question of considerable difficulty and depends upon the particular facts surrounding each case.

While the word "sale" as said by the supreme court in the case of Williams vs. Berry, 8 Howard 495, is a word of precise legal import, both at law and in equity, and means at all times a contract between parties to give and pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold, still at times there is some difficulty in determinings, under the particular facts of the case when the sale is actually completed. It is elementary that no sale is completed unless there has been a delivery either actual or constructive. Title must pass. The vender must lose his dominion over the property, while the purchaser must be vested with dominion over it, yet "every case, (as stated by Benjamin on Sales, paragraph 111) must stand upon its own peculiar evidence and cannot be a controlling precedent for any other case." If the sale is an absolute one, title to the thing sold vests in the purchaser. Whether and when title to an article is to pass to a buyer is a question of intention and the circumstances surrounding the transaction may show this intention. While delivery is generally essential, yet it may be dispensed with if such be the intention of the parties.

It might be interesting in this connection to call attention to the present provisions of section 6071, General Code. This is the latest amendment of the so-called Dow-Aiken tax law, and the new license law and the tax law are so interrelated that they bear directly one upon the other. A person cannot traffic in intoxicating liquors without first obtaining a license, and then after having obtained the license, upon engaging in the traffic he comes under the provisions of the tax law on the business of trafficking in intoxicating liquor. Section 6071 of the General Code reads as follows:

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

It is the license that limits the business to the particular place under the amended law. The tax is upon the business of trafficking in intoxicating liquors. Formerly this tax was upon as many places as there were businesses conducted by the same party. Now a person is limited to one license and consequently can have only the one place of business. While not in point, but still affording some light on the question asked reference is made to a case recently decided in the superior court of Cincinnati (February 8, 1913,) by Judge Oppenheimer.

In that case the plaintiff was the proprietor of a restaurant situated upon the second floor of a building located at 509 George street in the city of Cincinnati. Upon the first floor of the building was a saloon owned and operated by Messrs. Dancer & Henderson. Entrance to the restaurant was obtained directly from the street through a hall-way which led past the side entrance to the saloon and a "dumb waiter" run from the restaurant to the saloon below. The plaintiff was Loy Sing, and was the proprietor of what is popularly known as a "Chop Suey" restaurant, furnishing to his patrons various Chinese dishes and green tea or beer. The testimony indicated that no beer was kept upon the premises, but that whenever an order for beer was given to one of the waiters in the restaurant, the order was communicated to the bartender in the saloon below through the "dumb waiter" or by a messenger,—usually the waiter who took the order—and the beer was sent or brought to the restaurant and served to the patron. Sometimes orders were taken for beer without eatables and filled in the same manner. The patron was charged the same price for the beer as plaintiff paid the saloonist therefor, and that amount was paid there when the beer was served or when the patron was ready to depart. Judge Oppenheimer (Ohio Law Rep. April 7, 1913, page 30) says, after quoting the facts as above:

> "The sole question in the case is whether these facts justify the inference that plaintiff is engaged in 'trafficking in intoxicating liquor' within the meaning of the General Code, section 6071. Plaintiff contends that his acts are merely acts of hospitality for the purpose, as he puts it, of 'accommodating customers'; and that in performing such acts he is acting only as agent of the customers in procuring the beer from the saloonist, or as the agent of the saloonist in serving the same. In other words he contends that the sale is, in each case, a sale by the saloonists themselves, made directly to the customer through himself as agent.
>
> *"If this restaurant were conducted by Dancer & Henderson in connection with their saloon, plaintiff's position would perhaps be tenable.* Unfortunately for his position, however, he has absolutely no interest in the saloon nor have the saloonists any interest in the restaurant. * *"

In this case the court held that the sale was made by the keeper of the restaurant, and that the injunction sought against the treasurer of Hamilton county for the collection of the Aiken tax should be dissolved. Now it is true that in this case the beer was delivered usually by the waiter who took the order in the restaurant, but, as indicated by Judge Oppenheimer, the restaurant not being conducted by the saloonists, and some elements of the sale taking place in the restaurant it constituted the place of sale.

Certainly, under the admitted facts of this case, to authorize such sale, the parties not only would have been liable to the Dow-Aiken tax but had the license law been in effect they would have been making sales without a license.

The license amendment to the constitution limits the number of places designated as "saloons," and the letter and spirit of this amendment is against permitting more places where intoxicating liquors are sold in small quantities, than is therein allowed. Anything that would tend to increase the number of such places must necessarily be frowned upon, and while I can conceive of cases where there might be a delivery of intoxicating liquors outside of the premises covered by the license owing to circumstances and facts that make it clear beyond question that the sale was completed and was entirely referable to the premises covered by the license, still, in the question submitted by you, I have no hesitancy in saying that the proprietor of the saloon in question would not be entitled under his license to make sales in an adjoining restaurant operated by a different proprietor.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

693.

EXPERT WITNESSES—FEES—SECTION 2494, G. C., MUST BE COMPLIED WITH.

An expert witness may not be paid fees from the county treasury unless section 2494 of the General Code is complied with.

COLUMBUS, OHIO, November 21, 1913.

HONORABLE CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your letter of November 14th, inquiring as to the right to pay expert witness fees out of the county treasury, is received.

The situation as you state is:

> "The defendant in a pending action asked the court to appoint a neutral expert to examine the viscera of a deceased person, and ascertain whether death was caused by a poison known as cyanide. The court, over the objection of the prosecuting attorney, made the appointment naming one professor M., who accepted, acted and filed his report stating that he did not 'find any cyanide or trace thereof.' On the witness stand, however, he testified that owing to the condition of the viscera at the time of its delivery to him, the chance of discovering cyanide, was remote, if not impossible. This, you state, was misleading, and you further state that the state was entitled to all the information and research of Prof. M., and that he should have included in his report the facts developed in his testimony."

Whether Prof. M. should have gone into a statement of the condition of the viscera in his report, or the means by which the presence or absence of cyanide is determined, or should have done more than merely report upon the question submitted, which he did, is neither here nor there. He said that he found no cyanide nor trace thereof, and to my mind, under his commission he was not called upon to state or discuss what might or might not have prevented its discovery. But this has nothing to do with a solution of the question presented.

Section 2494, General Code, reads:

> "Upon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the county commissioners may allow and pay such expert such compensation as they deem just and proper and the court approves."

Prior to this enactment, an expert witness was only entitled to ordinary witness fees.

> "State ex rel. vs. Darby, 17 Bull. 62.
> "Pengelly vs. Comm'rs. 8 O. N. P. 386."

Therefore, section 2494, General Code, must be followed before an allowance of a claim for expert witness fees may be paid from the county treasury.

It is not for this department to consider the motive of the court in making the appointment; that of the prosecutor in resisting said appointment, or in refusing to make the certificate under section 2494. All that is before me is the naked legal question of the right to pay an expert witness, fees from the county treasury without section 2494 being complied with, and I hold that it may not be done.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

694.

HIGHWAY DEPARTMENT REPRESENTS STATE IN CONSTRUCTION OF ROADS—STATE NOT LIABLE FOR DAMAGES IN ACCIDENT.

The state is not liable for damages that may be sustained by reason of the construction of a road. The state highway commission represents the state in highway matters, under the state aid law, and would not be the proper party defendant in a damage suit for damages caused by the construction of a road.

COLUMBUS, OHIO, October 30, 1913.

HONORABLE G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your leter of October 22, 1913, wherein you inquire:

> "(1) In the improvement of public highways under the state aid law, where a change of grade of such highway has been made, thereby making cuts at some places and fills at other places, along the premises of a land owner, does such land owner have a right of action for damages

for injury to his premises, and especially where it is claimed by such land owner that his right of ingress and egress to and from such highway to his premises has been interfered with? Such an action has been brought by a land owner against the commissioners of Wayne county, and I presume he is relying upon the case of Smith et al., vs Commissioners. reported in 50 O. S., page 628.

"(2) Under this law the state highway commissioner has the construction of such improvements under his direction and authority, and the engineer preparing the plans and specifications is employed by the state highway commissioner. Under these circumstances, should not the state highway commissioner be made a party defendant?"

During the incumbency of this administration, I do not recall a similar question having been presented, and our office files do not disclose any opinion rendered on this subject.

This department has adopted a rule not to render opinions upon matters that are pending in the courts, and for this reason, we decline to answer your first question.

Your second question is answered by the last sentence of section 1203 of the General Code of Ohio, which provides:

"The state highway commissioner may reject any or all bids. Before entering into a contract, he shall require a bond with sufficient sureties conditioned that if the proposal is accepted the contractor will perform the work upon the terms proposed, within the time prescribed, in accordance with the plans and specifications, and will indemnify the county against any damages that may be claimed during the construction of the improvement. An approved surety company may be accepted as surety on such bond. In no case shall the state be liable for damages sustained by reason of the construction of an improvement under this chapter."

This section was amended in 1913, 103 Ohio Laws, 449, but its provisions in this respect were not changed.

Inasmuch as the state is not liable for damages that may be sustained by reason of the construction of a road, I am of the opinion that the state highway commission who represents the state in highway matters, under the state aid law, would not be a proper party defendant.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

695.

STATE ARMORY BOARD NOT LIABLE FOR STREET ASSESSMENTS.

The state armory board is an agency of the state, and a payment by it would be a payment by the state, consequently the state armory board is not liable for the payment of a street assessment.

COLUMBUS, OHIO, December 24, 1913.

HONORABLE BYRON BARGER, *Secretary State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 5th, wherein you state:

> "I herewith have the honor to transmit a letter from the city clerk of Bucyrus asking the armory board to pay sidewalk assessment of $132.15. As this seems to be a tax, I am taking the liberty of requesting your opinion as to whether or not the board should pay same. The armory and the land both belong to the state of Ohio."

Property of the state of Ohio is exempted from taxation by section 5351, General Code, which provides:

> "Real or personal property belonging exclusively to the state or United States shall be exempt from taxation."

A special assessment is sought to be collected rather than a tax in the strict sense of the word. A special assessment has been distinguished from a tax by our supreme court in the case of Lima vs. Cemetery Association, 42 O. S., 128. This case involved the collection from a private cemetery association of a special assessment for a street improvement, and court held that the cemetery association could not, by relying on the general statute exempting its property from taxation, escape the payment of the special assessment. That case, however, is not decisive of the question presented here. It is a fundamental principle of statutory construction that a state is not bound by the terms of a general statute unless the statute so expressly provides.

> "State ex rel. vs. Board of Public Works, 36 O. S., 409.
> "State ex rel. vs. Cappeller, 39 O. S., 207, 213."

Our statutes do not expressly provide that the state shall be liable to the payment of special assessments levied by municipal corporations for public improvements.

As your board is an agency of the state, and as payment by it would be payment by the state, I am of the opinion that, as a matter of law, your board is not liable for the payment of this assessment.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

696.

WARRANTS OF AUDITOR OF STATE—LAW DOES NOT AUTHORIZE ISSUANCE OF DUPLICATE WARRANTS—TREASURER CASHES SUCH WARRANTS AT HIS OWN RISK.

The Auditor of State has no authority to issue duplicate warrants on the treasurer of state for the payment of money, without any action on the part of the general assembly—the treasurer of state accepts and cashes such warrants at his own risk.

COLUMBUS, OHIO, January 7, 1914.

HON. JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 11, 1913, you submitted for my opinion the following questions:

> "Should the auditor of state issue a duplicate warrant on the treasurer of state for payment of money without any action on part of the general assembly of Ohio authorizing same?
>
> "May the treasurer of state accept and pay such warrant? Should the treasurer of state redeem such a duplicate warrant and then through an over-sight redeem the original, where would the responsibility lie for such double payment?"

Section 242, General Code provides that no money shall be drawn from the state treasury except on the warrant of the auditor of state and the auditor is required to keep an accurate account of such warrants.

Section 243, General Code, requires that the auditor shall examine each claim presented for payment from the state treasury and to issue his warrant on the treasurer of state.

Section 245, General Code, requires that the warrants on the auditor of state shall be printed and bound, with stubs or margins, and the stubs or margins are required to be preserved by the auditor of state.

Section 301, General Code, provides that no money shall be paid out of the state treasury except on the warrant of the auditor of state.

Section 304, General Code, provides how warrants shall be paid.

There is, however, nothing in the statutes providing for the issuance of duplicate warrants, even on evidence satisfactorily submitted to the auditor of state that the original thereof has either been lost or destroyed, nor is there any provision in the statutes for the giving of bonds to secure the auditor or treasurer should a duplicate warrant be issued. There being no such authority given to the auditor for the issuing of a duplicate warrant he would be without authority so to do unless there was some action on the part of the general assembly to authorize the same. Should the treasurer of state accept and pay a duplicate warrant knowing the same to be such, or such duplicate warrant expressing on its face that it is a duplicate, the treasurer of state would do so at his own risk. Furthermore, should the treasurer of state redeem a duplicate warrant and then through oversight redeem the original he would be liable to make good the amount of the duplication, and would then be required to reimburse the state for that amount, looking to whatever security might be behind the issuance of the duplicate warrant. Such security, however, could only be for his personal benefit, the state requiring him to make good the amount so paid out.

Under date of December 12, 1913, you submitted a further inquiry along the

same line relative to state insurance fund, your specific question being whether or not the industrial commission is authorized by law to issue a duplicate warrant on the treasurer of state against said fund.

Section 1465-56, General Code, (103 O. L., 76) provides that the treasurer of state shall be the custodian of the state insurance fund and that all disbursements therefrom shall be paid by him upon voucher authorized by the state liability board of awards.

As you are aware the industrial commission superseded the state liability board of awards, (103 O. L., 97, section 12).

There is no authority that I have been able to find authorizing the industrial commission to issue duplicate warrants on the treasurer of state against the "state insurance fund," and, consequently, for the reasons given relative to the right of the state auditor to issue duplicate warrants, I am of the opinion that the industrial commission is likewise without authority so to do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

697.

SERVICE OF WRITS—CONSTABLE MAY NOT SERVE WRITS UPON HIMSELF—SHERIFF MAY NOT SERVE WRITS UPON HIMSELF—SHERIFF MAY SERVE WRITS ON A DEPUTY SHERIFF—CORONER MAY SERVE WRITS ON A SHERIFF.

1. *A constable may not serve writs upon himself and collect regular fees for said service, the same to be charged as costs in the case.*

2. *A sheriff may not charge a regular fee for serving a subpoena on himself. He may serve on his deputy same as any other person. The coroner may serve subpoenas on the sheriff under section* 11504, *G. C.*

COLUMBUS, OHIO, January 15, 1914.

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

GENTLEMEN:—In your letter of December 17, you ask the following questions:

> "First: May a constable serve writs upon himself and collect regular fees for said service, the same to be charged as costs in the case?
>
> "Second: May a sheriff charge and collect fees for serving a subpoena upon himself or deputy sheriff for attendance as grand jury witnesses or as witnesses in a criminal or civil case in the common pleas court?"

A constable can not serve writs upon himself, and consequently no fees can be collected by him for such alleged services. A writ, such as a subpoena, coming into his hand with his name as a witness therein, is sufficient notice to him; and the party serving him can, in the trial, call him as a witness. He is supposed to attend the trial in which he is acting as constable, and is allowed therefor by section 3347, General Code, $1.00. A party can subpoena the constable, or a special constable can do so.

For the same reason a sheriff can not charge fees for alleged service of subpoenas on himself in any case, or before the grand jury. The sheriff can serve a subpoena on his deputy in any case, or as grand jury witness, the same as upon

any other witness, and charge up the usual fees therefor. The coroner can serve subpoenas on the sheriff, under section 11504. There is no necessity for the sheriff to be subpoenaed before the grand jury. It is his duty to appear whenever he is called as a witness.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

698.

ANNUAL SESSION OF NATIONAL CHILDREN'S HOME SOCIETY—EXPENSES OF DELEGATES FROM STATE BOARD OF CHARITIES MAY BE LEGALLY PAID.

The annual session of the national children's home society is a meeting of the character contemplated by section 1352, *G. C., as amended. An executive officer of the state board of charities may lawfully receive his expenses for attending such meeting under the provisions of sections* 1357 *and* 1352, *G. C.*

COLUMBUS, OHIO, January 15, 1914.

HON. H. H. SHERER, *Secretary Board of State Charities,* 1010 *Hartman Building, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 10, 1914, in which you inquire:

"Under the provisions of section 1352 of the General Code, as amended April 28, 1913, members of the executive force of this board are entitled to attend state and national conferences for the discussion of questions pertinent to their duties and the actual traveling expenses so incurred to be paid as any other expenses of the board.

"On January 21-22, there will be held at Milwaukee, Wisconsin, a meeting known as the annual session of the National Children's Home Society. This is a gathering of workers from the various state children's home societies, whose primary work is selecting and placing dependent children in foster homes.

"Under the provisions of the juvenile code, recently enacted, this board has established a children's welfare department and appointed Mr. C. V. Williams as director. One of the functions of his position will be in behalf of the board to place children in family homes and supervise the work done by other placing agencies. As he has been invited to make an address at this meeting at Milwaukee and the board believes that his presence at this meeting will be of value to the new department, it has instructed him to accept the invitation.

"There is some doubt as to whether this meeting can be construed as coming within the express terms of the section referred to above. As the board does not desire to go beyond the intention of the act, your opinion is requested as to the legality of the state paying the expenses of Mr. Williams while in attendance at this meeting."

Section 1352, General Code, as amended April 28, 1913, 103 O. L., 864, reads:

"The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and private benevolent and correctional institutions of the state and county, and

municipal jails, work-houses, infirmaries and children's homes, and all maternity hospitals or homes, lying-in-hospitals, or places where women are received and cared for during parturition, as well as all institutions whether incorporated, private, or otherwise which receive and care for children. Officers in charge of such institutions or responsible for the administration of public funds used for the relief and maintenance of the poor shall furnish the board of its secretary such information as it requires. The board may prescribe such forms of report and registration as it deems necessary. For the purpose of such investigation and to carry out the provisions of this chapter, it shall employ such visitors as may be necessary, who shall, in addition to other duties, investigate the care, and disposition of children made by institutions for receiving children, and by all institutions including within their objects the placing of children in private homes, and, when they deem it desirable they shall visit such children in such homes, and report the result of such inspection to the board. The members of the board and such of its executive force as it shall designate may attend state and national conferences for the discussion of questions, pertinent to their duties. The actual traveling expenses so incurred by the members and such of its executive force as it shall designate shall be paid as provided by section 1351 of the General Code."

Section 1357, General Code, reads:

"The necessary expenses of all the persons invited to such conferences shall be paid from any fund available for their respective boards and institutions provided they shall first procure a certificate from the secretary of the board of state charities that they were invited to and were in attendance at the sessions of such conferences."

While, without express authority state officials are not called upon or justified in going out of the state in performance of their duties, as a general rule, yet I feel that the language of 1352, supra, very clearly evinces an intention to pay the expenses of members of your board or such of its executive force as it may designate to go outside the state to attend state and national conferences, for the discussion of questions pertinent to their duties.

I think it clear from your statement, that the annual session of the National Children's Home Society is a meeting of the character contemplated by section 1352, G. C., as amended: that Mr. Williams is one of your executive officers and that his expenses in attending said meeting may be lawfully paid under the provisions of section 1357 and 1352, above quoted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

699.

ARTICLES OF INCORPORATION OF THE WORKMAN'S AID ASSOCIATION OF TOLEDO SHOULD BE FILED BY THE SECRETARY OF STATE.

The articles of incorporation of the Workman's Aid Association of Toledo, Ohio, the purpose of which is to provide and maintain a fund to be used to aid and assist needy workmen, to provide and maintain a meeting place, reading rooms for their use and enjoyment, to own and maintain suitable real estate for this purpose and to do all things necessary and incident thereto, may be filed and the usual fee of $2.00 *may be charged.*

COLUMBUS, OHIO, January 14, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 2d, submitting for my examination and action, on the assumption apparently that the same is required by law, the proposed articles of incorporation of the Workman's Aid Association of Toledo, Ohio. The statement in the letter is that these articles are accompanied by the sum of two dollars, which is tendered as a filing fee. The corporation is one not for profit, and its purpose is as follows:

> "To provide and maintain a fund to be used to aid and assist needy workmen, to, provide and maintain a meeting place, reading rooms and play rooms for their use and enjoyment, to own and maintain suitable real estate for this purpose and to do all things necessary and incident thereto."

This purpose seems to be wholly charitable; comprises no insurance scheme whatever; is not mutual in any particular, and the articles of incorporation as they stand may be accepted by you and filed, the fee of two dollars being the usual one.

I might add that my conclusion is based upon the exact language of the purpose clause. Under this clause it would be unlawful for the corporation to conduct any kind of a mutual enterprise, limiting its benefits and liabilities to the members of the association.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

700.

BUDGET COMMISSION—DISPOSITION OF FUNDS OF THE STATE BOARD OF EMBALMING EXAMINERS—APPROPRIATIONS.

The proper course for the state embalming board to follow in reference to its receipts is to keep its revenue in its own possession as it has in the past, accounting for its official acts in its annual reports to the governor as provided in series 1348, *G. C.*

COLUMBUS, OHIO, January 14, 1914.

HON. H. H. SHAW, *Chairman State Board of Embalming Examiners, 668 N. High, Columbus, Ohio.*

DEAR SIR:—You request my opinion as to whether or not the state budget commissioners may require the state board of embalming examiners to furnish estimates for appropriations, and, generally, as to the authority and duty of the budget commissioner in the premises so far as the state board of embalming examiners is concerned.

Out of courtesy to Mr. Heffernan, State Budget Commissioner, I shall send a copy of this opinion to him.

The act of the general assembly, providing for the budget system for state officers, departments and institutions, is found in 103, O. L., 658. This act does not create any such position as "state budget commissioner," but it does authorize, by section 5 thereof, (designated section 270-5, General Code), the governor to "appoint competent, disinterested persons to examine, without notice, the affairs of any department, institution, public works, commission or office of the state for the purpose of ascertaining facts, and to make findings and recommendations relative to increasing the efficiency and curtailing the expense therein."

The appointees of the governor under the same section may exercise notarial powers to secure the attendance and testimony of witnesses. The earlier provisions of the same act provide in part as follows: (Sec. 2704-1).

> "On or before the fifteenth day of November, biennially, in the even numbered years, the several departments, institutions, commissions and officers of the state shall report on blanks furnished for such purpose, an estimate in itemized form to the governor, stating the amount of money needed for their wants for the biennial period beginning with the first day of July thereafter."

Section 2 provides in part as follows:

> "On or before the fifteenth day of November, biennially in the even numbered years the auditor of state shall furnish the governor the following statements:
> "1. A statement showing the balance standing to the credit of the several appropriations for each department, etc.
> "2. A statement showing monthly revenues and expenditures from each appropriation account * * *.
> "3. A statement showing the annual revenues and expenditures of each appropriation account for each year of the last four fiscal years * * *."
> "4. A statement showing the monthly average of such expenditures from each of the several appropriations accounts for the fiscal year, and also the total monthly average from all of them for the last four fiscal years."

Section 3 provides as follows:

"The departments, institutions, commissioners and officers of the state upon request shall forthwith furnish to the governor any information desired in relation to the affairs of their respective departments, institutions or officers."

Section 4 provides as follows:

"At the beginning of each regular session of the general assembly the governor shall submit to the general assembly, together with the estimate of such departments, institutions, commissions and officers of the state, his budget of current expenses of the state for the biennial period beginning on the first day of July next thereafter."

I think it is reasonably apparent from all the foregoing that in the first instance the budgetary scheme embodied in the act is related to the regular session of the general assembly in the odd numbered years, and that, except as to section 5, first above quoted, no duty devolves upon any department or institution, and no power vests in the governor with respect to making up the budgets, at any time than for and preceding the regular session. Accordingly, when you ask whether or not the budget commissioner has the right to determine and report on the expenditures for the coming year of the state board of embalming examiners, I might say that strictly speaking, the governor and his appointees have no authority, under the budget act, to make any investigations or recommendations except for the purpose of biennial appropriations in the even numbered years.

Of course, the governor, as the chief executive officer of the state has the constitutional right to recommend policies to the general assembly at the time of convening the legislature in extraordinary session. I need not cite the constitutional provision upon which this statement is based, as it is familiar.

In my opinion the provisions of section 3 and 5 of the budget commission act, may be used by the governor at any time in furtherance of his constitutional power as well as in furtherance of the budget scheme. That is to say, the governor may, in the alternate year, and with a view to calling to the attention of the general assembly such matters as should engage their attention at an extraordinary session, call upon the departments, institutions, commissions and officers of the state for any information desired by him in relation to the affairs of their respective departments; and appoint competent disinterested persons to examine their affairs.

In addition to this, I should incline to the view that by virtue of his mere position, the governor of the state might require information of any of the appointive state officers and boards at his pleasure. This, however, is a conclusion that rests upon inference. In either event the authority to require statements and reports from your board would be that of the governor and not that of any officer known as "budget commissioner," because there is no such officer independent of the governor. As a practical matter, of course, you may well assume that the requests made of you by the budget commissioner are those of the governor and may govern themselves accordingly.

As to the question of whether or not the state board of embalming examiners is a "state board" I, of course, have no doubt whatever that either your board is an agency of the state, and a branch of its executive department, or it has no powers whatever. I would, therefore, conclude that as a general proposition the governor may at any time require of the state board of embalming examiners such information relative to its finances as he may deem proper. But I take it that

your question is deeper than that already discussed and goes to whether or not the governor may make use of the information which you may furnish him, through his budget commissioner in the manner suggested by the act to establish a budget system.

Of course, strictly speaking, no proceedings can be had under this act at this time. This matter has already been treated of. But coming to the question as to whether or not the governor might make practical use of the information derived by him from your answers to his questions under his constitutional power, I would have to answer such a question by saying that it would depend upon the extent to which the governor desired to go in recommending remedial legislation. As the law now is, of course, the state board of embalming examiners is independent of the state treasury and requires no appropriation to maintain it. It is provided by section 1339, General Code, that all the expenses of the board shall be paid from the fees received under the provisions of the chapter. Related statutes do not require any of the revenues of the board to be paid into the state treasury. In my opinion, the practice of the board in the past, which has been to keep its revenues in its own possession, accounting for its official acts in its annual reports to the governor, as provided in section 1348, General Code, is the proper one under the statutes as they stand.

If the board were requested to make a statement of its needs for appropriation from the general revenue fund, or any other fund in the state treasury, it could well answer that it had no need of any such appropriation under existing laws. Unless the statutes relating to the state board of embalming examiners were amended the governor certainly cannot make any practical use of any information as to the needs of the board for the ensuing fiscal year, because the revenues of the board and their expenditure are, under the said statutes, beyond the fiscal control of the general assembly.

But should the governor desire to recommend to the general assembly the amendment of the laws relating to the state board of embalming examiners so as to require its revenues to be paid into the state treasury, and thus to subject its expenditures to the biennially exercised control of the legislature through appropriations, and should the general assembly legislate in accordance with such a recommendation, the situation would be entirely changed, and any information acquired by the governor might be put to practical use under amended statutes of the kind suggested.

Under all the circumstances I can only advise that at the present time, under existing laws, any information which the governor might acquire through his budget commissioner cannot be used by him, either under the budge act of 1913 or under his general constitutional power to recommend legislation in such a way as to call for any action by the general assembly in the making of an appropriation for the use of the state board of embalming examiners; but that if the law should be amended so as to require the payment of the board's revenues into the state treasury, then such information might be used by the governor in recommending to the general assembly, under his constitutional powers, the making of an appropriation from the state treasury for the use of the board during the ensuing year.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

701.

FEES OF ASSISTANT CONSTABLES ARE TO BE PAID IN EACH SEPARATE CASE AT RATE OF $1.50 PER DAY IN CRIMINAL CASES.

A justice of the peace in criminal cases may tax, in favor of a constable, a fee of $1.50 *for each assistant constable in each case, notwithstanding the fact that such assistants participate in the making of more than one arrest in a day.*

COLUMBUS, OHIO, December 23, 1913.

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

GENTLEMEN:—Under date of October 13th, you inquired of me as follows:

> "May a justice of the peace in criminal cases, tax in favor of a constable, a fee of $1.50 per day for each assistant constable, notwithstanding that several arrests were made or participated in by the assistants on the same day."

Section 3336, General Code, authorizes the employment of assistance by a constable, as follows:

> "In discharging their duties, constables may call to their aid the power of the county, or such assistance as may be necessary."

Section 3347, General Code, *inter alia,* allows to a constable for "assistants in criminal causes, one dollar and fifty cents per day, each."

This fee must be taxed in favor of the constable, rather than the assistants, because the statute does not recognize the right of the latter to have any fee taxed in their favor. The employment of assistants, under the statute, is by virtue of an arrangement with the constable and they must look to the constable for their compensation. It rests in the discretion of the constable to determine the number of assistants, and there is no doubt of the authority of a justice of the peace to tax in favor of a constable, a fee of one dollar and fifty cents per day for each assistant, when assistants are employed in but one case, in any one day.

Your question is as to the right of a constable to such fee, when there is more than one case in any one day, in which assistants are employed. Doubtless you had in mind the well established principle of law that a public officer cannot recover a per diem compensation from two or more different sources for services performed by him in one day.

This refers to per diem compensation from two or more public sources and not to a case where such per diem is taxed in favor of a public officer against a private individual, and paid by the latter. I have not succeeded in finding any authority defining the rights of the public officers in this respect, but there is a line of decisions in 35 Cyc., page 1562, to the effect that a witness, who, in obedience to a subpoena, attends at the same time in several cases, is entitled to per diem in each case.

It seems to me that the situation of a constable, in respect to the fee for assistants, is no different from that of a witness, who is subpoenaed in more than one case in a day, especially when such several fees are not to be paid from the public treasury, but are taxed against and paid by a private individual.

It would be wholly impracticable to attempt to apportion the per diem of assistants of a constable among all the different parties or according to the time

occupied in the disposition of different cases, during any day in which there would be more than one case.

I am, therefore, of the opinion that a justice of the peace may legally tax in favor of a constable, the sum of one dollar and fifty cents for each assistant constable in each case, notwithstanding the fact that such assistants participate in the making of more than one arrest in one day.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

702.

BUSINESS PAPER AND COMMERCIAL PAPER ARE SYNONYMOUS WITH BANKABLE PAPER—NEGOTIABLE PAPER.

The terms "commercial paper" and "business paper" are used interchangeably with and synonymous with bankable paper and all are used as applying to negotiable paper ordinarily used for the purpose of daily transactions in a bank.

COLUMBUS, OHIO, December 16, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter in which you ask for an opinion as to what "business" or "commercial" paper is, and in answer thereto I desire to say:

> "The principal distinguishing feature of commercial paper is its negotiability. This means not only that the instrument may be assigned and that the assignee may sue upon it in his own name, but also that he takes it free from equities that may exist between prior parties, and that out of the acceptance and transfer of the paper (often by mere signature of delivery) shall arise the well-established relations and liabilities that are created by the law merchant.
> "7 Cyc. 521."

Black, in his law dictionary, furnishes the following definition:

> "The term, 'commercial paper,' means bills of exchange, promissory notes, bank checks and other negotiable instruments for the payment of money which by their form and on their face purport to be such instruments as are, by the law merchant, recognized as falling under the designation of 'commercial paper.'"

This is substantially no definition at all and is not nearly so clear as the definition from Cyc.

The legal lexicographers do not undertake to make a definition of "business paper," and I am constrained to the view that the terms "business paper" and "commercial paper" have been and are being used interchangeably with, and as a synonym of "bankable paper," and all are used as applying to negotiable paper, whether in draft, note, check or other shape that is ordinarily used for the purposes of the daily transactions in a bank, and are of such character that when going into the hands of an innocent holder for value, pass free from any equities existing between any prior holders thereto.

It occurs to me that the making of your request arises from the fact that the terms in question have been used interchangeably, and, possibly at times, mistakenly.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

703.

SPEED ORDINANCE IN A MUNICIPALITY—POWER OF MUNICIPAL CORPORATIONS TO REGULATE SPEED OF MOTOR VEHICLES—POWER OF STATE TO REGULATE SUCH MATTERS.

Municipal corporations are without any authority whatever under the statutes to regulate the speed of motor vehicles or motor cycles within their boundaries. An ordinance or regulation seeking to accomplish such purpose is void, and prosecution cannot be maintained under it.

COLUMBUS, OHIO, January 15, 1914.

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

GENTLEMEN:—I am in receipt of your letter of October 10th, in which you inquire:

> "Has the council of a municipality the authority under section 3632, G. C., to regulate by ordinance the fast driving or propelling of vehicles through the public highways of the municipality, provided said ordinance in fixing such rates of speed does not violate the provisions of law as found in section 12604, G. C.?"

Section 3632, General Code, is a general statute authorizing municipal corporations:

> "To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

The powers granted by the foregoing statute are very broad and there is no doubt that the council of a municipal corporation has the right to regulate by ordinance the speed of ordinary vehicles on the streets of the municipality.

Your question, however, seems to be directed to the power of a municipality to pass and enforce ordinances regulating the speed of motor vehicles, and to that subject I shall confine this opinion.

Section 12604 and 12608, General Code, are incorporated in the penal statutes relating to motor vehicles. They are as follows:

> Section 12604: "Whoever operates a motor cycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 12608: "The rates of speed mentioned in section twelve thousand six hundred and four, shall not be diminished or prohibited by an ordinance rule or regulation of a municipality, board or other public authority, but municipalities, by ordinance, may define what are the business and closely built-up portions thereof."

These are special statutes designated to cover the classes of vehicles mentioned in section 12604, to-wit: motor cycles and motor vehicles, and to the extent that they are inconsistent with the general statutes on the subject of regulation of speed of vehicles on the streets of a municipality, the latter must yield.

It will be observed that municipalities are expressly prohibited by section 12608 from passing any ordinance or regulation to diminish or prohibit the rates of speed of motor cycles and motor vehicles, prescribed by section 12604. The regulation of rates of speed of such vehicles is a power reserved to the state and as this power has not been granted to municipal corporations, it cannot be exercised by them. The most that can be done by municipal ordinance in reference to these classes of vehicles, is to define the business and closely built-up portions of the municipality.

I am, therefore, of the opinion that municipal corporations are without any authority whatever under the statutes, to regulate the speed of motor vehicles or motor cycles within their boundaries. An ordinance or regulation seeking to accomplish such purpose, is void, and prosecutions cannot be maintained under it.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

704.

WITNESS FEES—FEES OF EXPERT WITNESSES—STATE NOT TO REIMBURSE THE COUNTY FOR PAYMENT OF SUCH FEES.

Where in the trial of a felony case the commissioners employ certain expert witnesses who were paid upon their allowance, and such witnesses were not paid the regular per diem and the mileage allowed to them as witnesses in the common pleas court, in the absence of a specific showing in the cost bill, no witness fees or mileage can be paid out of the state treasury, and in no event can a payment be made to reimburse the county for payments made under favor of section 2494, *G. C.*

COLUMBUS, OHIO, December 26, 1913.

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

GENTLEMEN:—I have your letter in which you inquire:

"In the trial of a felony case, the commissioners employed certain expert witnesses who were paid upon their allowance. Such witnesses were not paid the regular per diem and mileage allowable to them as witnesses in the common pleas court. It does not appear from the information at hand whether or not they appeared in obedience to subpoenas. Is the state liable to the county for the regular witness fees and mileage allowable under section 3014?"

I assume from your statement that the question propounded grows out of the consideration of a cost bill in a felony case where the defendant was convicted and sentenced to the penitentiary, but that the cost bill presented is silent

upon the question whether the expert witnesses were or were not subpoenaed; but it does appear affirmatively that they were no paid mileage and perdiem under section 3014.

I might restate your question as follows: Is the state liable to the county for the regular witness fees and mileage of expert witnesses, who are paid fees under section 2494, G. C., formerly 1302-1 R. S., where it is not shown that they attended under subpoena and it does not appear that they were paid by the county except under favor of 2494, G. C.

It will be seen that the attorney general of Ohio, in 77 O. S., 337, concedes that the ordinary fees and mileage of an expert witness when attending under subpoena may be "properly taxed" in the bill of costs. This I do not understand to be involved in your question, and there is therefore no occasion for its consideration.

Answering your question specifically, I desire to say that while the codification of the statutes has taken place since the decision in State vs. Auditor, 77 O. S., 333, the sections of the Revised Statutes therein considered will be found in the General Code without any substantial change. It is there held that the fees of expert witnesses under 1302-1 R. S. (2494, General Code,) are not payable out of the state treasury; that rule governs today and where, as I understand this situation, such fees have been paid, that fact does not authorize the conclusion that a part of this sum was witness fees and mileage under section 3014. In other words, in the absence of a specific showing, in the cost bill, no witness fee or mileage can be paid out of the state treasury and in no event can such payment be made to re-imburse a county for payments made under favor of section 2494, G. C.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

704-a

APPROVAL OF PLANS BY THE STATE HIGHWAY COMMISSIONER—NOT TO ACTUALLY SUPERVISE THE WORK—CONSTRUCTION OF SECTION 1183, GENERAL CODE.

Under the provisions of section 1183, *General Code, as amended, the state highway commission has authority and is required to approve the design, construction, maintenance and repair of bridges and culverts without being given supervision over the work.*

COLUMBUS, OHIO, December 11, 1913.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of September 24th, in which you call my attention to section 1183 of the General Code of Ohio, as amended April 18, 1913, (103 O. L., p. 450), and in reference to which you inquire:

> "Does your construction of this act require that the state highway commissioner shall approve the design, construction, maintenance and repair of all bridges and culverts: Whether built by the county commissioners, township trustees, or municipalities: Or is his approval limited to such bridges as are built by state money, or when he is requested to take charge by the authority building the bridge?
>
> "In other words, must the approval of the state highway commis-

sioner be given to the design, construction, maintenance and repair of all bridges and culverts constructed by public authority, whether the same is built by state money or not."

Amended section 1183, in so far as its provisions are pertinent to your inquiry, reads as follows:

"The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all highways, bridges and culverts which are constructed, improved, maintained or repaired with or by the aid of state money. He shall aid county commissioners in establishing, creating and preparing suitable systems of drainage of highways, and advise with them as to the construction, improvement, maintenance and repair of highways, and he shall approve the design, construction, maintenance and repair of bridges and culverts. He shall cause plans, specifications and estimates to be prepared for the construction, maintenance or repair of bridges and culverts, when so requested by the authorities having charge thereof; * * *."

Section 1191, as amended (103 O. L., p. 452), provides:

"The state highway commissioner shall cause plans, specifications and estimates to be made for the construction or improvement of all bridges and culverts upon the section of highway to be improved. A certified copy of such plans, specifications and estimates shall be transmitted to the county commissioners as provided for in section 1193 (section 20). The cost of such construction shall be apportioned equally between the state and county in which the improvement is made, except as provided in section 1210-1. The state highway commissioner shall so far as is possible standardize the plans and specifications for bridge construction, and furnish such plans and specifications with estimates of cost of construction to the county commissioners or township trustees upon application for use upon other than inter-county highways."

These two provisions of statute are in *pari materia* and should be construed together. Section 1191 and the first sentence of section 1183 make it clear that the state highway commissioner is vested with exclusive control of the construction, maintenance and repair of bridges and culverts upon state aid roads. These provisions of themselves furnish sufficient authority for the state highway commissioner to assume jurisdiction over the construction, etc., of bridges and culverts on such roads. They are clear and unambiguous, and certainly nothing else was needed to establish with certainty the will of the legislature with respect to the powers of the state highway commissioner over bridges and culverts on state aid roads.

Excluding the first sentence of the portion of section 1183 above quoted, the remainder would have been useless, if it were intended to apply to state aid roads only. I can arrive at no other conclusion, therefore, than that it was intended to apply, and does apply to bridges and culverts on roads constructed by public authorities other than the state highway commissioner. You will observe that the statute imposes no duty upon local authorities to submit the design of bridges and culverts to the state highway commissioner for his approval; no consequences are prescribed for their failure to do so, nor is such a submission and approval made a condition precedent to the making of a contract. The submission to the state highway commissioner of the design, etc., of any such bridge or culvert

for his approval, is in my judgment entirely optional with the local authorities having the same in charge, and cannot be enforced by the state highway commissioner or any other authority.

The state highway commissioner is required to approve the design of such bridges and culverts only when such design is sent to him by the local authorities for that purpose.

When the plans for such bridge or culvert are presented to the state highway commissioner, his duty is done when he approves or disapproves the design, construction, maintenance or repair thereof, and certifies his action to the proper officers. This does not mean that the highway commissioner is required, personally or by deputy, to supervise the actual work of construction. He is merely to approve the method of construction, the character of materials therefor, etc., provided by the plans and specifications. That this is the correct and reasonable interpretation of his duty in this respect is apparent from a comparison of the language of the first sentence of section 1183, by which the state highway commissioner is given

> "general supervision of the construction, improvement, maintenance and repair of all highways, bridges, and culverts which are constructed, improved, maintained or repaired with or by the aid of state money,"

with the latter part which merely requires him to approve the design, construction, maintenance and repair of bridges and culverts, without giving him *supervision* over the work.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

705.

PAYMENT OF MONEYS INTO STATE TREASURY BY STATE DEPARTMENTS- STATE UNIVERSITIES NOT AFFECTED BY PROVISIONS OF SECTION 24, G. C.

Ohio University, Miami University, Ohio State University and the combined normal and industrial department of Wilberforce University are not affected by the provisions of section 24, General Code, which provides that state officers, departments, boards and commissions shall pay to the treasurer of state on or before Monday of each week all moneys received by them during the preceding week.

COLUMBUS, OHIO, January 19, 1914.

HONORABLE JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your favor of August 26, 1913, asking my opinion as to whether the four Ohio universities are required to comply with the provisions of section 24, General Code, which provides as follows:

> "On or before Monday of each week, every state officer, department, board, or commission shall pay to the treasurer of state all moneys, checks, and drafts received for the state, during the preceding week, from fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed verified statement of such receipts.

The universities affected by the question here made are Ohio University, Miami University, Ohio State University and the combined normal and industrial department of Wilberforce University. The section of the General Code above noted is section 1 of an act passed April 25, 1904, entitled: "An act to provide a depository for state funds." The subsequent sections of the original act (97 O. L., 535) created a board of deposit consisting of the treasurer of state, auditor of state and attorney general. The act makes detailed provisions governing the powers and duties of such board of deposit, and authorizes the selection by such board of banks and trust companies to act as depositories of state funds.

It is obvious that the only moneys, checks or drafts required to be paid to the treasurer of state, in the manner and at the times prescribed by this section, are such as are received by a "state officer, department, board or commission." As to the institutions affected by your inquiry, it may be seriously questioned whether they, or any of them, come within the designation of "state officer, department, board or commission" as those terms are used in this section.

However, as I view the proper construction of said section 24 in its entirety, I do not find that a determination of this particular question is necessary for a solution of the inquiry presented by you and the same is not here determined. It is clear that the only funds required to be paid to the treasurer of state, in the manner and at the times prescribed by this section are those "received for the state." The act of which section 24 is a part is one pertaining to state funds and it is such only as are affected by the provisions of the section.

It is not the intent and purpose of the section to require any funds to be paid into the state treasury except such as, independent of this section, are received for the state, and as such, payable to the state treasurer; and this section, operating on such funds only, expends its whole force in directing the manner and time in which the same shall be paid in. This conclusion, obvious from the language of the section itself and which is effective to exclude the funds of these universities from the operation of the section follows as well, so far as the question of the application of this section to these institutions is concerned from the application of established rules of statutory construction.

At the time of the enactment of section 24, each of these institutions was established and, in a large measure, controlled by special statutes. These special statutes provided that these several institutions should be under the conduct and supervision of boards of trustees, who were empowered and charged with the duty of appropriating, expending and using the income of their respective institutions for the purpose of advancing and promoting the end and purpose of these institutions in the manner contemplated by the laws establishing and controlling them. Save as otherwise expressly provided, these special statutory provisions contemplated that these universities, through their boards of trustees or fiscal officers should retain all moneys collected as income of these respective institutions, and apply and expend the same for their use. Treasurers of these several institutions were provided for and these officers, though in no sense state officers, were, by the provisions of these acts, required to execute bonds in amounts and securities to the approval of the respective boards of these institutions. These special provisions, applying to these several institutions, likewise provided for complete and accurate reports of all receipts and expenditures to be made by the board of trustees to the governor. In brief, at the time of the enactment of section 24, General Code, complete fiscal systems for each of these institutions had been authorized, provided for and contemplated by special statutory provisions. This situation makes applicable the well established rule of statutory construction that a subsequent statute, treating a subject in general terms and not expressly contradicting the provisions of prior acts, shall not be considered as intended to

affect more particular and positive provisions of such prior acts, unless it be absolutely necessary to do so in order to give its words any meaning.
(Fosdick vs. Perrysburg, 14 O. S., 472.)

> "It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one. * * * It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act, or what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the intention of the legislature had been turned to that special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. * * * *
>
> "The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction."

(Endlich on the Interpretation of Statutes, section 223, 51 Wash., 555).

> "Particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms and not expressly contradicting the provisions of the prior act, unless such intention is clear."

(Commissioners vs. Board of Public Works, 39 O. S., 628-632.)
Shunk vs. First National Bank, 22 O. S., 508-515.
State ex rel. vs. MacGregor, 44 O. S., 628-631.

Inasmuch as full force and effect can be given to the provisions of said section 24 by confining its operation to funds which, independent of its provisions, are received for the state and as such made payable to the state treasurer, it follows, by application of the rule of construction just noted, that the funds of these institutions in question are not within the operation of this section, nor affected by its provisions.

Subsequent legislation indicates that it has not been the view of the legislature that these institutions were governed by the provisions of section 24, General Code. For instance, at the time of the enactment of this section it was provided, by special statutory provision applying to Ohio University, that money received by the treasurer of this institution on payments made by persons receiving deeds for university lands on surrender of leases held by them, should be deposited by the treasurer of the university in the state treasury on or before the first day of January next after the receipt of such money. (80 O. L., 193, Sec. 5; R. S., sections 4105-5).

In 1910 these provisions, which were carried into the General Code as section 7936, were amended. (101 O. L., 208). The legislature, however, in amending this section, did not, in anywise change the provisions of the prior law requiring the university treasurer to deposit this money on or before the first day of January next after the receipt of same, but re-enacted these provisions as they were. Again the act of April 2, 1906, declaring the policy of the state with refer-

ence to Ohio University, Miami University and Ohio State University, and providing for a tax rate for the support of these several institutions, provided as follows:

> "The expenditure of all moneys under the provisions of this act or for the purposes of carrying out the provisions of this act raised or secured from any source whatsoever shall be subject to the inspection of the state bureau of public accounting, the cost of same to be paid by the university or college inspected at the cost as now provided by law."
> (98 O. L., 312, Sec. 9, Sec. 7931, G. C.)

The provisions of this section were enacted after those of section 24, General Code, and they lend color to the view that it was the legislative intention that these institutions, save, of course, as otherwise specially provided, were to retain and expend all moneys raised or secured from any source, and as to such expenditure be subject to the inspection of the state bureau of public accounting.

A question quite identical to that here presented was made in the case of state ex rel. vs. Clauson, (51 Wash., 548). In that case, the statute involved, provided as follows:

> "That it shall be the duty of each state officer or other person (other than county treasurers) who is authorized by law to collect or receive moneys belonging to the state, or to any department or institution thereof, to transmit to the treasurer of state each day, all moneys collected by him on the preceding day, together with a statement of the source from which each item of said money was derived, and to transmit to the state auditor a duplicate of said statement."

The question there arose with respect to the state college of Washington, an institution which was supported by income derived in part from the general and state governments; in part from students for rent, and in part from the sale of its agricultural products. After the passage of the act above noted, the treasurer

Municipal corporations are without authority whatever under the statutes

and state governments, a certain sum of money which was deposited by him with the state treasurer under the belief that he was required to do so by the provisions of the act. Subsequently, a demand was made by the board of regents on the state auditor to issue warrants against the funds deposited by the treasurer of the board with the state treasurer, to pay for certain improvements and running expenses of the college. The demand was refused by the auditor on the ground that the money deposited by the treasurer of the board of regents was, under the act, properly payable to the treasurer of state. The court, in determining the question, held that the obvious purpose of the act was to daily place in the hands of the state treasurer the finances of the state, but held further, that inasmuch as special statutory provision had been made establishing and controlling the college with reference to its finances, that it was not the intention of the legislature, by the general language of the act there in question, to include the funds of the college within its operation. In other words, the court there held that the college funds were not part of the state finances to which only the act thereunder consideration was intended to apply.

Upon considerations above noted, I am of the opinion that these institutions in question, to-wit Ohio University, Miami University, Ohio State University and the combined normal and industrial department of Wilberforce Universty are not affected by the provisions of section 24, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

706.

AN ANALYSIS OF THE DECISION OF JUDGE DAY OF THE FEDERAL DISTRICT COURT OF THE NORTHERN DISTRICT OF OHIO, IN CONSTRUING SECTION 21-2 OF THE WORKMAN'S COMPENSATION ACT.

COLUMBUS, OHIO, January 5, 1914.

HON. WALLACE D. YAPLE, *Chairman Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 17, 1913, in which you call my attention to the decision of Judge Day of the federal district court of the northern district of Ohio, in construing section 21-2 of the Workmen's Compensation Act of this state.

You ask for an analysis of Judge Day's opinion, together with a statement of my view of sections 23, 26 and 29 of such said act. The act in question is to be found in 102 O. L., 524, section 21-1 of which provides that:

> "All employers who employ five or more workmen or operatives regularly in the same business or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses.
>
> "The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

Section 21-2 reads as follows:

> "But where a personal injury is suffered by an employe, or when death results to an employe from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, *and in case such injury has arisen from the wilful act of such employer or any of such employer's officers or agents,* or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employes, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employe, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to an employe, or to his legal representative in case death results, except as provided in this act.
>
> "Every employe, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employe or his legal representative in case death results,

who exercises his option to institute proceedings in court as provided in section 21-2, waives his right to any award; except as provided in section 36 of this act."

In view of the extreme amount of work imposed upon this department, I have been unable to answer this inquiry as soon as I should have liked, and because of the importance of this question, I shall herein express my views of the opinion of Judge Day, and the proper construction to be placed upon this section of the act, and shall defer discussing the other provisions referred to in your letter, until a later date.

In the case before Judge Day, it appears that one John J. McWeeny brought an action to recover damages against The Standard Boiler and Plate Company upon two grounds: (1) That the foreman was guilty of a wilful act, producing injuries for which recovery was sought, and (2), The failure of the company to comply with laws engaged for the protection and safety of the employes. It is only necessary here to discuss the first ground.

The facts show that the plaintiff was engaged in erecting a sheet iron tank, and while in the course of his employment was directed by his foreman to go to the top of a scaffold, which had been built around a tank, and used for pulling a line, to which was attached a heavy sheet iron plate, suspended from the derrick. When complying with this order, which is designated as a wilful act, the derrick fell, and the plaintiff was injured.

There was no question that the defendant had paid the premiums required by each act in question, and had complied with its terms regarding the posting of notices. The court charged the jury that it must be proved that the act of the foreman was a wilful act, and in defining the meaning of the expression "wilful act" he said:

> "To constitute a wilful act in this case, you must find that the action of Fisher (the foreman) was such an action as to evince an utter disregard of consequences, so as to inflict the injuries complained of. In other words, that negligent action was such recklessness reaching in degree to utter disregard of consequences which might probably follow. If the action of Fisher in ordering McWeeny to work on this scaffold and in connection with this derrick was done under such circumstances as to evince an utter disregard for the safety of McWeeny and the other employes working there in connection with him, then that action was a wilful act, but if the action of Fisher was merely the want of ordinary care on his part, then it would not be a wilful act on his part, and McWeeny could not recover.
>
> "Now, negligence is the want of ordinary care, and the want of ordinary care which constitutes mere negligence is not the negligence comprehended by this act, but it must be a wilful act and a wilful act must be such an act as utterly disregards the safety of others, or such recklessness as would utterly disregard the probable consequences which might result in injury to some other person."

In discussing this phase of the question, the court also says that the action of the foreman in ordering McWeeny to work upon the structure must have been either intentional or given under such circumstances as to evince an utter and reckless disregard for the safety of McWeeny and the other employes about the derrick, in order that there might be recovery.

The foregoing quotation and statement substantially state the position of the court in order to enable us to present the analysis for which you ask, and hence I have not dealt more fully with the charge.

It is clear, I think, that Judge Day has taken the position that the phase "wilful act" as used in this act really means wilful injury, and in this, I think that he is correct.

It might be argued that the word wilful was purely tautological, as the word act carries with it the implication of some positive action on the part of the employer or his servants, proceeding from volition, and that wilful adds nohing to this; if something positive is done by one, it necessarily follows that it must have proceeded from the will, and, therefore, was wilful. This is not the sense in which the word wilful is used in this act. It must be read in connection with the language preceding it to the effect that in case *the injury has resulted from a wilful act,* etc., in other words, wilful must be read in connection with the resultant injury, or to use the definition to be found in Black's law dictionary:

> "Wilful act may be defined as follows: Intending the result which actually came to pass; designed; intentional; proceeding from the conscious motion of the will."

Furthermore, the section quoted must be read in connection with section 21-1, which is in pari materia, and consequently must be construed in connection with the section which renders employers who fail to contribute to the said fund liable for injury sustained by the wrongful act, neglect or default of the employer.

Now, if the word act as used in the section which we are discussing merely meant something positive, rather than something negative, it would be unnecessary to have inserted it in the section dealing with employers who do not contribute, because they would be liable even though they did contribute, and hence, other language should have been employed in section 21-1.

We cannot assume that the legislature intended the word wilful to be meaningless as used in section 21-2; not only is this true, but section 20-1 adds additional force to this reasoning. This section provides that the employer paying the premiums shall not be liable to respond in damages at common law, or by suit, save as otherwise provided in the act, for injury or death of his employes. This shows that it was the clear and manifest intent of the legislators to preclude resort to courts by employers of those who contribute to the fund, except in extraordinary cases; if they were allowed to go into the court merely because their injuries were occasioned by an act of the employer or his servants, it would be to give the law a construction that the legislature never intended. It would be an absurdity to say that the employe could not recover if he was injured by neglect, and could recover if he was hurt by reason of an act of his master, or a fellow-servant.

The only distinction between act and neglect is, as we have said before, that one is positive and the other negative; the one is not necessarily any more serious or more violative of duty than the other. If Judge Day had taken the theory we here deny of this act, he would have told the jury that the plaintiff could recover if the employe was injured because of any positive action on the part of the fellow-servant. He limited this by requiring that the act be intentional, or done in reckless disregard of the rights of an employe.

The serious question, therefore, is whether the court in the foregoing decision correctly defined the term wilful, when used in the sense in which we have here construed it.

In addition to the foregoing definition of wilful act given in Black's dictionary, I wish to call attention to the following definition of the word "wilful:"

> "Resulting from the exercise of one's will; voluntary; intentional; distinguished in law from accidental or involuntary and generally implying evil intent and malice."

"Funk & Wagnall's New Standard Dictionary.

"Due to one's own will; spontaneous; voluntary; deliberate; intentionally."

Century Dictionary.

This makes clear the fact that in order that an act may be wilful, it must be intentionally done, and it is antithetical to that which is accidental or involuntary. It carries with it the idea of deliberation and intent. As used in the workmen's compensation law, it means that the act in question must have been done with the purpose or intent of causing injury. To state the proposition with reference to the concrete facts, one may say that to constitute a wilful injury there must be designed purpose and intent to do wrong and inflict the injury.

Recklessness and heedlessness as well as negligence carry with them the necessary inference of unconsciousness. In those cases the party does not think of the act or consequences. If he does think of the consequences, his conduct is intentional, while if he does not think of it, he is negligent, or heedless or reckless.

Recklessness cannot devolve into intention to hurt, otherwise, it would follow that a thought may be absent from the mind yet present. He who is guilty of rashness thinks of the given consequences, but by reason of an error of judgment arising from insufficient advertence he concludes that the given consequence will not follow the act in the given instance. All this is opposed to intention.

It is true that it is often difficult to determine whether one intends or whether he is merely heedless, or reckless, but the acts to which we must resort as evidence of the state of his mind are for the consideration of the jury, and it is for them to decide whether or not from such evidence, the acts are wilful. It will not do for the court to say that a heedless disregard of consequences renders an act wilful. To use the language of Mr. Austin in his lectures on jurisprudence: "It is therefore clear to me that intention is always separate from negligence, heedlessness or rashness by a precise line of demarcation. The state of the party's mind is always determined, although it may be difficult, judging from his conduct, to ascertain the state of his mind."

It is failure on the part of Judge Day fully to appreciate this that has lead him into what we regard as fundamental error in this case, and a study of the case arising under what is known as the "last clear chance" doctrine will readily develop the reasons guiding him in his construction of the law. It will be remembered that this doctrine is based upon the hypothesis that when one has, by his contributory negligence, placed himself in a perilous situation, the defense of contributory negligence cannot be taken advantage of, if the defendant after having ascertained that situation of peril in time to have averted the injury, in reckless disregard of the rights of such person, injures him.

It is in these cases that charges such as those used by Judge Day obtain, and many of the decisions contain exactly the language used by him, with certain modifications and limitations that he refrained from stating and which he should have done, as we shall hereafter show; but we must continually keep in mind the facts upon which those decisions are based, and the legal principles governing them.

In cases of that kind not only does wilful injury preclude the defense of contributory negligence but wantonness is also effective to deprive the defendant of such defense. Hence, it follows that wantonness and wilfulness accomplish exactly the same result, and therefore, the courts were not required to make any distinction between them. In the present question, however, the word wantonness is not used and we must confine ourselves strictly to wilfulness.

That these two terms are not interchangeable is clearly apparent from an examination of the cases and a careful study of the underlying principles of the law of negligence.

We have already defined wilful injury so that it is only left for us to determine what the word "wantonness" comprehends. The courts define it as reckless indifference or disregard of the usual or probable consequences of doing an act. Purpose and intent to injure are no ingredients of it. Yet, the very explanation of wilfulness as given by Judge Day carries with it not only the meaning of the word wilful, but also the meaning of the word wanton. In fact, his language in expressing the meaning of the former word contains many elements of the definition given by courts to the word wanton, and is only erroneous in describing the latter word in that it does not sufficiently set out the necessity of consideration by the actor of the consequences of his act, as we shall hereafter show.

> "Railway vs. Bowers, 20, So. 345.
> "L. & N. Ry. Co. vs. Calvert, 54, So. 184.
> "A wilful act means an act which shows that the person intended to do what was done; wanton act means an act done in total disregard of the rights of others.
> "Gosa vs. So. Ry., 45, S. E., 810."

Possibly the clearest and best distinction to be found is that stated in Hazel vs. Railroad, 173 Fed., 431, in the following language:

> "There are two ways in which wilful and wanton injury may be made to appear; first by an intentional act done with the purpose and design of doing the wrong or inflicting the injury ensuing. The doing of such an act the law denominates wilful—that is done knowingly and purposely with the direct object of injuring another, and, second, by a reckless indifference or disregard of the natural consequences of doing an act or omitting to do an act, which is by some authorities denominated wanton negligence."

Judge Hull in Griffin vs. Railway Company, 21 G. C., 547, on page 551 of his opinion very clearly defines wilful act thus:

> "A wilful act, a wilful tort, is one done intentionally where one injures another with the wilful intent to do him unlawful injury. It is somewhat used as a definition of a legal malice, and the use of this adjective 'wilful' and the adverb 'wilfully' in this petition was intended to designate this injury on the part of the defendant to the plaintiffs as an intentional injury.
> "Wilful imports a much more positive affirmative mental condition prompting the act than wanton. Many judges hold, and with much reason, that 'wilful negligence' is a contradiction, an anomaly. It has been generally held that wilful injury is not charged by an allegation that the act was committed recklessly, wantonly, purposely, wrongfully, or unlawfully. * * * When it is sought to hold a master liable for the act of the servant, it is sometimes material to inquire whether the act complained of emanated from the wilful or malicious state of mind of the servant.
> "Telegraph Company vs. Catlett, 171 Fed., 71."

That there must be evidence tending to show maliciousness of the offender—that is intention to do injury—is made clear in:

> "Hoberg vs. Collins and Company, 78 Atl., 166.
> "See especially Sharkey vs. Skelton, 76 Atl., 950.
> "Note Shearman and Redfield on Negligence, 6th Ed., sections 6, 19."

Now, even if it be conceded, which is probably correct, that the jury might, under certain conditions, infer conscious intent to occasion the injury complained of from the recklessness and disregard of consequences on the part of the master, that would be solely a matter for the jurors to decide as a question of fact. In other words, it is *an inference of fact rather than presumption of law,* and yet the court treated it as the latter. The distinction between an inference and a presumption is well made in:

"Cogdell vs. Railroad, 44 S. E., 618.

"See also Leighton vs. Morrill, 159 Mass., 271, 278.

"When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury.

"Continental Lumber Co. vs. Mimshaw & Co., 109 N. W. 760; 118 N. W. 1057."

Judge Day in the charge used the words "negligent action" in connection with that part of the charge to which we object, which is practically saying to the jury that they can infer wilfulness from negligence. Furthermore, the recklessness and disregard of consequences might not have been such as to have lead the jury to believe that the foreman in the case under consideration had any intention of occasioning injury, and therefore, the instruction was improper; in addition to all this, the charge is technically incorrect in not carrying the definition of wilfulness to its logical conclusion, even if wantonness and wilfulness might be treated as synonymous. Observe also that the words wilful negligence are not used in the statute, "wilful act" is the expression employed.

In order that these two subjects may be correctly embodied in the instruction, it must appear that the injury was intentional, and that the act producing it was wilful, or of such character that the injury must reasonably have been anticipated as a natural and probable consequence of the act. It is not sufficient that there merely be an utter disregard of consequences, but the resultant injury *must have been reasonably anticipated as the natural and probable result of the act.*

The jury should have been told this in no unmistakable terms, and the charge would have been bad in this particular, even if the word wilful be not given the restricted meaning, which we contend should be here given it. It would not have been a correct statement to the jury, even under the "last clear chance" doctrine. This is elucidated in:

"C. C. C. & St. L. Ry. Co. vs. Starks, 92 N. E. 54."

With these considerations in mind, you will readily see that it is our judgment that the court should have defined a wilful act that would have justified recovery, in the case before Judge Day, as an intentional act done with the purpose and design of inflicting the ensuing injury. He should there have stopped instead of making any reference to reckless disregard of the consequences of the act; and further, you will also take it as my opinion that the word wilful act as used in said section must be construed as carrying with it an intention on the part of the employer, or any of his officers, or agents, to produce the result which actually came to pass, viz., the injury to the employe, and it must have been designed and intentional. Such construction seems to me to be in harmony with the scope and object of the law, which was to prevent the employe from recovery, unless something more than mere negligence or wantonness existed.

Trusting that the foregoing fully answers your inquiry in this regard, I am,

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

707.

EXPENSE OF A COMMON PLEAS JUDGE—MAXIMUM AMOUNT ALLOWABLE—DEFINITION OF YEAR AS USED IN SECTION 2253, G. C.

1. *The maximum amount payable under the law upon an expense voucher of a Judge of the Court of Common Pleas whose term began on Jan. 1st, 1913, and ended on Jan. 1, 1914, is* $300.00 *and would be* $300.00, *providing the expense of the judge equalled that sum.*

2. *The year mentioned in section 2253, G. C., has reference solely to the year of the term of office and not to the calendar year, fiscal year, or year beginning when the law went into effect.*

COLUMBUS, OHIO, January 15, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 29, 1913, you call our attention to section 253, General Code, prior to amendment 103, Ohio Laws, 419, and likewise the same section as amended in 103, Ohio Laws, at page 419, and you then ask:

> "1. What is the maximum amount payable under the law upon an expense voucher of judge of the court of common pleas whose term began on Jan. 1st, 1913, ending Jan. 1st, 1914.
>
> "2. Does the year mentioned in the above section of law refer to the calendar year, fiscal year, year of the term of office, or year beginning when law went into effect?"

In answering your two inquiries above set out I shall answer the second of such inquiries first.

Section 2251, General Code, provides what shall be the annual salary of the judges of the court of common pleas, and

Section 2252, General Code, provides an additional salary to be paid quarterly from the treasury of the county upon the warrant of the county auditor.

The salary provided in section 2251, General Code, is to be paid by the state and under section 2260, General Code, the same is to paid by the state and under section 2260, General Code, the same is to be paid monthly.

Section 2253, General Code, both prior to amendment in 103, Ohio Laws, 419, states that the expenses to be received by the judge in any one year shall be in addition to the annual salary, and since the annual salary can only refer to the year of *service* of a judge, I am of the opinion that the year mentioned in section 2253, General Code, refers solely to the *year of the term of office* and not to the calendar year, fiscal year, or year beginning when the law went into effect.

Second:—Section 2253, General Code, prior to amendment provided that in addition to the annual salary each judge of the court of common pleas "shall receive his actual and necessary expenses not exceeding one hundred and fifty dollars in any one year."

Said section 2253, General Code, was amended in amended senate bill No. 36, (103, O. L., 419), passed on April 29, 1913, and filed in the office of the secretary of state May 8, 1913; such bill was not declared to be an emergency measure. The sole amendment to said section 2253, General Code, was to increase the allowance for actual and necessary expenses of judges of the court of common pleas to not to exceed three hundred dollars in any one year.

It would appear that the expenses which were to be allowed to the judges of

the court of common pleas was limited up to the time of the going into effect of amended senate bill No. 36 to not to exceed one hundred and fifty dollars. The legislature then by the amendment referred to extended the allowance by the sum of one hundred and fifty dollars. This would make the maximum total allowance at the end of the official year three hundred dollars, and I feel that it was the intention of the legislature that such total allowance should be granted to the judge at the end of the year which he was then serving, and that it is not necessary for him or you to apportion the expenses between the allowance as it stood prior to amendment and subsequent thereto. In other words, I do not believe that the duty is placed upon you to do other than to consider what the expense of a certain year was at the end of such year. While it is true that had the statute been repealed instead of amended it might well have been considered that the judges would be entitled up to the sum of one hundred and fifty dollars for the amount incurred by them up to the time of the repeal, or should such section have been amended by reducing the amount instead of increasing the same, that the same conclusion would have been reached to wit: that the judges should have been entitled to the maximum allowance of one hundred and fifty dollars, yet I believe it was the intention of the legislature to increase the amount to three hundred dollars irrespective of the time during the year in which the expenses were incurred.

I, therefore, hold that the maximum amount payable under the law for a year beginning January 1, 1913, and ending January 1, 1914, would be three hundred dollars, and that you would be authorized to allow such maximum if the expenses equal that sum.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

708.

STATIONERY—SUPERVISOR OF PUBLIC PRINTING—NOT TO FURNISH STATIONERY TO LIQUOR LICENSE BOARDS—OTHER PROVISION MADE IN THE STATUTES FOR THESE DEPARTMENTS.

The state and county liquor licensing boards are authorized to provide themselves with supplies, stationery, etc., by statute, consequently there is no authority for the state supervisor of public printing to furnish this material to said departments.

COLUMBUS, OHIO, September 15, 1913.

HON. FRANK HARPER, *Supervisor of Public Printing, Columbus Ohio.*

DEAR SIR:—I have your letter of September 12, 1913, in which you inquire:

> "Requisition has been made on this department by the state liquor licensing board for the printing of pamphlets of the license law, letter heads and envelopes for the state board, and letter heads and envelopes for each of the county boards.
>
> "Will you please give me an opinion as to whether this department is to furnish the printed matter for the state and county licensing boards?

> "Section 5 of license act, 103, O. L., 218. The state liquor licensing board shall provide itself with an office at the seat of government. Said board shall employ the necessary clerks, examiners, inspectors, stenog-

raphers and other assistants as it deems necessary, and fix their compensation, subject to the approval of the governor; and shall also provide itself with the necessary furniture, books, stationery and other things that may be necessary for the proper conducting of the office; and may incur such other expenses as it deems expedient, subject to the approval of the governor.

"The commissioners, the secretary, clerks, examiners, inspectors, stenographers, and other assistants, that may be employed shall be entitled to receive their actual and necessary expenses while traveling on the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the same, allowed by the commission and paid as other expenses are paid.

"The board may remove any of its employes for any violation of law or the rules of the board, or for any neglect of duty or for other good and sufficient cause.

"Section 13, of license act, 103, O. L., 220. Each county board shall provide itself with an office at the county seat. Each board may employ such clerk and employes as it deems necessary for the transaction of business and fix their compensation, and may provide itself with books, stationery and other paraphernalia, and may incur such other expenses for its operation as may be necessary for its business. All expenses, including compensation of clerks and employes, shall be subject to the approval of the state board and the county board shall certify to the state board on the first day of each month, a statement of all expenses of such county board for the month preceding, and upon approval thereof the state board shall cause same, together with the compensation of the commissioners and secretary, to be paid in the same manner as its own expenses are paid. The members of the county board, its secretary and employes shall be entitled to receive their actual and necessary expenses while traveling on the business of the board. Such expenses shall be itemized and sworn to and paid as other expenses of the board.

"In certifying the statement of expenses herein provided for the county board shall also certify all receipts of whatsoever kind received during the preceding month.

"Section 46 of license act, 103 O. L., 236. All fees and other moneys received by the state board shall be paid to and accounted for by the secretary, and by him paid into the state treasury daily, to the credit of a special fund for the use of said board to be known as the 'state liquor license fund.' A detailed verified statement of such receipts shall be filed with the auditor of state at the time of making such deposit.

"All expenses of the state board, including salaries, and all expenses, including salaries, certified by the various county boards to the state board, and approved by the state board, shall be paid by the treasurer of a state on warrant of the auditor of state. Before the auditor of state shall issue his warrant a voucher, signed by at least two members of the state board, with a detailed statement attached thereto, shall be filed with the auditor of state.

"At any time it is deemed advisable, by the unanimous vote of the state liquor licensing board and subject to the approval of the governor, said board may certify to the auditor of state and the treasurer of state whatever sum said state board may fix as aforesaid, as being necessary for the use of the board, and upon receipt of such certificate said sum as in said certificate indicated shall be transferred from said state liquor license fund to the general fund of the state.

"The state liquor licensing board shall make a quarterly report to the governor of all its financial transactions, and at least once a year, or oftener if ordered by the governor, the books, accounts and financial transactions of said board shall be thoroughly and critically inspected and examined by the department of the auditor of state, which department is hereby authorized so to do."

From a consideration of these sections it is made clear that the state and county licensing boards are authorized to provide themselves with supplies, stationery, etc., and this I believe to be in full harmony with section 2 of article XV. of the constitution as amended in 1912, and therefore, there is no authority to require you to do the things mentioned in your letter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

709.

STATE CIVIL SERVICE COMMISSION HAS NO AUTHORITY TO PAY WITNESS FEES—POLICE OFFICER NOT ENTITLED TO WITNESS FEES—CITY CLERK UNDER CIVIL SERVICE—SECRETARY AND ASSISTANT TO DIRECTOR OF PUBLIC SERVICE SUBJECT TO NON-COMPETITIVE EXAMINATION.

1. *The municipal civil service commission has no authority to pay fees to witnesses in the matters heard before the commission arising in the department of safety.*

2. *Where under an ordinance of the city of Mansfield the council elects its clerk, the municipal civil service commission has the right to place the clerk of council under civil service—the civil service commission is not authorized to place the secretary and assistant of the director of public service in the classified service.*

3. *A person legally appointed during the interim between the time the civil service law became effective and January* 1, 1914, *and holding such position on January* 1, 1914, *is considered an incumbent and would be subject to a non-competitive examination.*

COLUMBUS, OHIO, December 27, 1913.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of December 13, 1913, you inquire:

"Members of municipal civil service commissions in the state have submitted to us the following list of questions on which they request we obtain the ruling of your department.

"First:—Has the municipal civil service commission any authority to pay witness fees to witnesses in matters heard before the commission arising in the department of safety, either under the statute prior to the going into effect of the present statute, and also under the present statute?

"If this question is answered in the affirmative, will an employe in the fire division of the department of safety be entitled to witness fees upon being called as a witness, and at the same time be entitled to his pay as fireman?

"At the trial held before the civil service commission, arising in the safety department, at the request of the commission, a police officer was assigned for duty at the trial by the chief of police. It happened to be the day off for the officer assigned. This officer now presents a bill for services at said trial.

"Has the commission any authority to pay this bill?

"Second:—Under an ordinance of the city of Mansfield, the council elects its clerk. Under section 19 or 486-19 has the municipal civil service commission the right to place the clerk of council with the consent of the mayor under civil service? Would the same ruling apply to the secretary of the director of service as well as the assistant to the director of service?

"Third:—Where an employe of a municipality has been appointed since the civil service law passed April 28, 1913, went into effect, is the appointee an incumbent under the provisions of paragraph 10, section 486-10, of this act? Or is he a temporary appointee and subject to a competitive examination under the provisions of paragraph 14, section 486-14?"

The payment of witness fees is statutory and this is especially true where such fees are to be paid from public funds.

The civil service law as applied to cities, before the recent repeal and amendment, will be considered first.

Section 4505, General Code, provides in part:

"The commission, in all hearings or appeals before it, shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred in this chapter upon the mayor."

This provision refers to the manner of securing attendance of witnesses and the power to administer oaths. It does not provide for payment of witness fees, or refer to any other provision for that purpose. This provision refers to sections 4489, et seq., General Code, which authorize the mayor to investigate the enforcement of the civil service.

Section 4489, General Code, provided in part:

"In the course of such investigation, the mayor or such appointee may administer oaths and secure by subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation. Such subpoena shall be served by any officer authorized to serve civil process.

Section 4492, General Code, provided the procedure when a witness refused to obey a subpoena.

Section 4493, General Code, provided for payment of fees to such witnesses as follows:

"The fees for witnesses for such attendance and travel shall be the same fees as witnesses receive before the court of common pleas, which fees and the fees of the officer serving such witnesses shall be paid from the appropriation for the expenses of such department.

This section specifically applies to attendance at the mayor's investigation. It does not cover hearings before the civil service commission.

The provision of section 4505, General Code, above quoted, is not broad enough to include the payment of fees to witnesses.

I find no provision under the former civil service law which authorized the civil service commission to pay fees to witnesses for attendance at hearings before it.

Therefore, under the former law the municipal civil service commission had no authority to pay witness fees in hearings before it.

As to the new civil service law:

Section 7 of the civil service act, section 486-7, General Code, provides in part:

> "The commission shall,
>
> "Fourth:—Have power to subpoena and require the attendance in this state of witnesses and the production thereby of books and papers pertinent to the investigations and inquiries hereby authorized, and to examine them and such public records as it shall require in relation to any matter which it has authority to investigate. Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, for attendance and traveling, as provided in section 3012 of the General Code for witnesses in courts of record."

"The commission" herein referred to is the state civil service commission as is plainly shown by section 6, which provides in part:

The commission shall maintain suitable offices in the city of Columbus.

This provision can only apply to the state civil service commission and "the commission" referred to in section 7 is the same commission as referred to in section 6.

Section 19 of the civil service act, section 486-19, General Code, provides in part:

> "Said municipal commission shall have and exercise all other powers and perform all other duties with respect to the civil service of such city and city school district, as herein prescribed and conferred upon the state civil service commission with respect to the civil service of the state; and all authority granted to the state commission with respect to the service under its jurisdiction shall be held to grant the same authority to the municipal commission with respect to the service under its jurisdiction. The expenses and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city.

This provision refers to the power and authority of the municipal civil service commission. It does not refer to the payment of fees to witnesses.

I find no provision in the act of 103 Ohio Laws, 698, et seq., the civil service law, which authorizes a municipal civil service commission to pay fees to witnesses for attendance at hearings before it. Such commission cannot therefore pay such fees.

You ask as to the payment of a police officer in attendance at a hearing before a municipal civil service commission.

The police officer was directed to attend by the chief of police, but at the request of the civil service commission. The duties performed were evidntly in the line of his official duties. It is to be presumed that his salary would cover these services.

It appears that the police officer served on his day off. The civil service commission had nothing to do with this. I find no authority granted to the municipal service commission to appoint or to have appointed an officer or constable for attendance at hearings before it.

The civil service commission would not therefore have any authority to pay the officer who served at such hearing.

Section 4486, General Code, provided:

> "The commission shall make such other rules and regulations as are not inconsistent with this chapter for the promotion and the betterment of the service. The council shall provide for the salaries, if any, of the commission, for such clerical force, examiners, necessary expenses and accommodations as may be necessary for the wrok of the commission."

This section will not include a police officer attending the hearings before the commission.

Your second inquiry calls for a construction of a part of section 19 of the civil service act, section 486-19, General Code.

Said part reads:

> "The placing of additional officers in the classified list in any such city in addition to those specified in section 8 hereof, when approved by the chief executive authority of such city, shall not be deemed inconsistent with the provisions of this act."

Section 8 referred to, places certain described positions in the unclassified service and all others, "for which it is practicable to determine the merit and fitness of applicants by competitive examinations," are placed in the classified service.

The foregoing portion of section 19 applies to "officers." Employes and positions are not mentioned. Throughout the civil service act a distinction is maintained between officers and employes.

Where a provision is to include both employes and officers both of these terms, or some similar terms are used which will include both officers and employes. Or the language used is broad enough to include both.

For example in section 1 of the civil service act it is provided:

> "The term 'civil service' includes all officers and positions of trust * * *"

Again in the same section:

> "6. The term 'employe' or 'subordinate' signifies any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer."

In section 8, branch (a):

> "The unclassified service shall comprise the following positions * * *"

Also in branch (b):

> "The classified service shall comprise all persons in the employ of the state, the counties, cities and city school district thereof, * * *

"1. The competitive class shall include all positions and employments * * *"

In section 9:

"* * * the commission shall put into effect rules for the classification of offices, positions and employments in the classified service, * * *."

The part of section 19 under consideration provides that

"The placing of additional officers in the classified list"

shall not be inconsistent with the provisions of the civil service act.

The word "officers" does not include employes. The fact that in other parts of the act the legislature has used words which clearly include officers and employes and in this section has used only the word "officers" is significant. It clearly shows that this provision does not apply to employes.

You specifically ask in reference to the clerk of council and the secretary and assistant of the director of public service.

The clerk of council has been heretofore held to be in the classified service. The secretary and assistant of the director of public service are employes, and they do not, therefore come within the provisions of section 19, under consideration.

The civil service commission is not authorized by section 19 of the civil service act to place the secretary and assistant of the director of public service in the classified service.

Your third inquiry is as to whether appointments made after the act of 103 Ohio Laws, 698, became effective and prior to January 1, 1914, are to be considered as incumbents:

Section 2 of the civil service act provides:

"Method of appointment. On and after January 1, 1914, appointments to and promotions in the civil service of this state and the counties, cities and city school districts thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable, shall be competitive; and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Section 10 of said act, section 486-10, General Code, provides in part:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive examinations shall conform in character to those of the competitive service."

By virtue of section 2 appointments are to be made in the civil service in accordance with the provisions of said act on and after January 1, 1914.

The word "incumbents" in section 10 refers to persons legally appointed and holding the office or position on January 1, 1914.

The new law does not cover the manner of appointment until January 1, 1914.

Section 14 of the civil service act applies to "temporary and exceptional appointments." By virtue of the provisions of section 2, supra, this applies to appointments made on and after January 1, 1914, and not to those made prior thereto.

Therefore, a person legally appointed, during the interim between the time the act of 103 Ohio Laws, 698, became effective after January 1, 1914, and holding the position on January 1, 1914, would be considered an incumbent under section 10 of said act and would not be a temporary appointee under the provisions of section 14, thereof.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

710.

POWER OF MILITARY AUTHORITIES TO PURCHASE CASKETS—CONTRACT—STATE TO PAY FOR SUCH CASKETS AS WERE USED.

Where an undertaker ordered a carload of caskets for the city of Dayton during the flood in that city and a captain of the national guard stationed in the city is said to have agreed to take these caskets on the credit of the state, the state should pay a reasonable price for such caskets as were actually used by it, and the military authorities should not attempt to pay for such caskets as were not used.

COLUMBUS, OHIO, December 17, 1913.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Under favor of December 5th, you submitted the following for my consideration:

> "1. I am submitting papers in the case of the Richmond Casket Company against the state of Ohio, and would request your legal opinion as to the liability of the state in the premises. This claim was before the military board in Dayton and they could not reach an adjustment with the Richmond Casket Company.
>
> "2. A brief statement of the case is given below and the further facts can be had by reference to the correspondence and affidavits:
>
> "On the evening of March 26th, or 27th, Frank Riessinger, an undertaker, living on West Third street, Dayton, Ohio, in a section of the town which was out of the water, wired the Richmond Casket Company for a car load of caskets for immediate shipment to him. The Richmond Casket Company in their letter stated that Riessinger was not a desirable risk for a car load of caskets and that they consulted with the commercial club in Richmond as to what they should do and the secretary of the commercial club advised them that in all probability there was great need for caskets.

"According to the statement of the Richmond Casket Company they started to work about midnight and made and shipped a car load of caskets to their own order, not caring to ship an open order to Riessinger: That on the afternoon of Friday, March 28, the president of the company came over to Dayton and in company with Mr. Riessinger endeavored to locate me, the military commander of the Dayton military district and get authority from me to take these caskets in on the account of the state of Ohio; that they failed to locate me, which is perfectly probable, as I was a very busy man on that Friday; that on Saturday morning, March 29th, Frank Riessinger got in touch with Captain J. E. Gimperling, quartermaster, Ohio national guard, and here the story begins to vary and the alleged liability of the state of Ohio is said to begin.

"3. As a preliminary statement, I will say that the Pennsylvania freight office, in the city of Dayton, had been under eleven feet of water and on Saturday was not opened for business. The railroad bridge connecting the west and east sides of the town was down and there was practically no communication between the county west of the Miami river and the east side. The Pennsylvania tracks from Richmond to Dayton were in fair condition and the car was on a siding in west Dayton. For what happened that morning I refer you to the affidavits of the representative of the Richmond Casket Company, a Mr. Hirchcock, of Richmond, who claims to have been in Dayton, and Captain Gimperling himself. Gimperling, you will notice claims to have had no knowledge of the facts as stated above and that he had no intention of assuming this responsibility for the state of Ohio, but the company claim that he was acting for the state of Ohio and that his telephone or telegram, directing delivery to Frank Riessinger was an assumption by the state of Ohio of the bill for the entire car load of caskets.

"4. This department has been ready and willing at all times during this controversy to pay for the caskets used but has refused to assume the liability for the car and has only been willing to pay for the caskets used on a basis of quantum meruit. As the legal representative of the Richmond Casket Company is pressing for settlement, I am submitting all papers to you for your opinion. At any time I will be very glad to call at your office and give you any further information or go over the papers with you."

I have carefully examined all of the correspondence submitted by you in connection with your communication, and I am unable to find anything therein which discloses the slightest evidence tending to show that there was anything in the nature of an order by Captain Gimperling, or any other representative of the national guard, for the entire car load of these caskets.

In his affidavit Captain Gimperling states that it was represented to him that an order from the military was necessary in order to release the car load of caskets, and there is ample evidence to sustain a ready appreciation of the fact that conditions at the time were such, particularly as regarded the railroads, that it was necessary that property remain untouched by any parties without permission from the military authorities. The military authorities were in control at the time and such was the state of affairs that it was impossible for any other authority to determine rights to property. The car load of caskets was sent to Dayton, Ohio, solely by virtue of the order of Mr. Frank Riessinger, and Captain Gimperling, nor any other authority of the military organization, was in anywise responsible for the constructing of these caskets, or the sending of same to Dayton. The same were constructed and sent solely upon the request and authori-

zation of Mr. Riessinger. It is true the car load was billed to order of the Casket Company and might be held, in law, not to have been delivered to Mr. Riessinger. One thing is perfectly clear, however, and that is that up to this time, the military authorities could, under no consideration, be charged with any liability in respect to this consignment.

The evidence as to further steps made, as you state in your letter, is somewhat obscure. A representative of the Casket Company, Mr. T. C. Harrington by name, states in his affidavit that one whom he supposed to be the quartermaster general of Ohio was informed over the telephone by Mr. Ward of the casket company, that a shipment of caskets had been made by the Richmond Casket Company to its order, and that invoice and bill of lading had been fastened in a small box and nailed to the door of the car containing the caskets. Captain Gimperling denies that he had such telephone communication or that he was so informed, and states that he merely sent a telegram authorizing the casket company to release the caskets in behalf of Mr. Riessinger.

In their letter of May 13 to Captain Gimperling, the casket company expressly admitted that the car load of caskets was released by them for delivery to Mr. Riessinger, but added that the goods were being delivered to Mr. Riessinger as the property of the state of Ohio.

To my mind the evidence submitted is by no means sufficient to burden the state with a moral obligation of paying for the caskets used, and which they have offered to pay for. There has been no evidence submitted, of any order on the part of the military authorities for the caskets. All evidence submitted shows that the negotiations were clearly in behalf of Mr. Riessinger.

I would not be willing to say, however, that the facts submitted would preclude the possibility of there having existed an order on the part of the military authorities for such amount of caskets as they wished to use, since the telgram sent by Mr. Gimperling is the only communication admitted or in any way definitely pointed to between the military authorities and the casket company, which might be looked upon as an order or an offer to purchase.

In brief, up to the time of the alleged interference of Captain Gimperling, there was absolutely no incident which could in any way connect the military authorities with any contract liability, and when Captain Gimperling did interfere, if it may be proven that he interfered to the extent of procuring caskets in behalf of the state, he certainly did so, only to the extent of confiscating such of the caskets as the state might desire to use. The caskets, up to this time, belonged either to the Richmond Casket Company or to Mr. Riessinger, and the state ordered or confiscated (if it is to be fairly charged with any responsibility at all) only such number of these caskets as they desired for use, and there would be no logical or reasonable grounds of any character, for charging the state with liability for a consignment of a whole car load of caskets, solely in accordance with and by authorization of the order of Mr. Riessinger.

I, therefore, conclude that it would clearly be an unwarranted assumption of authority for the military authorities to attempt to pay for the balance of these caskets, and furthermore recommend that payment by the state, for the caskets actually used, is a thoroughly fair and reasonable settlement for you to make.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

711.

CITY COUNCIL—PASSAGE OF SALARY ORDINANCE—VOTE NECESSARY FOR PASSAGE OF SUCH ORDINANCE—PRESIDENT OF COUNCIL.

Where in a city the council consists of three members elected at large, four members elected from wards and the president of council, an ordinance fixing salaries is read on three different days as provided by law, and on motion to adopt the vote stood three for and three against, one member being absent, and thereupon the president voted in favor of the ordinance and declared the same carried, such ordinance was not legally enacted.

COLUMBUS, OHIO, January 17, 1914.

HON. ELMER E. BODEN, *City Solicitor, Barberton, Ohio.*

DEAR SIR:—I have your letter of December 18th, as follows:

"*The facts*:—B is a city. The council thereof consists of three members elected at large, four members elected from wards, and the president of council. An ordinance fixing salaries was 'fully and distinctly read on three different days,' as provided by law. On motion to adopt, the vote stood three for and three against, one member being absent. The president of council thereupon voted for the adoption of the ordinance and declared same carried. Thus the vote stood four for and three against the ordinance.

"*The question*:—Is not this ordinance legally passed?"

Section 4206 of the General Code provides how the council shall be composed.

Section 4272, relating to the president of council provides:

"The president of council shall be elected for a term of two years, commencing on the first day of January next, after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation, and shall preside at all regular and special meetings of the council, but shall have no vote therein except in case of a tie."

Section 4224, General Code, provides in part as follows:

"* * * No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

The council of the city referred to in the above request consists of seven members, and the ordinance in question was passed by the concurrence of three of these members, and the president of council who voted because of a tie vote cast by the six regularly elected members who were present at the meeting. The question is now asked—was the ordinance legally passed?

In volume 28 Cyc., p. 337, I find the following:

"It has been held that where the mayor is only entitled to vote in case of a tie, and a majority of all the 'members-elect' of the council is

required to pass a measure, the mayor cannot vote when the members are equally divided so as to give such majority, and is not to be counted in determining whether the measure has been passed."

In support of this proposition the case of State vs. Gray, 23 Neb., 365, is cited, and in the 1913 supplement of Cyc., the case of Morrian vs. Railroad is cited on the same proposition.

In both of these cases the presiding officer of council is held not to be a member of council within the provision laid down by the statute that "no ordinance shall be passed without the concurrence of a majority of the members elected thereto."

It is said in Dillon on "municipal corporations," volume 2, page 836, note to section 513, that:

> "The language of the decisions which declares that a mayor who is only a presiding officer with a casting vote in case of a tie is not a member of the council, must not be taken in its absolute and literal sense. He is a member for the purpose of presiding with a vote in the contingency specified. It is anomalous that he should take any part in the proceedings of the council and not be regarded as a member. Carrollton vs. Clark, 21 Ill., App. 74. When the statute confers upon the mayor the *right to preside* and to give a *casting vote* in case of a tie, he is so far a member of the council that the aldermen or councilmen cannot deprive him of these rights. State vs. Yates, 19 Mont. 239; Mc Court vs. Beam, 42 Oreg., 41."

If the president of council is not a member of council to the extent that he may not vote on an ordinance when there is a tie, then, of course, the ordinance referred to in your question was not legally passed since three is not a majority of seven. If the president of council is a member of council to the extent and for the purpose of voting on an ordinance in case of a tie, then at such time when such vote is being taken the council of the city referred to in your question consists of eight members instead of seven, and four votes is not a majority of eight, so that it matters not which line of decisions we follow, the result in the case before us is the same, and I am of the opinion that the ordinance referred to in your letter was not legally passed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

712.

SPEAK EASIES—LIQUOR TRAFFIC—ORDINANCE—PROSECUTIONS MUST BE MADE UNDER THE STATE LAW.

A municipal corporation has no authority to pass an ordinance prohibiting speak easies, as this is a matter that has been taken care of by statute.

COLUMBUS, OHIO, December 23, 1913.

HON. W. E. WARREN, *Village Solicitor, Leetonia, Ohio.*

DEAR SIR:—In your communication of September 29th you submit the following question for an opinion thereon:

> "Has any municipal corporation the authority to pass an ordinance prohibiting speak easies, or must these prosecutions be under the statute, exclusively?"

Section 3661 of the General Code provides as follows:

> "To regulate ale, beer, porter houses and shops, and the sale of intoxicating liquors as a beverage. But nothing in this chapter shall be construed to amend, repeal or in any way affect the provisions of law relating to the sale of intoxicating liquors on Sunday or local option as to sale of liquors in municipalities."

This statute at one time conferred power to regulate, restrain and *prohibit* places where intoxicating liquors were sold at retail, and in that form, as decided in Burckholter vs. McConnellsville, 20 O. S., 308, a municipal corporation was authorized to enact an ordinance prohibiting places where intoxicating liquors were sold at retail; but the statute has been amended, and there is no delegation of power to restrict such places in the present statute.

In the case of Berning vs. Norwood, 1 O. L. B., 25 (affirmed without report, Norwood vs. Berning, 72, O. S., 593) Judge Hollister held that in "regulating" the liquor traffic as it was authorized to do, under section 5 of the Municipal Code, and also under the provisions of the Beal law, (section 5 of the Municipal Code being carried into the General Code as said section 3661) council was not empowered to "prohibit" the traffic, which can only be done by a vote of the people.

It is, therefore, my opinion that the prosecutions spoken of must be brought under the statute.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

713.

POWERS UNDER CHARTER—CHARTER MUST BE FULLY COMPLIED WITH—COMMERCIAL BANK—TRUST COMPANY—INCORPORATORS.

Where incorporators take out a charter, including the power to transact several different things within the scope of the law, they are bound by all the provisions of the charter. Consequently, where a banking institution possesses the powers of a trust company, safe deposit company, commercial bank and savings bank, but claims that it does not act as a commercial bank, but as a combination of the others, such institution if it has the powers of a commercial bank under the terms of its charter, it is a commerical bank and cannot rid itself of that condition by confining its operations to other powers granted in the charter.

COLUMBUS, OHIO, December 13, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter in which you inquire:

> "A certain institution under the supervision of this department possesses the power of a trust company, safe deposit company, commercial bank and savings bank. Although this institution has a very large line of checking accounts, payable on demand, it claims to not be exercising the power of a *commercial bank* and sets forth the following claim.
>
> "We wish to call your attention to the fact that we do not operate as a commercial bank, and we do not loan on personal security nor do we discount, buy, sell or assign promissory notes or other evidences of debt. We have always considered our company as a combination of savings, trust and safe deposit company, and as such we are entitled to set up as a reserve 3% of our demand deposits in bonds enumerated in section 9764.
>
> "Upon reference to the various reports rendered by this bank I find that the above statement as to the bank's loans and investments is correct, and therefore would resquest your opinion as to whether or not they may enjoy the privilege of carrying certain bonds as a part of their reserve on account of demand deposits."

You state that the institution in question possesses the powers of a trust company, safe deposit company, commercial bank and savings bank, but that it claims that it does not act as a commercial bank, but as a combination of the others, which claim you find to be sustained by the reports rendered your department. The question for determination is whether the charter of bank controls in ascertaining its character, or whether the same is to be determined from the character of business carried on by the bank and the manner in which the same is conducted.

It has been said:

> "The privilege granted to the Metropolitan Transit Company was defined and limited by the act (laws of 1872) and it was bound to exercise the privilege, if at all, according to the terms in which it was conferred. It could not take part and reject the rest.
>
> "Matter of Metropolitan Transit Co., 111 N. Y., 601, cited in 1 Cook on corporations, p. 10.

"*Conditional or partial acceptance.* It follows from this that a charter must be accepted unconditionally and entirely as it is offered. It cannot be accepted on conditions not expressed in nor implied by the law, nor can it be accepted in part only, for if this were permitted, a corporation might reject the obligations imposed and accept the benefits conferred.

"1 Clark & Marshall on private corporations, 121.

"There can be no conditional or partial acceptance of a charter. The grant, when accepted, is upon the footing of a contract, which, being an entire thing must be accepted or rejected altogether. 4 Syl.

"Baldwin vs. Hills boro, etc., R. R., 10 Western L. M., 337."

While this is only a common pleas decision, it is in full harmony with all others to be found on the subject; conforms to the reasonable interpretation of the condition presented and the institution in question is to be governed by the terms of its charter, the acceptance of which must have been as an entirety and cannot be changed or modified by any subsequent action of the bank, its stockholders or directors.

I am therefore of the opinion that incorporators, who take out a charter, including the power to transact several different things within the scope of the law, are bound by all the provisions of the charter and the same may not be confined to a portion of the powers granted by a neglect, failure or refusal to exercise all the powers included in the grant.

If the institution in question has the powers of a commercial bank under the terms of its charter, it is a commercial bank and cannot rid itself of that condition by confining its operations to other powers granted in the charter.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

714.

BANKS AND BANKING—SALE OF SHARES OF STOCK TO PAY BALANCE DUE ON SAME—POWER OF DIRECTORS OF BANK TO MAKE SUCH SALE—PROCEDURE TO BE FOLLOWED.

Where a stockholder has subscribed for ten shares of stock, but has only paid in the sixty per cent, and his whereabouts are unknown, this stock can be sold and the balance due on the stock be paid. In making the sale the directors should be very careful to comply strictly with the law.

COLUMBUS, OHIO, January 15, 1914.

HON. EMERY LATTANNER, *Superinetndent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 7, 1914, in which you inquire:

"We have a stockholder who has subscribed for ten shares, but has only paid in the sixty per cent, and we are unable to locate him to collect the balance for $200.00. Can this stock be sold, and can we compel him to pay if he should refuse?"

This question, as I understand, is one that has been submitted to you and is not as clear as it might be when it is noticed that a payment of 60 per cent on ten shares leaves a balance of $400, and not $200.

Section 9717, G. C., reads:

"When a stockholder or his assigns fails to pay an installment on his stock, as required by the preceding section to be paid, or for thirty days thereafter, the directors for such company may sell his stock at public sale for not less than the amount due thereon, including costs incurred, to the person who will pay the highest price therefor, having first given the delinquent stockholder twenty days' notice of such sale personally or if no personal notification can be given, then by mail at his last known address as appears from the corporate record, and having advertised the sale for a like period in a paper of general circulation within the county in which the corporation is located. If no bidder can be found who will pay for such stock the amount due thereon, with costs incurred, such stock shall be sold as the directors order, within six months for not less than the amount then due thereon with all costs of sale."

This section to my mind answers your question to the effect that the directors of a bank may, under the circumstances stated, sell stock to satisfy an unpaid balance of the subscription price thereof. In the doing of this the directors should be careful to comply with the provisions of this section, for the reason that where there are two remedies given for righting the same wrong, the election to follow one precludes the enforcement of the other at a later date.

Wilson vs. Wilson, 30 O. S., 365; 48 O. S., 357.

The reason for this is, that the bank has the option to collect at law upon the contract of subscription or under section 9717, by sale of the stock, and that it may follow either but not both remedies.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

715.

STATE ARMORY BOARD—INSTALLATION OF HEATING SYSTEM—PAYMENT FOR SAME—POWERS OF ARMORY BOARD.

The state armory board may, under section 5255, *G. C., legally install a new heating system in the Pomeroy armory even though the cost thereof exceeds* $600.00. *Payment should be made from the state armory fund and not from any fund appropriated for the maintenance of the Ohio national guard.*

COLUMBUS, OHIO, January 14, 1914.

HON. BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 24th, which is as follows:

"I herewith have the honor to transmit minutes of the armory board relative to installing new heating system at Pomeroy armory. This armory is owned by the state and the present heating system is inadequate. It will require probably $1,800.00 to put in a new system and this amount is far in excess of the usual maintenance allowance for state armories. But section 5255 of the General Code requires the board to provide for the maintenance of armories and it has found that this armory requires a new heating plant.

"Heretofore the board has not spent over an average of six hundred dollars a year on any state armory because that is the maximum allowance for organizations occupying leased armories. But a case like the Pomeroy armory one is likely to arise whenever the usefulness of the building is impaired by its condition and section 5255 does not impose any restriction in requiring the board to provide for the maintenance of armories."

The resolution to which you refer reads:

"*Pomeroy armory*:—Whereas the report of the inspection of Architect Best and the reports of the local board of control show that the present heating system in the Pomeroy armory is inadequate, it is unanimously,

"*Resolved*:—That Architect Best secure bids for the installation of a complete and adequate steam heating system at the Pomeroy armory and that the secretary request the attorney general for an opinion as to the board's authority to incur the necessary expense."

Section 5255, General Code, provides:

"The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments, and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes when, in its judgment, it is for the best interests of the state so to do. The board shall provide for the management, care and maintenance of armories and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

Section 5261, General Code, provides in part:

"* * * nor shall a building be leased or rented for the use of a company or single organization in excess of six hundred dollars per year for each organization provided for."

From a consideration of section 5255, it is clear that the state armory board is charged with the duty of *maintenance* of armories. The word "maintenance" is defined by lexicographers as "maintaining, supporting, upholding, keeping up."

Section 5261 limits the amount that may be expended for the rent of an armory to $600.00 per annum. There is no limitation in the statutes upon the amount that the board may expend for maintenance. The limitation for this purpose mentioned in your letter, derives its force from a regulation of the armory board and not from any statute of the state.

Inasmuch as it is necessary to have an adequate heating system in order to properly maintain an armory and carry on the work for which it was intended, I am of the opinion that your board may, under section 5255, legally install a new heating system in the Pomeroy armory, even though the cost thereof exceeds $600.00. Payment therefor should be made from the state armory fund and not from any fund appropriated for the maintenance of the Ohio national guard.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

716.

OFFICES INCOMPATIBLE — TRUSTEE OF THE KENT NORMAL SCHOOL AND MEMBER OF STATE BOARD OF ADMINISTRATION.

One man may not lawfully hold the position of trustee of the Kent normal school and member of the state board of administration at the same time. These offices are incompatible.

COLUMBUS, OHIO, January 22, 1914.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR COX:—In answer to your verbal request that I advise you by opinion as to whether or not under the laws of Ohio the same person may hold the position of trustee of the Kent Normal School and member of the state board of administration, I do not deem it necessary to dwell at length upon the question. Agreeably to section 4 of the act of May 19, 1910, found in Vol. 101, Ohio Laws, page 320, it is provided:

> "Each board of trustees (of the normal schools) shall organize immediately after its appointment by the election from its members of a president, a secretary and a treasurer * * *."

It is further provided in the same act that:

> "The board of trustees * * * shall select and appoint * * * instructors * * * and provide a suitable course of study * * * fix rates of tuition * * *"

and do numerous other things not necessary here to enumerate, but which would require considerable time from the members acting as a board.

It is provided in section 1836, General Code of Ohio, among other things in referring to the state board of administration, that:

> "* * * Each member, officer and employe shall devote his entire time and attention to the duties of his position, and failure so to do shall be ground for removal."

You can, therefore, readily see that so far as the act in relation to the normal schools is concerned no disqualification presents itself, but section 1836 of the General Code, in reference to the board of administration, presents the disqualifications of a member who would give any of his time or attention to the duties of another office.

My conclusion is, therefore, that one man may not lawfully hold the two positions at the same time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

717.

APPOINTMENT OF CEMETERY TRUSTEES—LENGTH OF TIME SUCH TRUSTEES SHOULD SERVE—DUTIES OF THE MAYOR MAKING THESE APPOINTMENTS.

Where a board of cemetery trustees continues to act under an appointment made prior to the adoption of the General Code, a member so acting has a right to act until their successors are appointed and certified. Since the time has expired for a three year appointment to be made the mayor should appoint three trustees for six, four and two years respectively, from Jan. 1, 1914, *when the municipal officers are qualified and placed in their offices. After the date of Jan.* 1, 1914, *the mayor shall appoint one trustee for a period of six years.*

COLUMBUS, OHIO, January 13, 1914.

HON. N. H. MCCLURE, *Village Solicitor, Medina, Ohio.*

DEAR SIR:—In your letter of March 6, 1913, you say:

> "Some doubt exists as to the legality of our cemetery board as at present organized, appointments having been made of one member annually for a term of three years, until January of this year, when the change in the law having come to the attention of the council and mayor, no appointment was made and the board as previously constituted continues to act under the appointments made in conformity to the law as it existed prior to the adoption of the Code.
>
> "The question arises as to when the appointment should be made, under the statute, for the respective terms of six, four and two years, whether after the first municipal election succeeding the adoption of the Code, or should an entire new board have been then appointed for the term of three years, and then after the expiration of that time, and at the first municipal election on succeeding such expiration, when the Mayor took office, should the appointment be then made for the respective terms of six, four and two years."

The solution of this question involves a construction of the statute on the appointment of such cemetery trustees both before and after the adoption of the General Code.

Section 1536-479a (section 2518) Bates revised statutes, provided for the appointment, by the mayor of a village, of three cemetery trustees for three years. The act further provided that the term of office of the board *first appointed,* after the passage of the act, shall extend until the first municipal election has been held thereafter and the officers chosen at said election duly qualified and placed in office; and thereafter the mayor shall appoint a board for three, two and one years, respectively. The statute still further provided:

> "And thereafter, each year after the annual municipal election has been held and the newly elected officers have been duly qualified and placed in office the mayor shall at the first meeting night of the council within his village, appoint one member on the board of cemetery trustees whose term of office shall be for three years, or until his successor in office shall have been regularly appointed and qualified."

In case of vacancy, the mayor had power to fill the same by appointment for the unexpected term.

This section became a law May 3, 1904, and continued without change until the adoption of the General Code, February 15, 1910. In the General Code, the section above referred to, 1536-479a, was repealed, and the present section, 4175, General Code, was enacted.

Section 4175, General Code, effective February 15, 1910, provided for the appointment of cemetery trustees, consisting of three members for a term of three years; and that the term of office of the board first appointed, shall extend until the first municipal election thereafter and the officers chosen at such election are duly qualified and placed in office. This section further says that *thereafter* the mayor shall appoint a board of three trustees as follows:

> "One for a term of six years, one for a term of four years and one for a term of two years."

Biennially thereafter, after the newly elected officers have been placed in office, the appointments are to be one trustee for six years, or until his successor has been appointed and qualified. The last above statute is now the law, and has been since the repeal of the old statute, February 15, 1910. When the present law was enacted, it changed the terms of office of all such cemetery trustees, and required the appointment of three members for three years, in February, 1910, the term of said members to extend until *the first municipal election thereafter,* and the officers chosen thereat duly placed in office, *which would be in January,* 1914.

This required the mayor, in February, 1910, to appoint three trustees whose terms would expire January, 1914, but he did not *appoint at that time, and has not appointed since,* leaving the trustees to act and continue under their old appointments; and are still holding by virtue of the law which allows them to serve until their successors are regularly appointed and qualified.

The present trustees have been in lawful exercise of the office of cemetery trustees because they were originally lawfully appointed, and no one having been appointed in their stead, they had a legal right to same "until their successors in office were regularly appointed and qualified." The time has expired for a three year appointment to be made; and all that remains for the mayor to do, is to appoint three trustees for six, four and two years, respectively, from Jan. 1, 1914, when the municipal officers of your village were duly qualified and placed in office.

Each two years after the last above date, January 1, 1914, the mayor shall appoint one trustee for six years.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

718.

COUNTY DEPOSITARIES—AUTHORITY OF THE COUNTY COMMISSIONERS TO DESIGNATE COUNTY DEPOSITARIES—BIDS FOR COUNTY FUNDS—ADDITIONAL ADVERTISEMENT—COUNTY TREASURER HAS AUTHORITY WITH REFERENCE TO DEPOSITARIES FOR COUNTY FUNDS.

1. *Where certain banks are designated as depositaries under the provisions of section 2715-2745, G. C., by the county commissioners for the purpose of depositing county funds, and the awarding of the active funds to be deposited were under bid, the county commissioners have authority to and should immediately readvertise for bids on that portion of the funds not bid for in the first instance, and should continue to advertise these funds until they have all been awarded.*

2. *The county treasurer may use his own judgment in placing these funds so long as he chooses a bank that has been designated by the county commissioners as a depositary of the county funds. It is a matter entirely within his discretion and one about which the county commissioners have no authority to speak.*

COLUMBUS, OHIO, December 10, 1913.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of December 13, 1913, as follows:

"On the 14th day of October, 1913, pursuant to the provisions of sections 2715-2745 of the General Code, the board of county commissioners of Lucas county, Ohio, designated certain banks and trust companies as depositaries for the money of Lucas county, Ohio, all as is more fully set forth in letter of said board of county commissioners to the county teasurer of said county, under date of November 26, 1913, a copy of which is herewith enclosed.

"The probable aggregate amount of funds of the county so to be deposited, as determined by resolution of said board of county commissioners, was in the sum of $2,600,000, of which amount the sum of $615,000 was to be considered as inactive and the balance as active deposits. The inactive funds were several times overbid, but the active funds were underbid by $800,000. Instead of rejecting all bids and readvertising, awards were made to the highest bidders to the full extent of inactive funds, to-wit, $615,000, and to all bidders for total active funds bid for, to wit, $1,185,000, thus leaving $800,000 active funds unprovided for.

"On November 3, 1913, awards were made covering active funds theretofore unprovided for, all as is more fully set forth in said board of county commissioners' letter of November 26, 1913. All proceedings relative to first letting being a matter of public record, bidders for said $800,000 of active funds at the second letting were in a position to knowingly offer, as some of them did, a higher rate of interest than obtained at said first letting.

"From notice to bidders under which both awards were made, copies of which are herewith enclosed, it will be observed that the only difference is that in the first notice bids were asked for inactive and active deposits, and in the second notice for active deposits only.

"The county treasurer, pursuant to instructions contained in said board of county commissioners' letter of November 26, 1913, is now

placing active funds in depositaries which have bid the highest rate of interest therefor, regardless of the date when awards were made. To this action on the part of our county treasurer certain active depositaries designated under said award of October 14, 1913, are protesting on the ground that such action is unfair under the circumstances under which the awards were made. Our county treasurer has asked a ruling from this office as to what course should be pursued by him under the circumstances named.

"It appears that it was the understanding of the members of the board of county commissioners that deposits would be made in the order in which awards were made, in order that bidders at the letting had October 14, 1913, might be fully protected. I must confess that under the circumstances the action complained of on the part of our county treasurer would seem to be somewhat unfair to depositaries designated under said award of October 14, 1913, in that bidders at letting had November 3, 1913, were in full possession of all the facts relative to the first letting, knew the exact rates of interest offered thereat, and hence were in a position to offer a slight increase in rate of interest, and thereby secure to themselves an advantage in the matter of obtaining deposits of active funds, if deposits were to be made in accordance with the rate of interest offered.

"The situation presented is somewhat unfortunate and one concerning which we should be pleased to have your immediate advice. Kindly give us your opinion at your earliest possible convenience as to whether or not preference should be given to active depositaries designated under said award of October 14, 1913, or those designated under award of November 3, 1913, regardless of rates of interest offered."

Sections 2715, 2716 and 2721 of the General Code read as follows:

Section 2715: "The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks, located in the county as such inactive depositaries, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary. No bank or trust company shall receive a larger deposit than one million dollars."

Section 2716: "When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the

county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent per annum on the average daily balance on inactive deposits, and not less than one per cent per annum on average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

Section 2721: "If no proposals are received offering the rate of interest hereinafter prescribed, the commissioners shall at once again advertise in the same manner until acceptable proposals are received. Each subsequent advertisement shall also state whether any proposal was received under the preceding advertisement, and, if any, the bank or banks or trust companies and the rate of interest offered."

The awards made on November 3, 1913, in this case were made in conformity with the above sections, and no question of any irregularity is raised. The active funds, however, were underbid by $800,000, and the commissioners immediately readvertised for bids on the $800,000 active funds not bid for in the previous bidding. That it was legal and proper for the commissioners to do this, I feel satisfied. It is their duty under section 2715 to designate the active and inactive depositaries, and section 2721 provides that if no proposals are received offering the prescribed rate of interest, the commissioners shall again advertise for bids in the same manner. In view of this it is certainly reasonable to conclude that in case only part of the funds are bid for in response to the first advertisement, the commissioners have authority to and should immediately readvertise for bids on that portion of the funds not bid for in the first instance. The duty is imposed upon them by statute to procure bids for active and inactive funds through the medium of advertising, and if the first advertisement does not secure sufficient bids to cover the entire amount of money to be deposited, then additional advertisements must be printed until all of the active and inactive funds have been awarded.

This is what was done in the case before us, and no complaint can arise with reference to the commissioners' action.

The next question is: What is the treasurer's duty in placing these active funds? Must he be controlled by the date of the letting, or the amount of interest offered?

Section 2736, General Code, as amended in 103, O. L., p. 562, defining the duty of the treasurer, reads:

"Upon the receipt by the county treasurer of a written notice from the commissioners that a depositary, or depositaries, having been selected in pursuance of law, and naming the bank or banks or trust companies so selected, such treasurer shall deposit in such bank or banks or trust companies as directed by the commissioners, and designated as inactive depositaries to the credit of the county all money in his possession, except such amount as is necessary to meet current demands, which shall be deposited by such treasurer in the active depositary or depositaries. Thereafter, before noon of each business day, he shall deposit therein the balance, if any, remaining in his hands after having paid out of the receipts of the preceding business day,

in cash, warrants presented to him for payment during such day, except as herein before provided. Such money shall be payable only on the check of the treasurer."

No mention is made in this section, or in any other, of any rule to be followed by the treasurer in placing the funds. The county commissioners have authority to designate the active and inactive depositaries, and the county treasurer must deposit the money in the banks designated by the commissioners, but in placing these funds he may prefer one or the other of such depositaries as he sees fit. It is a matter entirely within his descretion, and one concerning which the county commissioners have no authority to speak.

See State vs. Whipple, 60 Neb., p. 650, holding:

"When a county board has acted upon propositions of different banks applying to be made depositaries of county funds, and approved or rejected the bonds for that purpose, its powers and authority in the premises ceases, and it is without power or authority to control the action of the county treasurer, and direct in which of the depositaries, or in what amount, the depositing of county funds shall be had; and when an attempt is made to designate one bank as a preferred depositary, such action is a nullity and without force or effect."

Having concluded, then that the action of the commissioners in readvertising for bids on the $800,000 of active funds was legal, and that the order in which the treasurer shall place the funds in the different depositaries designated by the commissioners is discretionary with himself, I must refrain from indulging in any further discussion of the matter. The treasurer is familiar with his duty to the taxpayers of the county and with all the facts in this case, and will undoubtedly act in such manner as will best serve the interests of all concerned.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

719.

CHARITABLE INSTITUTIONS—CHARGE FOR SERVICES RENDERED—EMPLOYMENT AGENCY—FORMER OPINION REVERSED.

Under sections 886 and 893, G. C., a charitable organization operating in a small way an employment agency, is not required to have a license even though they do make a charge for services rendered.

COLUMBUS, OHIO, January 26, 1914.

To the Industrial Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a communication from Honorable Philip Roettinger, of Cincinnati, Ohio, wherein he says:

"We are counsel for a charitable organization in this city which has heretofore been engaged in operating, in a small way, an employment agency, charging the employer, but not the employe, for the services mentioned.

"Now the commissioner of labor has notified them that they must have a license, and in looking at section 886 and section 893, it seems to

me that a charitable organization is not required to have a license, even though they do make a charge for the servces rendered. I take the liberty to ask you for your construction of the two sections noted, and shall, as usual, thank you both in advance and afterwards, for any information given."

This department gave an opinion to Hon. Fred Lange, on March 15th, 1912, wherein we held that charitable organizations maintaining an employment department and charging a fee either by way of registration fee or by way of a commission upon the salary of the party assisted is a private employment agency within the meaning of the statute and is obligated to secure a license.

This department, upon receipt of Mr. Roettinger's letter, took the matter up for more definite and further consideration than when the subject was before us formerly. Upon reconsideration all of counsel and myself concurred in the proposition that we were in error in the former opinion.

Section 893 is as follows:

"Except an employment agency of a charitable organization, a person, firm or corporation furnishing or agreeing to furnish employment or help, or displaying a sign or bulletin, or offering to furnish employment or help through the medium of a circular, card or pamphlet, shall be deemed a private employment agency, and subject to the laws governing such agencies."

From the plain language of this section a charitable organization which runs an employment agency as an adjunct to or part of the purpose for which it is organized does not become subject to the provisions of the law in regard to private employment agencies.

Sometimes it is most easy to fall into error in things that are really the plainest and such seems to have been my experience in reference to this question. I concur in the views expressed by Mr. Roettinger that under section 886 and section 893, a charitable organization is not required to have a license even though they do make a charge for services rendered. The conclusion in my former opinion is hereby reversed, and I request that you advise the proper head of the department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

720.

ABSTRACT OF TITLE.

Abstract of title from Helen W. Wooster to state of Ohio.

COLUMBUS, OHIO, January 26, 1914.

HON. J. D. MCDONEL, *Member Board of Trustees, Bowling Green Normal School, Fostoria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title and deed from Helen W. Wooster to the state of Ohio, for the following described real estate, which your board desires to acquire for use in connection with the Bowling Green Normal School, to wit:

> "That part of out lot number ninety-seven (97) in the city of Bowling Green, Wood county, Ohio bounded and described as follows, viz.:
>
> "Beginning one hundred and twenty (120) feet east of the intersection of the west line of said out lot No. 97 with the north curb stone of the Wooster street improvement (which point is the intersection of the east line of that part of said lot heretofore deeded by Helen W. Wooster to Benjamin L. Loomis, with the north curb of the Wooster street improvement); thence north along the east line of that part of said out lot No. 97 owned by said Benjamin L. Loomis, a distance of about two hundred and seventeen and one-half (217½) feet to the point where said east line intersects the south line of that part of said out lot No. 97 heretofore deeded by Helen W. Wooster to the city of Bowling Green, Wood county, Ohio, and now owned by the state of Ohio; thence east along the south line of that part of said out lot No. 97 now owned by the state of Ohio to a point where said line intersects the west line of that part of said out lot No. 97, heretofore deeded by Helen W. Wooster to John W. Zeller; thence south on the west line of that part of said out lot No. 97, owned by said John W. Zeller to the north curb stone of the Wooster street improvement; thence west on said north curb stone of the Wooster street improvement to the place of beginning."

I have carefully examined the abstract, and am of the opinion that the present owner has a good and indefeasible estate in and to the above premises, in fee simple. There are no liens or encumbrances of any kind against the same disclosed by the abstract.

The deed is in legal form, is signed, acknowledged and witnessed in accordance with statute, and is sufficient to convey to the state of Ohio a fee simple title.

I, therefore, advise that you accept the same.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

720-A.

JUVENILE CODE—EMPLOYMENT OF MINORS—SCHOOLING CERTIFICATES—TELEPHONE OPERATOR.

In the employment of minors where a boy over fifteen years old, or a girl over sixteen years old attends school, then after school has some employment, the child should not be interfered with in performing such work after school hours, nor should the employer under such circumstances be prosecuted. Under these circumstances such children need no schooling certificates before performing their work.

COLUMBUS, OHIO, October 19, 1913.

HON. WALLACE D. YAPLE, *Chairman the Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge communication addressed to you by Mr. Kearns and by you referred to me, in which he asks:

> "1. Whether under section 12993, minors are permitted to be employed in telephone or telegraph offices; and
>
> 2. Whether girls between 16 and 18 years of age, who are regularly attending high school, may be employed as telephone operators after school hours, with or without schooling certificates.

Section 12993 reads thus:

> "No male child under fifteen years nor female child under sixteen years of age shall be employed, permittted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mercantile or mechanical establishments, (5) tenement-house, manufactory or workshop, (6) store, (7) office, (8) office building, (9) restaurant, (10) boarding-house, (11) bakery, (12) barber shop, (13) hotel, (14) apartment house, (15) bootblack stand or establishment, (16) public stable, (17) garage, (18) laundry, (19) place of amusement, (20) club, (21) or as driver, (22) or in any brick or lumber yard, (23) or in the construction or repair of buildings, (24) or in the distribution, transmission or sale of merchandise, (25) nor any boy under fifteen or female under twenty-one years in the transmission of messages.
>
> "It shall be unlawful for any person, firm or corporation to employ, permit or suffer to work any child under fifteen years of age in any business whatever during any of the hours when the public schools of the district in which the child resides are in session."

It must be remembered that this section appears in a revision of the laws relating to the employment of minors and female persons, and consequently resort may be had to the prior state of the law in construing the statute just quoted.

Section 12993, as originally enacted, read in part as follows:

> "Whoever, having charge of management of a factory, workshop, *business office, telephone or telegraph office* * * * employe or permits a child under the age of fourteen years to work in or in connection with such establishment, or in the distribution or transmission of merchandise or messages, shall be fined not less than twenty-five dollars nor more than fifty dollars."

A comparison of these two sections will show that the adjective "business" and the phrase "telephone or telegraph" are omitted as modifications of the word office in the act last pased. From this, one may reasonably infer that the legislature contemplated that the word "office" standing by itself, would include all words of offices, and, having in mind the previous state of the law, it no doubt intended this word to cover a telephone or telegraph office. While "office" in its strict and technical sense might not perhaps include a telephone exchange, yet the law makers evidently had in mind that would, or they would not in the original statute have used the expression "telephone office" as the words "business office" would have included what is done in the business department of telephone exchanges as distinguished from the work done in the exchange proper, and hence the expression "telephone office" would be surplusage, unless it was to include the work done in the exchange, which had not been comprehended within the term "business office." Furthermore, Webster defines an office as "a place where a particular kind of business or service for others is transacted." Can it be said that a telephone exchange is not a place where a particular kind of service is rendered for others or transacted? I think not.

I am aware that resort cannot be had to a prior law in construing a revision of it, when there has been a manifest intent on the part of the legislature to change the statute by altering its language, but I do not think that this rule here obtains, as I do not believe that the legislature intended to make any change in the meaning of the word "office," but, realizing that the word "office" might appropriately apply to a telephone exchange, as it had been made to apply by a former legislature, it felt that the word "office" standing by itself, was a broader term and would without the insertion of any adjective, cover all kinds of offices including business and telegraph offices and telephone exchanges, the word "office" having been treated by the former legislature as an appropriate description of a telephone exchange.

A proper rule of statutory construction to adopt in this case is, that where words, which do not materially affect the sense, have been omitted from revising statutes on the theory that the same general idea will be expressed in briefer phases, no design of altering the law, in this regard, can be rightly based upon such modifications of the language. There must be a clear intent on the part of the legislature to change the construction of a statute, when revising it, or the court would not be warranted in holding that such change has been made. See Black on interpretation of laws, section 137; Conger vs. Barker, 11, O. S., 1.

In Posey vs. Pressley, 60 Ala., 243, it is said:

> "The manifest purpose to express in general words the substance of former statutes, must be borne in mind; and from the omission of special words found in former statutes, embraced by the general words, an intention to change the former statute will not be implied."

With these principles in mind, I am of the opinion that no male child under 15 years or female child under 16 years of age shall be employed or permitted to work in, about or in connection with a telephone exchange or telegraph office, and that it is unlawful for any child under 15 to be employed in any business during school hours.

Very cogent reasons may also be advanced for holding that a telephone exchange is a mechanical establishment.

Second.

Section 12994, 103, O. L., 907, reads thus:

"No boy under sixteen years of age and no girl under eighteen years of age shall be employed or permitted to work on or in connection with the establishments mentioned in section 12993 of the General Code, or in the distribution or transmission of merchandise or messages unless such employer first procures from the proper authority the age and schooling certificate provided by law."

This statute clearly and explicitly states that no boy under 16 years of age and no girl under 18 years of age shall be employed to work in connection with the establishments mentioned in section 12993, without a schooling certificate, and, as I have just held that a telephone exchange is an establishment mentioned in section 12993, it necessarily follows that ordinarily no boy under 16 or girl under 18 may be employed therein without an age and schooling certificate provided by law. It must not be forgotten, however, that it is not the purpose of this statute to prevent a child from working, but it is the aim and purpose of the law to require the child to attend school until he or she possesses the statutory educaional requirements. As your question states that the children are in the high school, they must necessarily have the educational requirements, and besides they only desire to work after school hours. Taking these facts into consideration, it would seem to me that the object of the law should be borne in mind and if its object has been accomplished, you should adopt a liberal rule in applying its strict letter. In other words, in case of a male child, if the applicant is over 15 years of age and when a female child, if the applicant is over 16 years of age, and attends school, then he or she should not be interfered with in his or her work after school hours, nor should the employer under such circumstances be prosecuted.

It might be urged that under this rule a child might work longer hours than proper because what he does in school might be regarded as work. The objection to this theory is that the legislature, in the statutes we are just discussing, has not made any effort to remedy this evil, as the child would be eligible for a schooling certificate, and, after obtaining it, he could then go to work after school hours, so that this objection would obtain, if compliance with the strict letter of the statute were demanded. It would be an absurdity to say that after a child had complied with the law in regard to attending school, he must have a school certificate to work after those hours.

In conclusion, I want to add that I am fully aware, in answering the first question, of the rule that a penal statute must be strictly construed and must not be extended to persons not within its descriptive term; but I have treated this situation as one of those wherein we should rely upon the modification of that rule which is to the effect that penal provisions are to be fairly construed according to the express legislative intent and mere nicety is not to be resorted to, to exonerate those within the terms of the law, or to defeat the purpose of the statute.

While you have not asked the question, I beg to call your attention to section 12996 regulating the hours of employment of minors. Those referred to in your communication cannot legally be employed for a longer period, or before or after the hours therein specified.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

721.

COMPULSORY ATTENDANCE AT SCHOOL—POWERS OF TRUANT OFFICER—AGES BETWEEN WHICH CHILDREN MUST ATTEND SCHOOL.

It is the duty of all truant officers to use legal procedure if that is necessary to force and compel school attendance on the part of all boys and girls who come within the provisions of sections 7770 and 7771, G. C., as amended in 103, O. L., 903, regardless of the grade of school that they should attend or would attend if they properly attended school.

COLUMBUS, OHIO, January 6, 1914.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Under date of November 24, 1913, you submitted to this department the following request for an opinion:

> "Does not the law of this state make it the duty of the truant officer to compel, through processes of law if necessary, the attendance at school on the part of all boys under 15 years of age and girls under 16 years of age who have passed through the eighth grade of the public schools unless said boys or girls excused by the superintendent of schools on account of physical or mental disability or unless in the opinion of the superintendent that the child is being instructed at home by person qualified? In other words, does or does not the truancy law apply to students who are eligible to go to high school as well as it applies to students who are below the high school?"

Section 7762 of the General Code, requires that children shall receive instruction in the branches of reading, spelling, writing, English grammar, geography and arithmetic, as follows:

> "All parents, guardians and other persons who have care of children, shall instruct them, or cause them to be instructed in reading, spelling, writing, English grammar, geography and arithmetic."

Section 7763 of the General Code, as amended, 103, O. L., at page 898, requires that every parent, guardian or other person having charge of any child between the ages of 8 and 15 years, if a male, and between the ages of 8 and 16 years, if a female, must send such children to a public, private or parochial school during the full time that such schools are in session, unless excused from such attendance, as follows:

> "Every **parent, guardian or** other person having charge of any child between the ages of eight and fifteen years of age if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having a superin-

tendent or by the principal of the private or parochial school, upon satisfactory showing, either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section."

Section 7764, General Code, as amended in 103 O. L., at page 899, provides for an appeal to the juvenile court in case such superintendent, principal, or clerk refuses to excuse a child from school attendance, as follows:

"In case such superintendent, principal or clerk refuses to excuse a child from attendance at school, an appeal may be taken from such decision to the judge of the juvenile court of the county, upon the giving of a bond within ten days thereafter, to the approval of such judge, to pay the costs of the appeal. His decision in the matter shall be final. All children between the ages of fifteen and sixteen years, not engaged in some regular employment, shall attend school for the full term the schools of the district in which they reside are in session during the school year, unless excused for the reasons above named."

Section 7767 of the General Code, as amended in 103 O. L., at page 902, contains the following provision:

"All minors over the age of fifteen and under the age of sixteen years, who have not passed a satisfactory sixth grade test in the studies enumerated in section seventy-seven hundred and sixty-two, shall attend school as provided in section seventy-seven hundred and sixty-three, and all the provisions thereof shall apply to such minors."

By said provision it is apparent that unless boys are excused by the superintendent of the public schools in city or other districts having such superintendent or by the clerk of the board of education in village, special or township districts not having a superintendent, or by the principal of a private or parochial school, upon satisfactory showing, either that the bodily or mental condition of such boys does not permit of their attendance at school, or, that they are being instructed at home by a person qualified in the opinion of such superintendent or clerk, as the case may be, to teach the branches mentioned in section 7762, supra, then such boys must attend school until they are 16 years of age, as said provision of said section 7767, supra, specifically provides that all minors over the age of 15 and under the age of 16 years, who have not passed a satisfactory 6th grade test in the studies enumerated in section 7762, shall attend school as provided in section 7763, supra, and all the provisions thereof *shall apply to such minors.*

By virtue of said specific provision, it seems to follow that the age limitation fixed by said section 7763, supra, is extended from 15 to 16 years as regards boys, unless they have passed a satisfactory 6th grade test or have been excused from attending school, in accordance with the provision contained in the latter part of section 7763 of the General Code, supra. Furthermore, it is also apparent that the said provision of said section 7767 of the General Code, supra, in no wise affects the age limitation of girls, for the reason that under the specific provision contained in section 7763 of the General Code, supra, girls are required to attend school between the ages of 8 and 16, unless they are excused from such attendance by the said provision contained in the latter part of said section 7763, supra. Said section 7767 of the General Code, as amended in 103 O. L., at page 902, fur-

ther provides that the board of education of any school district may establish part time day schools for the instruction of youth who are over the age of 15 years, and who are engaged in regular employment, and closes with the specific provision that if such youth are not employed, and are between the ages of 15 and 16 years of age, then they are required to attend school the full time that the schools are in session, as follows:

> "In case the board of education of any school district establishes part time day schools for the instruction of youth over fifteen years of age who are engaged in regular employment, such board of education is authorized to require all youth who have not satisfactorily completed the eighth grade of the elementary schools, to continue their schooling until they are sixteen years of age; provided, however, that such youth if they have been granted age and schooling certificates and are regularly employed, shall be required to attend school not to exceed eight hours a week, between the hours of 8 a. m. and 5 p. m. during the school term. All youth between fifteen and sixteen years of age, *who are not employed,* shall be required to attend school the full time."

Section 7768 of the General Code, as amended in 103 O. L., at page 902, provides that every child between the ages of 8 and 15 years, if a male, and every male child between the ages of 15 and 16 years not engaged in some regular employment, and every child between the ages of 8 and 16 years, if a female, who is an habitual truant from school, or who absents itself habitually from school, etc., shall be deemed a delinquent child and subject to the jurisdiction of the juvenile court, as follows:

> "*Every child between the ages of eight and fifteen years, if a male, or between the ages of eight and sixteen years, if a female, and every male child between the ages of fifteen and sixteen years not engaged in some regular employment,* who is an habitual truant from school, or who absents itself habitually from school, or who, while in attendance at any public, private or parochial school, is incorrigible, vicious or immoral in conduct, or who habitually wanders about the streets and public places during school hours having no business or lawful occupation, or violates any of the provisions of this act, shall be deemed a delinquent child, and shall be subject to the provisions of law relating to delinquent children."

From the foregoing, it is apparent that the age limitation of 15 years for boys, as provided in section 7763 of the General Code, supra, is raised from 15 to 16 years not only by the first paragraph of section 7767 of the General Code, as hereinbefore mentioned, but such age limitation is also raised from 15 to 16 years by virtue of the last sentence contained in said section 7767 of the General Code, supra, which says:

> "All youth between fifteen and sixteen years of age, who are not employed, shall be required to attend school for the full time."

This same intent is manifest on the part of the legislature, by virtue of the language employed in section 7768 of the General Code, supra, as follows:

> "Every youth between the ages of eight and fifteen years, if a male, or between the ages of eight and sixteen years, if a female, and every male child between the ages of fifteen and sixteen years not engaged in some regular employment,"

who absents themselves habitually from school shall be deemed delinquent children, although it appears by the foregoing provisions that if such male children between 15 and 16 years of age, are engaged in some regular employment then they need not or are not required to attend school.

By reason of the foregoing, it follows, that boys are required to attend school between the ages of 8 and 16 years, unless excused therefrom, as provided by section 7763 of the General Code, supra, or unless they are released from attending the regular school sessions between 15 and 16 years of age by virtue of having been granted age and schooling certificates and by virtue of being engaged in some regular employment, in which case such youth are only required to attend school part of the time, as provided by section 7767, supra, and are not to be regarded in such case as delinquent youth, as provided by section 7768 of the General Code, supra; and likewise, girls are specifically required to attend school between the ages of 8 and 16 years, unless they are excused therefrom by virtue of the provisions contained in section 7763 of the General Code, supra. Such attendance, I take it, on the part of such boys and girls, is required both on the part of those minors who are eligible to or who attend a high school, as well as on the part of those who are in or should attend the elementary grades below the high school grade; in short, attendance is required regardless of the particular grade they are in or that they should attend.

Section 7770 of the General Code, as amended in 103 O. L., at page 903, specifies the powers of the truant officer, and contains a specific provision that he may take into custody any youth between the ages of 8 and 15 years or between 15 and 16 years of age when not regularly employed or not attending school, and shall conduct such youth to the school he has been attending or should attend, as follows:

> "The truant officer and assistants shall be vested with police powers, and the authority to serve warrants, and have authority to enter workshops, factories, stores and all other places where children are employed, and do whatever may be necessary, in the way of investigation or otherwise, to enforce this act. He also may take into custody any youth between eight and fifteen years of age, or between fifteen and sixteen years of age when not regularly employed who is not attending school, and shall conduct such youth to the school he has been attending, or which he rightfully should attend."

Section 7771 of the General Code, specifies the duties of truant officers, as follows:

> "The truant officer shall institute proceedings against any officer, parent, guardian, person, partnership, or corporation violating any provisions of this chapter, and otherwise discharge the duties described therein, and perform such other services as the superintendent of schools or the board of education may deem necessary to preserve the morals and secure the good conduct of school children, and to enforce the provisions of this chapter. The truant officer shall keep on file the name, address and record of all children between the ages of fifteen and sixteen to whom age and schooling certificates have been granted who desire employment, and manufacturers, employers or other persons requiring help of legal age shall have access to such files. The truant officer shall co-operate with the department of workshops and factories in enforcing the conditions and requirements of the child labor laws of Ohio, furnishing upon request such

data as he has collected in his reports of children from eight to sixteen years of age and also concerning employers, to the department of workshops and factories and to the state commissioner of schools. He must keep a record of his transactions for the inspection and information of the superintendent of schools and the board of education; and make daily reports to the superintendent during the school term in districts having them, and to the clerk of the board of education in districts not having superintendents as often as required by him. Suitable blanks for the use of the truant officer shall be provided by the clerk of the board of education."

By virtue of sections 7770 and 7771 of the General Code, supra, as amended in 103 O. L., page 903, it is my opinion that it is the duty of all truant officers through legal procedure, if that is necessary, to enforce and compel school attendance on the part of all boys and girls, who come within the foregoing provisions and who are within the aforesaid mentioned age limitations, regardless of the grade of the school that they should attend or would attend if they properly attended school.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

722.

CEMETERY TRUSTEE—MEMBER OF THE VILLAGE COUNCIL—ABOLITION OF OFFICE OF MEMBER OF CEMETERY TRUSTEES.

Where a councilman-elect of a village was elected a member of the board of cemetery trustees ten years ago and never gave up his office, and was elected as a member of the village council, he is not precluded from serving as councilman of the village and has not forfeited his office by reason of acting as such cemetery trustee.

COLUMBUS, OHIO, January 19, 1914.

HON. M. W. BRADSHAW, *Legal Counsel for the Village of New Straitsville, Shawnee Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 6th, wherein you state:

"As solicitor of the village of New Straistville, Ohio, I am writing you for an opinion as to the right of one of the newly elected members to serve as councilman.

"The facts as to this newly elected councilman are as follows:

"About ten years ago this councilman-elect was elected a member of the board of cemetery trustees and has ever since and still is serving as a member of the cemetery board. He has never been re-elected or appointed since his election about ten years ago, but has actually held this position and yet is serving as a member of the board of cemetery trustees.

"The cemetery of which he is a member is a joint township and corporation cemetery.

"What the council wishes to know is, whether or not, his being a member of the board of cemetery trustees precludes him from serving as

a member of the village council of New Straitsville, Ohio, or in other words, do the above facts as stated constitute holding another office in violation of section 4218, General Code?"

The qualifications for membership in a village council are set forth in section 4218, General Code, as follows:

> "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

It is first necessary to determine whether the position of trustee of a joint municipal and township cemetery was at the time of the election of the councilman in question and of his induction into office, a public office or employment, the holding of which by a member of council would be prohibited by section 4218.

The management and control of joint cemeteries were, by sections 4184, 4185 and 4189, General Code, placed in the hands of a board of three trustees elected for a term of two years by the electors residing within the limits of the territory comprising the joint cemetery district.

The legislature, however, at its session of 1913, (103 O. L., 272) passed an act repealing sections 4184 and 4185, and amending section 4189, so as to provide:

> "The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

The effect of this act was to abolish boards of trustees of joint cemeteries and to transfer the powers theretofore exercised by such boards to the trustees of the township and council of the municipal corporation having the joint ownership of a cemetery.

This act was passed April 18th, duly approved by the governor, May 2nd, filed in the office of the secretary of state, May 3rd, and became effective ninety days after the last mentioned date.

The man in question, at the time of his election to the village council and his induction into that office, was not holding a public office or employment within the meaning of section 4218.

I am, therefore, of the opinion that he is not precluded from serving as councilman of the village, and has not forfeited his office as such by reason of having been acting as such cemetery trustee.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

723.

RAILROAD POLICEMEN—DUTIES—MAY COLLECT REWARD OFFERED BY COUNTY COMMISSIONERS.

Railroad policemen may be legally paid a reward offered by the county commissioners for the capture and conviction of a person accused of a felony where the capture and conviction of such person is the result of their efforts, and the crime with which the person is charged does not concern the railroad company with which he is employed, or was not committed on its premises.

COLUMBUS, OHIO, December 20, 1913.

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

GENTLEMEN:—I have your letter of December 1, 1913, asking:

> "May railroad policemen legally be paid a reward offered by the county commissioners for the capture and conviction of a person accused of a felony where the capture and conviction of such person is the result of their efforts?"

On December 4, 1913, I asked your department for more information in regard to this case and was referred to the Hon. W. C. Brown, prosecuting attorney of Jefferson county. I communicated with Mr. Brown, and he has advised me in part as follows:

> "Permit me to say the policemen in question were Mr. Albert Hinchcliffe and F. M. Butcher, Mr. Hinchcliffe residing in Steubenville, Ohio, and receiving his appointment under favor of the Ohio laws, and Mr. Butcher residing in the city of Pittsburgh and receiving his appointment under Pennsylvania laws; both officers being policemen paid by the Pennsylvania Company.
>
> "The case in question was of Guiseppe Ficco who was convicted of cutting to wound in Jefferson county, Ohio. The young man who was cut was Harold Cavos, an American, of exemplary habits; the accused, Guiseppe Ficco, being an Italian. The crime was committed on Washington street, in the city of Steubenville, Ohio; the arrest was made in the city of New York whither the accused had fled, and where he remained a fugitive for some two or three months. The matter seemed of grave concern, Cavos hovering between life and death for several weeks. Several times Dr. T. W. Walker told me he was in a serious condition, and one or two times I was planning upon taking his dying declaration. The commissioners offered the reward upon my recommendation. Both Hinchcliffe and Butcher went to New York where the arrest was made. For about two months they were working on the case. It was I that suggested to them to busy themselves in the capture. The crime not occurring upon railroad property their duties as policemen for the railroad did not require them, as I take it, to make any special exertions in the apprehension of this criminal other than that of a good citizen. The apprehension of the accused was solely through the efforts of these policemen. They told me, and I believe what they say, that they got leave of absence from the company to take this trip to New York. They also say that the time they were off is charged against them."

Section 2489 of the General Code, reads:

"When they deem it expedient, the county commissioners may offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of felony, and on the conviction of such person, pay it from the county treasury, together with all necessary expenses, not otherwise provided for by law, incurred in making such detection or apprehension. When they deem it expedient, on the collection of a recognizance given and forfeited by such person, the commissioners may pay the reward so offered, or any part thereof, together with all other necessary expenses so incurred and not otherwise provided for by law."

From this it is very clear that the county commissioners of Jefferson county had authority to offer a reward for the detection or apprehension of the said Guiseppe Ficco, and the only question for us to determine is whether or not the railroad policemen named may accept the same.

Sections 9150 and 9151 of the General Code, are as follows:

"Section 9150. Upon the application of a company, owning or using a railroad, street railroad, suburban or interurban railroad in this state, the governor may appoint and commission such persons as the company designates or as many thereof as he may deem proper, to act as policemen for and on the premises of such railroad or elsewhere, when directly in the discharge of their duties for such railroad. Policemen so appointed shall be citizens of this state and men of good character. They shall hold office for three years, unless for good cause shown, their commission is revoked by the governor, or by the railroad company, as provided by law. Not more than one such policeman shall be appointed for each five miles of a street, suburban or interurban railroad.

"Section 9151. Before entering upon the duties of his office, each policeman so appointed shall take and subscribe an oath of office, which shall be endorsed on his commission. A certified copy of such commission, with the oath, shall be recorded in the office of the clerk of the common pleas court in each county through or into which the railroad runs for which such policeman is appointed, and intended to act. Policemen so appointed and commissioned severally shall possess and exercise the powers, and be subject to the liabilities of policemen of cities in the several counties in which they are authorized to act while discharging the duties for which they are appointed."

Inasmuch as section 9150 provides that railroad policemen are authorized "to act for and on the premises of such railroad or elsewhere, when directly in discharge of their duties for such railroad," and section 9151 makes provision that "policemen so appointed and commissioned severally shall possess and exercise the powers, and be subject to the liabilities of policemen of cities in the several counties in which they are authorized to act, *while discharging the duties for which they are appointed,*" it is my opinion that a railroad policeman appointed in this state is only a police officer while discharging his duty to the railroad company, and that when he arrests or assists in the arrest of a person charged with a crime which does not concern the railroad company, or was not committed on their premises, he is acting in the capacity of a private citizen and is entitled to receive any such reward offered for such service.

The statute of Pennsylvania governing the appointment of police officers is similar to our own statute, and it has been held in that state:

> "a railroad policeman is entitled to a reward offered (or his proportionate share of same, if others assisted) for the detection and conviction of a criminal, if he did more than merely to make the arrest under a warrant * * * within the scope of his official duties."
> Pyle vs. Sweigart, 18 Lauc. L. Review, p. 81, 1899.

For these reasons it is my conclusion that the railroad policemen referred to in your request are entitled to the reward offered by the commissioners of Jefferson county, Ohio.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

724.

STATE HIGHWAY LAW—CONSTITUTIONALITY OF THE STATE HIGHWAY LAW—CASE OF LINK VS. KARB.

The question as to the constitutionality of the state highway department law was before the supreme court in the case of Link vs. Karb. The decision of the court in that case constitutes the constitutionality of the law res adjudicata.

COLUMBUS, OHIO, January 2, 1914.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have had under consideration for some time your letter of October 31, 1913, enclosing a letter from Hon. Charles F. Ribble, prosecuting attorney of Muskingum County, together with copy of opinion from Messrs Storey, Thorndike, Plamer and Dodge, of Boston, Mass. Your letter requested my views on the conclusions expressed by these gentlemen respecting the constitutionality of the state highway department law and certain proceedings thereunder.

One of the propositions advanced by the gentlemen named is that, by reason of article XII, section 11, of the present constitution of this state, the state highway law, which, in providing for the issuance of bonds, contains no machinery for the annual levy and collection of an amount sufficient to pay interest on the bonds and to set aside a sufficient amount for sinking fund purposes to retire them at maturity, is therefore unconstitutional in this respect.

I had hoped by this time to be able to advise you with some authority on this point. There is at present a case pending in the supreme court of this state, entitled Link vs. Karb, which arose in this county and which was admittedly instituted for the purpose of testing this question. The case has been advanced for early hearing by the supreme court, but has not yet been submitted.

So long as this case is pending it would be, of course, quite improper for me to attempt to express an opinion upon the question which is involved therein. I must, therefore, decline to do so at the present time.

Having received assurance from a member of your department that my opinion upon the remaining question was desired and would be acceptable without the expression of any view respecting the question just mentioned, I address myself accordingly to such remaining question, which may be stated as follows:

"Does the fact that the law provides for the improvement of roads outside the limits of a municipality exclusively, and yet authorizes the levy of a tax upon an entire county, including municipalities therein, render the law fundamentally unconstitutional, as violative of section 2, article I of our constitution, which provides that 'all political power is inherent in the people. Government is instituted for their equal protection and benefit * * *.'"

It is true that an intimation of this kind is found in the opinion in Hixon vs. Burson, 54 O. S. 470-485; but, as Judge Burket, who delivered the opinion, remarks, "this point was not presented by counsel in their briefs (and) it is left undecided."

On the other hand, in Lima vs. McBride, 34 O. S. 338, is found an equally direct intimation to a contrary effect. The language of Judge Okey's opinion on this point is:

"The people of the whole county are supposed to have an interest in the public highways. The particular condition of things which called for the imposition of the tax is unknown to us, but we are bound to assume it justified a levy on all the taxable property of the county; and we are not warranted in saying that it would be a violation of the constitution to tax the citizens of Lima, in common with the people throughout the county, for the repair of roads on which the prosperity of the corporation may largely depend; * * *. (Citing Burroughs on Taxation, 61; Cooley on Taxation, 104.)"

The question raised by the gentleman whose opinion is submitted to me by you has not been directly passed upon by the supreme court of this state. Lima vs. McBride, it must be admitted, is no greater authority in one direction than Hixson vs. Burson is in the other. At least, however, we are at liberty, under these circumstances, to form an opinion as to what the Ohio supreme court would hold in a proper case, by choosing that view of the question which seems to be founded upon the better reasoning and authority. The reasoning of Judge Okey is much more satisfactory to me than the mere conclusion of Judge Burket; and the authorities cited by Judge Okey certainly support the principle upon which they are cited. Therefore, I would be of the opinion that the supreme court of this state would, in a proper case, sustain the highway department law as against any such objection.

But there is another aspect of the case which is entitled to some consideration at least. You are, of course, aware of the recent and as yet unreported decision in the case of State ex rel. Donahey vs. Edmundson, wherein the supreme court sustained the constitutionality of what is familiarly known as the Hite half-mile road levy law of 1913. The principal attack upon this law, as set forth in the pleadings, was that, because a part of the revenue to be raised by means of the levy provided for therein was to go into the state highway fund and be administered as provided in the state highway law, the validity of the Hite law depended upon the validity of the state highway law; and that, for a variety of alleged reasons, the state highway law was unconstitutional so that the Hite law itself was unconstitutional.

While the exact ground of objection to the state highway law, asserted by the gentleman whose opinion has been submitted to me, was not raised in that case, some of the other points which were raised therein were essentially of the same nature. The court held the Hite law constitutional, and in so doing, necessarily held the state highway department law to be constitutional; for it was admitted

that the constitutionality of the Hite law did depend upon the constitutionality of the state highway department law.

The nature of the objection to the state highway department law now under consideration is fundamental; so that the law could not be held invalid in the particular now complained of without destroying its validity in toto.

It occurs to me, therefore, that the question as to the constitutionality of the state highway department law was before the supreme court in the case cited; and that the decision of the supreme court in that case constitutes the constitutionality of that law *res adjudicata*. I do not believe, at this time, that the supreme court of this state would seriously consider, in the face of the decision just mentioned, any claim to the effect that the state highway department law is unconstitutional throughout the field of its operation.

It is only proper, however, for me to point out that the decision in the case last cited did not have the effect of sustaining every single provision of the state highway department law against objections which might invalidate them as separate provisions without destroying the validity of the entire act. So that the point raised against the constitutionality of the bond issue provisions of the act, under section 11 of article XII of the constitution, could still be urged, notwithstanding the decision in State ex rel. vs. Edmundson.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

725.

TAXES AND TAXATION—CONSTRUCTION OF A BRIDGE TO REPLACE A BRIDGE THAT HAS BEEN CONDEMNED—COUNTY COMMISSIONERS—BOND ISSUE.

Where a bridge over the Miami river in Butler county was destroyed by the flood and a temporary bridge constructed and the temporary bridge becomes dangerous to public travel, this bridge may be condemned for public travel by the commissioners and a new bridge built in its place and the same be paid for according to the provisions of sections 5643 *and* 5644, *General Code.*

COLUMBUS, OHIO, January 29, 1914.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Butler County, Hamilton, Ohio.*

DEAR SIR:—You advised me verbally that a bridge over the Miami river in Butler county was destroyed by the flood, that a temporary bridge was constructed, that the bridge was an important one, that the bridge is maintained by the county, and that it has become dangerous to public travel. You wish to know if this bridge should be condemned for public travel by the commissioners and the building of a new bridge is by them deemed necessary for accommodation to the public, whether the commissioners may without first submitting the question to the voters of the county levy a tax for the purpose in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county.

Section 5643 of the General Code provides:

"If an important bridge, belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is con-

demned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county."

Section 5644 of the General Code provides as follows:

"If the county commissioners deem it necessary or advisable, they may anticipate the collection of such special tax by borrowing a sum not exceeding the amount so levied, at a rate of interest not exceeding six per cent. per annum, payable semi-annually and may issue notes or bonds therefor, payable when said tax is collected, or the commissioners, without such submission of the question, may proceed under the authority conferred by law to borrow such sums of money as is necessary for either of the purposes before mentioned, and issue bonds therefor. For the payment of the principal and interest on such bonds, they shall annually levy a tax as provided by law."

It is the opinion of this department that under the facts stated you have a right to proceed under said sections for the purpose of building a new bridge in place of the one condemned. Aside from the fact that you are condemning a bridge constructed for temporary purposes, it is the opinion of this department that the meaning of section 5643 of the General Code is broad enough to confer the authority for building a bridge upon the commissioners when a bridge is washed away by a flood or destroyed in any manner.

To say that a bridge that becomes dangerous to public travel either by decay or through other reasons may be rebuilt and one may not be rebuilt that has been completely destroyed is to give substance to shadow.

If by a flood the bridge is made dangerous, unquestionably you could proceed under section 5643; and if it be destroyed by a flood you certainly have a right to do the same thing as if it were made dangerous by a flood. In a modified sense the bridge is still there; that is, the approaches are there, the road is still there, mayhap, the abutments are there. Without going into detail, as both you and I are in a hurry, it is my conclusion that under the facts presented by you, you have a right to proceed under said sections, and I would therefore advise that you have the commissioners pass the necessary condemnation resolutions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

725-A.

TAXES AND TAXATION—SNYDER ACT—COUNTY COMMISSIONERS—CONSTRUCTION OF A PERMANENT BRIDGE TO REPLACE A TEMPORARY STRUCTURE—BOND ISSUE.

By reason of the joint effect of section 8 of the Snyder law and sections 5643 and 5644 of the General Code, the county commissioners of Butler county may lawfully condemn a temporary bridge erected after the March flood and construct in its place a permanent bridge across the Miami river in the city of Hamilton. Bonds that are issued for this purpose must be issued under the Snyder law and the taxes levied for the retirement of such bonds must be levied under the provisions of the same act.

COLUMBUS, OHIO, January 23, 1914.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 17th, in which you set forth at length the following statement of facts:

"It appears that the town of Hamilton was laid out under the government of the northwest territory and that as early as the year 1794, a few lots were laid out but that the plat of Hamilton was not recorded until the 28th day of April, 1802, which plat is now on record and shows that the said town of Hamilton was on the east side of the Great Miami river, and what is now High street was at that time designated as High street upon said plat which extended east somewhere near what is now designated as 7th street.

"It appears as if Rossville was laid out in 1804 and that the plat of Rossville, which was on the west side of the Great Miami river opposite the town above known as Hamilton, was recorded on the 14th day of March, 1804, and what is now Main street was at that time designated as Morris street on said plat, extending to what is now "D" street in the city of Hamilton.

"It appears as if the town of Hamilton was incorporated by an act of the legislature passed in January, 1810, which corporation became forfeited and that in the year 1827, the town was again incorporated under the names of 'the towns of Hamilton and Rossville.'

"It appears that on March 7, 1835, the legislature passed a law amending the act of incorporation and by said act the name of the corporation was changed to that of the town of Hamilton.

It appears that in December of the year 1808, a certain road was laid out, starting in the eastern part of said county on the Warren county line and leading across the Great Miami river to the Indiana state line, but at this time the county surveyor cannot say definitely that the said road crosses the said river at the intersection of High and Main street with said river.

"It would appear that in the year 1816, a company was incorporated by the legislature of the state of Ohio to construct a bridge across the Great Miami river at Hamilton, which was completed and opened to traffic in December of 1819, was a toll bridge and the first bridge constructed over the Great Miami river at what is known as the intersection of High and Main streets with the Great Miami river, said bridge taking the place of ferries which were discontinued in the year 1819.

The above mentioned bridge was swept away in the flood of September, 1866, which was rebuilt under an act passed on the 28th day of

January, 1867, 64 O. L., 267-268, giving the county commissioners of Butler county the right to construct a bridge across said river which bridge was replaced by the bridge which was swept away by the flood of March and April, 1913, by the county commissioners under an act passed May 21, 1894, (91 O. L., 813; see also 89 O. L. 526), which act authorized the county commissioners of Butler county to build a bridge across the Great Miami river at the intersection of High and Main streets with said river.

"It woud appear by the case of the State ex rel. vs. Davis, et al., 55 O. S., page 15, that an act of the legislature authorizing the county commissioners of Butler county to build the within mentioned bridge over the Great Miami river at High and Main streets in this city would be unconstitutional, as said case was decided June 23, 1896 after the former similar act had been passed granting the county commissioners the right to build the former bridge at said place, which was swept away by the flood of March and April, 1913."

You call my attention to the emergency act passed by the last general assembly, 103 O. L. 141, and especially to the language of section 1 thereof, wherein it is provided that certain enumerated public authorities shall have the right temporarily to repair or replace public property, or public ways, which such officers are authorized to "repair, reconstruct or construct under any *general* law of this state."

You then assume that the power of public authorities to make *permanent* replacements and reconstructions is similarly limited. That is that no permanent replacement or reconstruction can be made except by the public authorities authorized by general law originally to construct the public improvement in question.

In this assumption, I think you are in error. Section 1 of the so-called "Snyder emergency law" relates exclusively to the making of *temporary* repairs, reconstructions and replacements of property damaged by the 1913 flood. No authority is found in this section to make any *permanent* repairs or replacements, nor can any limitation upon the power to make permanent repairs and replacements be inferred from this section.

The reason for the phraseology of this section will appear from a further consideration of its language. As the section itself has it, the enumerated public authorities are "hereby empowered" to do certain things. The section is enacted, then, upon the theory that it is a great power which possibly would not be possessed by the authorities in question without the enactment of the statute. This is indeed its language, for it authorizes the officers enumerated in it, with the approval of the common pleas court to enter into contracts without any limitation whatever for the making of *temporary* repairs and replacements.

The act will be searched in vain for any similar provision respecting the making of permanent repairs, replacements and reconstructions.

Sections 3 to 7 of the act authorize the issuance of special bonds in the making of special tax levies for the purpose of providing funds necessary to make permanent repairs, reconstructions and replacements, but it does not confer upon any specific or designated board or officer any *power to make* such permanent repairs, replacements and reconstructions.

Section 8 sheds a great deal of light upon the question which I am now discussing. It provides in part as follows:

"Proceedings under the general laws of this state for the permanent repair, reconstruction or replacement of public property and public ways, destroyed or injured in the manner described in section 1 of this act, shall not be subject to "certain provisions of such general laws."

It will be seen that this section, which directly refers to proceedings to make the improvements to which the act applies, does not confer upon any specific officer the power to make any specific improvement but remits all officers to the general law for their authority to proceed in the premises, merely relieving them from certain limitations upon the exercise of those powers.

Therefore, I am constrained to disagree with the assumption which you have apparently made, that because of the language of section 1 of the emergency law, the county commissioners of Butler county who constructed the bridge which was washed away by the 1913 flood under a *special* act of the general assembly, are precluded from undertaking the permanent replacement of that bridge.

The question which you ultimately submit is as to whether or not an amendment of the so-called "Snyder emergency law" is necessary in order to authorize the county commissioners of Butler county to replace permanently the bridge destroyed by the 1913 flood as described by you.

I have already pointed out that the Snyder law itself confers no jurisdiction of the subject-matter of a particular improvement upon any distinct officer, but refers to the general laws of the state for the authority of any such officer to make any specific improvement.

At the out-set it may be stated that if the authority of the county commissioners of Butler county to replace or reconstruct the bridge in quesion was by a special act, then the Snyder law would have to be amended in order to cover the case. I have, however, examined the act in 91 O. L. 813, under which the bridge destroyed in 1913 was constructed, and find therein no authority on the part of the commissioners of Butler county to provide for the reconstruction or replacement of the bridge. Therefore, I conclude that the destroyed bridge was *not* one the replacement or reconstruction of which was covered by a *special* law, and if there is any authority to provide for its reconstruction it must be found in some *general* law of the state.

I believe such authority is to be found in the provisions of sections 5643 and 5644, General Code which provide as follows:

> "Section 5643. If an important bridge belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county.
>
> "Section 5644. If the county commissioners deem it necessary or advisable * * * the commissioners, without such submission of the question, may proceed under the authority conferred by law to borrow such sums of money as is necessary for either of the purposes before mentioned, and issue bonds therefor. * * *"

At first blush it might seem as if section 5643 does not cover the case of a bridge which is entirely destroyed by flood. I would be inclined to look with disfavor upon such an interpretation of the statute, however, because of the ridiculous consequences thereof, and if the necessities of the case should require, would lean strongly toward the view that the county commissioners might act under this section and the succeeding section in order to replace a bridge destroyed by flood. But in the present instance the necessities of the case do not require any interpretation of the statute along the lines just discussed.

You inform me verbally, in addition to the facts stated in your letter that on the assumption that they were authorized to do so, the county commissioners immediately after the 1913 flood acted under section 1 of the Snyder act, and constructed a temporary wooden bridge across the Miami river at the point described by you, paying therefor out of the funds of the county with the exception of a contribution made thereto by a street railroad company in consideration of the privilege of laying its tracks on such temporary structure and operating its cars thereon. This bridge, as I am informed, is now being maintained by the county and is certainly dangerous to public travel, not by reason of decay, although undoubtedly from the very nature of the structure, it is susceptible of decay of the inimical consequences of high water in the river which may be reasonably anticipated at an early date, in the event of which the bridge would certainly be swept from its foundation or rendered impassable.

Now the temporary bridge certainly "belongs to the county" just as its predcessor, the permanent bridge, "belonged to the county," and both bridges have been "maintained by the county." It makes no difference in my judgment that the constitutionality of the special act under which the bridge was originally constructed may be doubted, or that the authority of the commissioners under section 1 of the Snyder act to make the temporary replacement in question might be regarded as doubtful. The original bridge was actually built by the county's money and the temporary bridge was actually constructed by the same means, no question being raised in either case as to the propriety of the proceeding. Both bridges were none the less the "property of the county" by reason of the supposed infirmity in the proceedings by which they were constructed.

Now there is actually at the point described in your letter "an important bridge belonging to the county," to wit, a temporary bridge constructed by the county commissioners. This bridge is "dangerous to public travel" by reason of the character of its construction and the perils to which it will inevitably be subjected. Therefore, in my judgment the county commissioners have ample authority under section 5643 to condemn that bridge and to build a new bridge in place thereof. They also have authority under section 5644 to issue bonds for this purpose under any law authorizing them to issue bonds.

In my judgment the Snyder law is the law which authorizes the issuance of the bonds and the levy of the tax necessary to accomplish the desired result; for the building of the permanent structure, while it constitutes a replacement of the temporary structure now existing within the contemplation of section 5643, also constitutes a "permanent replacement" of the original bridge destroyed in the floods of 1913 within the contemplation of section 8 of the Snyder law.

The Snyder law on its face contemplates that in a case like the one which you present two steps shall be taken by the proper authorities: first, the temporary replacement of the public property for the immediate public convenience, and second, the permanent replacement thereof for the adequate protection of the future public interests. On the face of the law, then, the construction of a permanent structure in place of the temporary one would be clearly and plainly a "proceeding * * * for the permanent * * * reconstruction or replacement of public property * * * destroyed or injured" by the floods of 1913 as referred to in section 8 of that law.

I am, therefore, of the opinion that by reason of the joint effect of section 8 of the Snyder law and sections 5643 and 5644 of the General Code the county commissioners of Butler county may lawfully condemn the existing county structure which is of a temporary nature and construct in place thereof a permanent bridge across the Miami river in the city of Hamilton at the point described by you, and that the bonds which it may be necessary to issue for this purpose must be issued under the Snyder law, and the taxes levied for the retirement of such bonds must

be levied under the provisions of the same act and are relieved from the limitations of the general law as therein referred to.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

726.

POWER OF THE BOARD OF LIBRARY COMMISSIONERS TO APPOINT EMPLOYES IN THE OHIO STATE LIBRARY.

Under the provisions of section 789, G. C., the state board of library commissioners cannot appoint employes of the Ohio state library without the consent of the state librarian.

COLUMBUS, OHIO, January 29, 1914.

HON. J. H. NEWMAN, *Secretary and State Librarian, Columbus, Ohio.*

MY DEAR SIR:—I have your favor of January 26, 1914 (M110), wherein you make the following inquiry:

> "Can the board of library commissioners appoint the employes of the Ohio state library without the consent of the state librarian?"

In answer thereto I beg to advise that section 789 of the General Code of Ohio provides as follows:

> "The state board of library commissioners shall have the management of the state library. It shall appoint and remove the librarian with the consent of the governor, *and with the consent of the librarian shall appoint the assistants* who shall serve during the pleasure of the board. The board shall make such rules for the government of the library and the use of the books and other property therein as it deems necessary."

You will observe that by the express provisions of the statute, to wit: "It (the board) with the consent of the librarian shall appoint the assistants" it appears that the board of library commissioners cannot appoint the employes of the Ohio state library without the consent of the state librarian. Your department should have certificates of appointment which would disclose that the action of the commissioners in making the appointments was expressly consented to by the librarian.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

727.

SALES OF LIQUOR BY A DRUG CLERK—PROPRIETOR OF A DRUG STORE—PENALTY FOR ILLEGAL SALE OF LIQUOR.

Where a drug clerk was convicted for a violation of section 13195, *G. C., the proprietor of the drug store and his clerks may continue the sale of liquor legally. The provisions of section* 13239 *apply to the persons employed in the store and not to the business itself.*

COLUMBUS, OHIO, January 20, 1914.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In your communication of December 29th, you ask for an opinion upon the following question:

> "A drug clerk was convicted for a violation of section 13195, or rather pleaded guilty. The real facts were that he was not the 'keeper of the place' as provided in section 13195, but nevertheless he entered a plea of guilty to such a charge, without legal advice. Besides the real 'keeper of the place' there is still another clerk in this particular drug store. Section 13239 prevents a druggist or pharmacist from selling any liquor for two years.
>
> "Can the proprietor and the other clerk continue the sale, or does section 13239 apply more to the store than to the individual?"

Section 13239, General Code, provides:

> "Whoever being a druggist or pharmacist convicted of selling intoxicating liquor as a beverage contrary to a local option law, sells intoxicating liquor for any purpose, personally or by agent, within two years thereafter in the local option territory in which he has violated such law, or any place in this state where the sale of intoxicating liquor is prohibited, shall be fined not less than two hundred and fifty dollars, nor more than five hundred dollars, and, for each subsequent offense shall be fined not less than five hundred dollars nor more than one thousand dollars."

Under this section before a person is liable to the penalties therein contained, he must be a druggist or pharmacist who has already been convicted of selling intoxicating liquors as a beverage contrary to the local option law, and if after such conviction he sells intoxicating liquors for any purpose personally or by agent within two years in the local option territory in which he has violated the law, or any place in this state where the sale of intoxicating liquor is prohibited, upon conviction of this latter sale he shall be fined as provided in the section quoted.

As I understand your question, there is a record of conviction for a violation of section 13195, for keeping a place where intoxicating liquors are sold in violation of law, against the drug clerk. An additional penalty in section 13239 is fixed upon the *person* violating its provisions. It does not in any way attach to the *place* or *store* in which the illegal sale was made. I can see no reason why the proprietor of the drug store, or any clerk therein who has not been convicted of selling intoxicating liquor as a beverage contrary to the local option law, and who would make such sales of intoxicating liquors as would be within the law, would

be in any way penalized by reason of the infraction of the liquor law by some other person than themselves, even though a clerk in the same store.

It is my view, then, that notwithstanding the fact that a clerk has suffered conviction for violation of section 13195, General Code, the proprietor or any other clerk may continue to make such sales as they would be authorized to make under the law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

728.

LOST FEES—SHERIFF'S BILL FOR LOST FEES—WHAT IT SHALL INCLUDE—WHAT IT SHALL NOT INCLUDE.

A sheriff is entitled to include in his bill for lost fees only fees for services rendered in cases where the state failed to convict, and in misdemeanor cases where the defendant proved insolvent. He may not include in such bill fees for serving subpoenas for grand jury witnesses and fees in cases of lunacy, epilepsy and other cases mentioned in section 2846, as amended.

COLUMBUS, OHIO, January 16, 1914.

HON. M. F. MERRIMAN, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have at hand your letter of January 1st, wherein you state:

> "Section 2846, G. C., provides for the payment of not to exceed $300 in lost fees to the sheriffs in addition to salary. This section was amended and section 2998, G. C., repealed in 1911, 102 O. L. 287.
>
> "Formerly sheriffs were allowed in addition to fees in cases where the state failed to convict and in misdemeanor cases where a conviction was had and the defendant proved insolvent, fees for serving subpoenas for grand jury witnesses, fees in lunacy cases and other fees for the collection of which no particular provision was made by law.
>
> "The question now arises in this county as to whether or not the sheriff is entitled to include in his bill for lost fees, fees for serving subpoenas for grand jury witnesses, and fees in cases of lunacy, epilepsy, feeble minded and the other cases mentioned in section 2846 as amended, the entire amount of his lost fee bill, of course, not to exceed $300 in any case, or whether or not under section 2846 and section 2996, the sheriff's lost fee bill is strictly limited to criminal cases wherein the state fails to convict, and in misdemeanor cases wherein the convicted defendant proves insolvent. You will understand that the sheriff has drawn fees in cases of lunacy, epilepsy and the other cases mentioned in section 2846, and paid them back into the county treasury. Now can he include those fees in his lost cost bill?"

Section 2846, prior to its amendment read as follows:

> "In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for

services in criminal cases, where the state fails to convict, or the defendants prove insolvent, *and for other services not particularly provided for.* Such allowance shall be paid from the county treasury."

This statute as amended in 102 O. L. 287 now reads as follows:

"Upon the certificate of the clerk and the allowance of the county commissioners the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term. The fees of the sheriff in cases of lunacy, epilepsy, feeble minded, boys' industrial school, girls' industrial home, school for blind, school for deaf, and for serving subpoenas for grand jury witnesses, and summoning jurors, except in appropriation cases, shall be paid out of the county treasury upon certificate of the proper officer of the court in which the services were rendered."

When said section was amended section 2998 of the General Code was repealed. This statute formerly provided:

"Nothing in this chapter shall affect the power of the court of common pleas in each county to make an allowance of not to exceed three hundred dollars each year to the sheriff for services in criminal cases where the state fails to convict or the defendant proves insolvent and for other services not particularly provided for by law."

It was the intention of the legislature at this time, therefore, as it appears from the statutes quoted, that the allowance to the sheriff was for his private reimbursement, and included within the maximum amount of three hundred dollars all fees to which the sheriff was entitled for services in criminal cases where the state failed to convict, or the defendant proved insolvent, and also all other services, the collection of the fees for which was not particularly provided for by law.

In section 2846, General Code, as amended, the provision relating to all other services not particularly provided for by law was stricken out. That part of the statute which has been added, relating to the fees of the sheriff in cases of lunacy, epilepsy, etc., was clearly intended to specifically provide for payment from the county treasury of fees *not particularly provided for at this time.*

Section 2977 of the General Code provides that:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

The fund which accrues from the payment of such receipts into the county treasury is known as the "fee fund." This statute includes all receipts in the nature of fees received by the sheriff, in the absence of a clear exception with reference to any particular fee.

I am of the opinion that section 2846, in allowing the sheriff in addition to his salary, legal fees for services in criminal cases wherein the state fails to convict, and in misdemeanors, upon conviction, where the defendant proves insolvent, not more than three hundred dollars per year, clearly intends to except such fees from the general provisions of section 2977, General Code, as regards payment into the "fee fund." This was clearly the intention with respect to these particular fees prior to the amendment, and the change in the statute is not indicative of any change of intention in this regard upon the part of the legislature.

As regards the other fees, however, now specified in section 2846, General Code, the collection of which was not particularly provided for prior to this amendment, I can see nothing in the wording of this statute which would except these enumerated fees from the general provision requiring payment into the fee fund. The statute does no more than specify a certain fee for specific services, and requires their payment out of the county treasury. There is nothing in this language to indicate that such fees were intended to reimburse the sheriff's private pocket.

Answering your question directly, therefore, I am of the opinion that the sheriff is entitled to indicate in his bill for lost fees only fees for services rendered in cases where the state failed to convict, and in misdemeanor cases where the defendant provided insolvent. He may not include in such bill fees for serving subpoenas for grand jury witnesses and fees in cases of lunacy, epilepsy, feeble minded and other cases mentioned in section 2846, as amended.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

729.

LIQUOR LICENSE LAW—INTOXICATING LIQUOR—CONVICTION OF LICENSEE DOES NOT FOLLOW A LICENSE INTO HANDS OF THE TRANSFEREE.

Where a licensee files an application to transfer his license under section 35 of the liquor license law, the said licensee having been once convicted of violating the liquor license law, the fact of the conviction of the original licensee does not follow the license into the hands of the transferee.

COLUMBUS, OHIO, January 29, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In your communication of December 23, 1913, you inclose a letter from the Hamilton county liquor licensing board submitting the following question:

> "A licensee files an application to transfer his license under section 35, the said licensee having been once convicted of violating the liquor license law. Section 35 provides: 'and the person to whom the said license is to be transferred shall hold the license for the remainder of the said license year, and shall have all the privileges and obligations of the original licensee under the license.'"

Under our license law a license to sell intoxicating liquor is granted to the recipient of it because of his personal fitness. The licensing board determines this fitness, and grants him the permit to engage in the business of selling intoxicating liquor.

Bouvier defines "obligation" in its generic and most exclusive sense as synonymous with duty. In a more technical sense it is a tie which binds one to pay or do something agreeable to the laws and customs of the country in which the obligation is made.

Webster defines "obligation" to be the binding power of a vow, promise or contract of law, civil, political or moral independent of promise; that which constitutes legal or moral duty and which renders a person liable to coercion or punishment by neglecting it.

"Privilege" is defined to be a "peculiar benefit, favor or advantage of right or immunity not enjoyed by all or that may be enjoyed only under special conditions; a special right or power conferred or possessed by one or more individuals in derogation of general right."

Section 58 of the licensing act provides, among other things, as follows:

> "If any licensee is more than once convicted for a violation of the laws in force to regulate the traffic in intoxicating liquors, his license shall be deemed revoked and no license shall thereafter be granted to him."

This penalty is also personal. It is the licensee who, upon being convicted more than once for a violation of certain laws who loses *his* license. The second conviction works a revocation of the license of the person who has been twice convicted, and furthermore he is not eligible to have granted to him any other license.

The provision of section 35 imposing upon a transferee "all the privileges and obligations of the original licensee under the license" merely means that he is given with the license transferred to him all rights and duties possessed by the original licensee by virtue of having been granted a license. No penalties attach to the license; the provision for revocation of license on conviction of the second offense does not attach to the original license. As stated above, this penalty is purely personal. It is a punishment to the offender against the law, and when after one conviction a person transfers his license, the license goes to the transferee free of any penalty, and no different than if it was originally granted to the transferee by the board.

I am therefore of the opinion that the conviction of an original licensee does not follow the license into the hands of the transferee.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

730.

OFFICES COMPATIBLE—FIRE CHIEF AND VILLAGE CLERK.

Unless it is impossible for a man to perform the duties of both positions there is no statute which prohibits a man from acting as village clerk and at the same time hold the position of fire chief.

COLUMBUS, OHIO, January 10, 1914.

HON. C. H. STOLL, *Village Solicitor, London, Ohio.*

DEAR SIR:—I have at hand your letter of January 5th, wherein you ask whether a village clerk may hold the position of fire chief. I am unable to find any statutory prohibition against the holding of both of these positions by one individual.

Under section 4279, General Code, the clerk is elected for a term of two years by the electors of the village, and under section 4389, General Code, the chief of the fire department is appointed by the mayor. I am unable to find anything in the statutes which makes either of these positions a check upon the other, nor are there any duties annexed to either which would render it contrary to public policy for a single individual to perform while acting as an incumbent of both positions.

If it is a fact, therefore, that it is not physically impossible for one individual to perform the duties annexed to both of these positions, I am of the opinion that a person elected as clerk of the village is eligible to be appointed and may serve as chief of the village fire department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

731.

BOND—STATE DOES NOT REQUIRE BOND FROM SECRETARY OF OF AGRICULTURAL COMMISSION—COMMISSION MAY REQUIRE BOND FROM SECRETARY—WHERE SUCH BOND IS TO BE FILED.

The law does not require that the secretary of the agricultural commission shall give bond to the state of Ohio. The treasurer of state is without authority to keep such a bond on file. It is the duty of the treasurer of state to return such bond to the secretary of the agricultural commission. The agricultural commission may require a bond from their secretary if they so desire, and the bond should be deposited with the commission.

COLUMBUS, OHIO, December 23, 1913.

HON. J. P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under favor of December 11, 1913, you request my opinion as follows:

> "On October 17, 1913, Mr. B. F. Gayman, filed with this department a surety bond in the sum of $10,000.00 as security for faithful performance of duty, etc., as secretary of the agricultural commission of Ohio.
>
> It is now claimed that such a bond was not required by law to be given to the state proper, and he desires to withdraw this bond from the files in order to secure rebate on the premium paid for same.
>
> "Will you be kind enough to advise me as to whether or not such bond is required, and whether one now on file should be cancelled and returned to him?"

I can find nothing in the statutes which either compels or authorizes a secretary of the agricultural commission to give a bond to the state or to have the same deposited with the treasurer of state.

I am informed that it is the practice of the commission to require a bond from their secretary given to themselves and deposited by them, but that the bond in question was required of their secretary under a misconception existing in the mind of the commission at the time of their power to require a bond payable to the state.

I am further informed that since providing the first bond, for which there is no authority, Mr. Gayman has given bond intended as a substitute to the board itself, which has been deposited with it.

I am of the opinion that the second bond is perfectly legal and proper.

As regards the bond given the state, however, which was deposited with yourself, I am of the opinion since the same is not authorized by law, that it is void, and that you are without right or power to keep the same on deposit. It is, therefore, your duty to return this bond to the secretary of the agricultural commission, and it is the undoubted right of that official to have the same cancelled by the bonding company.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

732.

TAXES AND TAXATION—NON-TAXABLE BONDS—MATURITY—LISTING BONDS FOR TAXATION.

Where a man holds four one thousand dollar non-taxable bonds and these bonds are due and payable on April 1, 1913, *but were not presented for payment until April* 16th, *this date being after the second Monday of April when money becomes subject to listing for taxation, such bonds do not lose their character, as such, by reason of their being overdue, and being non-taxable before maturity continue to be so thereafter.*

COLUMBUS, OHIO, November 21, 1913

The Tax Commision of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 12th requesting my opinion upon the following question:

> "A man held four one thousand dollar non-taxable bonds. These were due and payable on April 1, 1913. On April 16, 1913, he presented them for payment, and the same were paid. These bonds were due on April 1, and the party did not present them for payment until after the second Monday of April, evidently so that he would not have the money to list. Should the $4,000 be listed for taxation?"

The constitutional and statutory provisions respecting the exemption of bonds from taxation make no attempt to define the term "bonds" in such way as to throw any light upon your question. Obviously, the overdue bond is none the less a "bond," unless some good reason should appear for holding that its character is changed because of the fact that it was not paid when due. No such reason

occurs to me. To be sure, it has, or may have lost its interest-bearing characteristics. It is no longer negotiable in the sense that it can be acquired by a bona fide holder. It is little better than a general credit.

However, this difference in my opinion was immaterial. The thing which constitutes a security, a "bond" for purpose of taxation, is not its negotiability; for an ordinary promissory note, or a bill of exchange is a negotiable instrument, yet is taxed as a "credit" if the payer be an ordinary individual or partnership, section 5323, General Code, defines the term "investment in bonds" as follows:

> "The term 'investment in bonds' as so used, includes all moneys in bonds, certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others."

This statutory definition, is, of course, not conclusive as to the present question. However, it suggests the distinguishing characteristic of such securities, which is, that they be issued by a public or private corporation.

If the non-taxable bond mentioned in your letter is a bond of the United States or of the state of Ohio, then the fact that it is overdue is immaterial, for the reason that the listing of such bonds is governed by section 5376, General Code, wherein the word "bonds" is used in the sense defined in section 5323, supra; and for the further reason that as to securities of the United States the non-taxable nature of such securities would not depend upon their negotiable character in any event, the state being without authority to tax any obligation of the federal government.

If the non-taxable bond mentioned in your letter is one made so by the provisions of article XII, section 2 of the constitution, as they existed between January 1, 1906, and January 1, 1913, a different question might, perhaps, arise, yet on consideration, I am of the opinion that where "bonds" is repeatedly used in this section, it is to be interpreted in the light of section 5323, supra, at least to the extent of eliminating from consideration the negotiable attribute of the instrument as affecting its character, so long as it was originally issued as a bond.

I do not mean to go so far as to hold that an ordinary municipal certificate of indebtedness, or a county warrant stamped "not paid for want of funds," or a note of the board of county commissioners, or the board of education, would be a "bond" within the meaning of article XII, section 2 of the constitution, although clearly these evidences of indebtedness would come within the definition of section 5323, General Code. None of these questions is before me. My conclusion on the question submitted by you, however, is that an evidence of indebtedness originally issued as a "bond" does not lose its character as such by reason of its being overdue, and being non-taxable before its maturity, continues to be so thereafter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

733.

JUROR FEES IN JUSTICE CASES—DEPOSIT OF JUROR FEES—GARNISHEE CASES—SECURITY FOR COSTS.

For a verdict and before rendering judgment, each juror in a justice of the peace court shall receive seventy-five cents for each day's service as such juror, the same to be paid by the successful party, and such fee shall be charged up in the cost bill against the unsuccessful party, the same to be collected according to the procedure provided for the collection of such costs. A justice of the peace may not require a deposit of the fees of jurors before a verdict is returned, except as provided in section 10325, *General Code.*

COLUMBUS, OHIO, January 21, 1914.

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

GENTLEMEN:—On October 23, 1913, your department submitted to this department a request for an opinion, as follows:

> "Under the amended law, 103 O. L., 567, not to exceed $2.00 may be legally taxed as fees for justice of the peace and constable in attachment and garnishee cases. If the defendant demands jury, may justice of the peace require security for additional fees of justice of the peace and constable, made necessary by reason of a demand for jury, and may the plaintiff be required to deposit the fees of jurors before verdict is returned?"

In reply thereto, I desire to say that sections 10253 to 10289 of the General Code, inclusive, provide for attachment and garnishment proceedings before a justice of the peace.

Section 10271 thereof, as amended April 11, 1913, (103 O. L., 567) provides as follows:

> "The personal earnings now exempted by law, in addition to the ten per cent for necessaries, shall be further liable to the plaintiff for the actual costs of any proceedings brought to recover a judgment for such necessaries, in any sum not to exceed two dollars and the necessary garnishee fee. Such garnishee may pay to such debtor an amount equal to ninety per cent of such personal earnings, less the sum of two dollars and the necessary garnishee of fee not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs as herein provided, due at the time of the service of process or which may become due thereafter and before trial and be released from any further liability to such creditor, or to the court or any officers thereof, in such proceeding, or in any other proceeding, brought for the purpose of enforcing the payment of the balance of the costs due in said original action. Both the debtor and the creditor shall likewise be released from any further liability to the court or any officers thereof in such proceeding or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action."

There is no provision in said section, nor in any of the others of said sections 10253-89 inclusive of the General Code, concerning the matter of attachment and garnishment proceedings before a justice of the peace, which provides that if the

defendant demands a jury, the justice of the peace may require security for additional fees of such justice and constable. Neither is there any provision therein contained that the plaintiff may be required to deposit the fees of jurors before a verdict is returned. In fact, I am unable to find any statute which enables the justice of the peace to require security or additional security in civil actions before a justice of the peace, except in cases where the party bringing the action is a non-resident of the township wherein the action is brought, as provided by section 10483 of the General Code, and in that case said section 10483 of the General Code provides that security can be required before issuing process or prior to trial, as follows:

> "When a person is not a resident of the township in which he seeks to or does, begin an action before a justice of the peace, previous to issuing process, or prior to the trial, the justice may require such person to give security for the costs of suit. This may be done by depositing such a sum of money as the justice deems sufficient to pay the costs, or by giving bond with surety approved by him to the adverse party, for the payment of such costs which accrue in the action."

Furthermore, I am unable to find any statutory authority whereby a party can be required to deposit the fees of jurors before the verdict is returned, except in cases of forcible entry and detainer, and in such cases section 10325 of the General Code provides that the party demanding a jury must first deposit with the justice a sum of money sufficient to pay the jury fees, as follows:

> "In actions of forcible entry and detainer, the party demanding a jury must first deposit with the justice a sum of money sufficient to pay the jury fee."

On the other hand, section 19271 of the General Code, above quoted, as amended April 11, 1913, provides specifically that in attachment and garnishment proceedings, the garnishee may pay to the debtor an amount equal to ninety per cent. of such personal earnings, less the sum of two dollars and the necessary garnishee of fees not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs herein provided, due at the time of the service of process, which may become due thereafter and before trial. And such garnishee is thereby released from any further liability to such creditor or to the court or any officer thereof, in such proceeding. Said section further specifically provides that both the debtor and creditor shall likewise be released from any further liability to the court or any officer thereof in such proceeding or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action.

It is to be noted that said section, in the first part thereof, specifically limits the amount of costs in such ancillary actions of attachment and garnishment, to the sum of $2.00 and the necessary garnishee fee, which latter fee is in no case to exceed 50 cents. This answers the first part of your inquiry.

However, section 10357 of the General Code, provides for jury fees and how the same shall be paid, where a jury has been demanded in a civil action before a justice of the peace, as follows:

> "Upon the verdict being delivered to the justice and before judgment rendered thereon, each juror shall be entitled to receive seventy-five cents per day for each day's service as such juror, at the hands of the successful party, which shall be taxed in the costs against his adversary. When the

jury is not able to agree upon a verdict, the same compensation shall be paid them by the party calling the jury, and it must be taxed in the cost bill against the losing party, except as otherwise provided."

In answer to the second part of your inquiry, it is to be noted that said section contains no provision to the effect that the justice of the peace may require security for the additional fees of the justice of the peace and constable, if a jury is demanded by the defendant or by either party for that matter, and does not require the plaintiff to deposit the fees of jurors before a verdict is returned, but on the other hand, merely provides that—upon the verdict being delivered to the justice and before judgment rendered thereon, each juror shall be entitled to receive seventy-five cents per day for each day's service as such juror, at the hands of the successful party, which shall be taxed in bill of cost against the losing party.

It seems clear, therefore, that after a verdict and before rendering judgment, each juror shall receive 75 cents for each day's service as such juror, the same to be paid by the successful party and which said jury fees shall be charged up in the cost bill against the unsuccessful or losing party, the same to be collected in accordance with the procedure provided for the collection of such costs, if the collection thereof can be enforced against such losing or unsuccessful party.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

734.

ABSTRACT OF TITLE.

Village of Oak Harbor to State of Ohio.

COLUMBUS, OHIO, February 4, 1914.

COLONEL BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 12th containing abstract of title to certain real estate which is to be used as an armory site, and described as follows:

"Lot 44 and the west 27 feet of lot 43, also all the land lying between said property and the Portage river, except 17 feet off of the east side thereof, and in block 130 Wardlow division of the village of Oak Harbor, Ohio."

I have carefully examined said abstract, and it is my opinion that the present owner, the village of Oak Harbor, has a good and indefeasible title to said real estate without lien or encumbrance of any kind.

Before the state of Ohio can acquire a fee simple title to said premises, it will be necessary for the village of Oak Harbor to execute a warranty deed therefor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

735.

OFFICES INCOMPATIBLE—MEDICAL EXAMINER FOR THE STATE INDUSTRIAL COMMISSION—MEMBER OF A CITY COUNCIL.

Where a member of council accepts an appointment as medical examiner for the state industrial commission, such person by the acceptance of employment from the industrial commission, which is a public employment in the meaning of section 4207, General Code, forfeited his office as councilman, and council should proceed to fill the vacancy, in the manner provided by section 4236, General Code.

COLUMBUS, OHIO, January 19, 1914.

HON. H. M. LILLEY, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 10th, in which you state that:

> "Dr. J. B. Barker was elected member of council of this city at the last election and is now duly qualified and acting. Since qualifying as such councilman he has been appointed as medical examiner for this locality by the state industrial commission"

and inquire whether under the above circumstances he may continue to act as a member of the council of the city of Piqua.

The qualifications for membership in a city council are prescribed by section 4207, General Code, which reads, in part, as follows:

> "* * * Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

The general rule of law is that the appointment or election to another office of a person already holding an incompatible office is void. This rule was followed by our supreme court in State ex rel. vs. Kearns, 47 O. S., 566, and in State ex rel. vs. Craig, 69 O. S., 236, 244.

Examination of the statutes upon which these cases were decided disclose a difference between said statutes and section 4207, in that the former contained no declaration of the forfeiture of his office by a councilman who accepted another incompatible office.

In section 4207, the above mentioned rule is changed; because the holding of any other public office or employment is made to work a forfeiture of the office of councilman instead of forfeiture of the subsequent office or employment.

This provision was construed by the circuit court in State ex. rel. vs. Gard, 8 O. C. C., N. S., 599 (affirmed by the supreme court without report). The first paragraph of the syllabus reads:

> "The inhibition against the holding of other public office or employment, found in section 120 of the Municipal Code (Revised Statutes, section 1536-613), relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office and employment."

On page 607 of the opinion the court says:

> "We are of the opinion that the inhibition against persons holding public office or employment is not limited to office in or employment by the municipality, but extends to all public office and employment. This is evidenced by the exception of notaries public and members of the militia."

Inasmuch, therefore, as section 4207 clearly prohibits the holding by a member of council of any other public office or employment except that of notary public or a member of the state militia, I am of the opinion that Dr. Barker has, by the acceptance of employment from the industrial commission of Ohio, which is a public employment within the meaning of section 4207, forfeited his office as councilman, and that council should proceed to fill the vacancy in the manner provided by section 4236, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

736.

COMPENSATION TO DEPUTY STATE SUPERVISORS OF ELECTION—BEGINNING OF THE YEAR—REGISTRATION CITY—ELECTION PRECINCT—COMPENSATION OF THE CLERK OF THE DEPUTY STATE SUPERVISORS OF ELECTION.

1. *The year referred to in section* 4822, *General Code, is the year which begins when the regular terms of the officers and clerks of the deputy state supervisors of election begin. The amount to be paid is determined by the number of precincts at the November election, preceding the first of May, or the first Monday in August, as the case may be, and this amount is to be paid for the year beginning on May first, or the first Monday of August.*

2. *The additional compensation to be paid by virtue of section* 4942, *General Code, is to be paid by the city in which registrations are held, and no part of this additional compensation is to be paid by the county; the county is not required to pay any deficit that might occur.*

COLUMBUS, OHIO, January 9, 1914.

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

GENTLEMEN:—Under date of December 12, 1913, you submit a letter from Mr. H. H. Haines, clerk of the board of deputy state supervisors and inspectors of election of Hamilton, Ohio, and ask for an opinion upon the two questions submitted by him.

The facts and questions are stated in the letter as follows:

> "First proposition:—At the election held in November in the year 1912, there were 82 precincts, and the deputy state supervisors of elections claim that by the provisions of section 4822 of the General Code they are entitled to compensation for the 82 precincts for all of the year 1913, whereas, the auditor thinks that said supervisors are entitled to compensation for the 82 precincts for the months of September, October, November and December of the year 1912, because his fiscal year begins on the first day of September. In accordance with this view of the auditor, he has up to the first of September of this year allowed the said supervisors com-

pensation for 78 precincts, being the number that existed in November, 1911. Therefore the said supervisors claim that the auditor should reimburse them for the first eight months of the year 1912 for the 82 precincts.

"Second proposition:—In the city of Middetown, which is a registration city, there are sixteen precincts, but under the provisions of section 4942 of the General Code, the minimum compensation for each supervisor shall not be less than $100.00; but in accordance with the opinion of the attorney general apportioning such compensation amongst the various political subdivisions,- the supervisors will have received from the city of Middletown for the year 1913, $83.48, making a loss to the supervisors therefore of $16.52. However, under the said opinion $6.52 of his loss is to be borne by the city of Hamilton, thus making a net loss to each supervisor for the year 1913 of $10.00. The supervisors maintain that the county should bear this net loss, while the auditor is of a different opinion.

"The compensation of the clerk of said supervisors also suffers a loss proportionally."

In the first proposition the contention of the auditor is that the year for which the compensation is paid begins on Sepember first, and the contention of the board of deputy supervisors is that the year is the calendar year beginning January first.

The compensation is fixed by section 4822, General Code, which provides:

"Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

The compensation to be paid by virtue of this section is paid quarterly and is considered as a yearly salary. The statute does not prescribe when the year shall begin or terminate. There is nothing in the statute to show that the year contemplated by section 4822, General Code, shall begin and end with the fiscal year of the county auditor. Nor does the statute indicate that the year is the calendar year.

Section 4804, General Code, as amended in 103 Ohio Laws, 815, provides in part:

"On or before the first Monday in August, 1913, the state supervisor of elections shall appoint for each such county two members of the board of deputy state supervisors of election, who shall serve until the first day of May, 1916, and whose successors shall then be appointed and serve for a term of two years from and after such date."

Said section 4804 prior to said amendment provided in part:

"On or before the first Monday in August of each year the state supervisor of elections shall appoint for each such county two members of the board of deputy state supervisors of elections, *who shall each serve for a term of two years from such first Monday in August.*"

This section fixes the terms of office of the deputy state supervisors of elections.

Section 4789, General Code, provides in part:

"On or before the first day of May, biennially, the state supervisor and inspector of elections shall appoint for each county two members of the board of deputy state supervisors and inspectors of elections, who shall each serve for a term of four years from such first day of May."

This section fixes the term of office of the deputy state supervisors and inspecors of elections, and the time when such terms shall begin and terminate.

The year contemplated by section 4822, General Code, supra, in fixing the compensation of such members is the year of their terms, which begin on the first Monday in August if appointed by virtue of section 4804, General Code, and on the first day of May if appointed by virtue of section 4789, General Code. In this connection it is not necessary to now consider the amended section 4804, General Code, which will change the time of appointment and the beginning of the terms.

The year therefore referred to in section 4822, General Code, is the year which begins when the regular terms of such officers and the clerk begin. The amount to be paid is determined by the number of precincts at the November election preceding said May first or said first Monday of August, as the case may be, and this amount is to be paid for the years beginning on said May first or said first Monday of August.

I take it from the second proposition that Butler county has two registration cities. If this is not true I cannot see how the city of Hamilton could make up any of the so-called deficit caused in the city of Middletown.

Section 4942, General Code, prescribes a minimum salary to be paid the deputy supervisors and the clerk. The question asked would seem to indicate that it has been contended that each registration city in a county must pay this minimum amount.

Said section 4942, General Code, provides:

"In addition to the compensation provided in section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall receive for his services the sum of five dollars for each election precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. *The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year,* and the compensation paid to the clerk under this section shall in no case be less than one hundred and twenty-five dollars each year. *The additional compensation provided by*

this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board.

The additional compensation to be paid by virtue of this section is to be paid by the city in which registrations are held and no part of this additional compensation is to be paid by the county. The county is not required to pay any deficit that might occur.

The minimum amount of one hundred dollars to be paid each deputy supervisor is the minimum amount to be paid "under this section." It is the minimum amount for all the registration cities in the county. It does not mean that each registration city shall pay said minimum amounts.

I take it from the statements of the letter that Middletown and Hamilton are both registration cities. Therefore if the combined precincts of these two cities are sufficient in number to pay each deputy supervisor or the clerk the minimum amount prescribed by section 4942, General Code, there is no deficiency in said compensation. If the combined number of precincts is not sufficient to allow the minimum salary, then said registration cities shall make up the difference in proportion to the number of precincts in such cities. The number of precincts is the basis of compensation and the deficiency should also be paid in accordance to the number of precincts.

The compensation of the clerk is governed by the same principles which govern the compensation of the deputy supervisors.

In the letter enclosed reference is made to an opinion of the attorney general in reference to the apportionment of the compensation. This department has not rendered any opinion as to the rule of apportion of the compensation allowed by section 4942, General Code. This department has rendered an opinion as to the rule of apportionment between a county and a registration city where the maximum salary is paid. It has rendered no opinion as to the apportionment between two registration cities.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

737.

MANDAMUS PROCEEDINGS—DUTY OF THE CITY SOLICITOR TO DEFEND THE MAYOR IN SUCH PROCEEDING—POWERS OF THE MAYOR TO DISMISS CITY OFFICIALS—CITY CIVIL SERVICE COMMISSION.

Where a mayor of a city dismisses the chief of police, and the chief of police filed a petition in mandamus against the mayor in the common pleas court to compel the mayor to reinstate him. The suit in mandamus is a proceeding to determine the right to the position as between two claimants. The city solicitor may or may not defend the mayor in his official capacity. There is no obligation upon him to represent the mayor in such cases, especially where the solicitor is of the opinion that the mayor has not acted according to law.

COLUMBUS, OHIO, January 26, 1914.

HON. C. A. LEIST, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—Under date of January 17, 1914, you inquire:

"On the 8th day of January, 1914, the mayor of the city of Circleville, Ohio, discharged the chief of police of Circleville, Ohio, and served said

chief with a copy thereof, together with his reasons therefor. The chief did not file an explanation therein, but within five days appeared before the board and filed an affidavit of prejudice against two members of the commission, setting forth that one member of the board said that he would not vote to reinstate the chief no matter what the evidence showed. The member did not deny this statement, but said he could sit and render an impartial decision. The board afterward and without a hearing and an examination into the facts, dismissed the proceedings before them saying there was nothing before them to hear because the chief did not file an explanation, and by such proceedings they refused to further act. The chief then filed a petition in mandamus against the mayor in the common pleas court, to compel the mayor to reinstate him. These proceedings were had under and by virtue of sections 17 and 19 of the civil service law passed in 1913, volume 103, pages 707 and 709.

"In the court of common pleas the mayor is made defendant, and not the city of Circleville, Ohio.

"The question upon which I am asking for an opinion, is whether it is my duty as solicitor to defend the mayor in the suit filed in the common pleas court."

You call attention to sections 4308 and 4305, General Code, and you also give the provisions of sections 28 and 29 of the ordinance of Circleville. The provisions of these sections are taken almost verbatim from the provisions of sections 4308 and 4309, General Code. The duties of the solicitor will be considered in reference to his statutory duties.

Section 4305, General Code, provides:

"The solicitor 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 title as legal counsel and attorney."

Section 4308, General Code, provides:

"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

You state that council has not passed any ordinance or resolution directing you to defend in the mandamus proceeding.

Section 4309, General Code, provides:

"When an officer of the corporation entertains doubts concerning the law in any matter before him in his official capacity, and desires the opinion of the solicitor, he shall clearly state to the solicitor, in writing, the question upon which the opinion is desired, and thereupon it shall be the duty of the solicitor, within a reasonable time, to reply orally or in writing to such inquiry. The right here conferred upon officers shall extend to the council, and to each board provided for in this title."

The city solicitor is the legal adviser of the city and of its officers in all things which concern the city. He is not the legal adviser of such officers in their individual capacity.

Where, in the discharge of their official duties two officers or boards are in controversy, the city solicitor has the right to choose which one he shall represent. This is left to his discretion. The city solicitor is the legal adviser of the mayor and also of the chief of police as to their official duties, and should represent them in suits involving their official duties and wherein the city has an interest.

In the case which you present the interest of the city is to secure an efficient person to perform the duties of the chief of police. The city is not concerned with the personality of the chief, provided he is capable of and does perform the duties, and is a proper person for the position.

The mandamus proceeding now in question is virtually a contest to determine who is entitled to the office. The city is not a party to the suit or controversy. The outcome of the suit will not affect the rights of the city. In any event it will have a chief of police. Either the new or old. The city has a general interest, however, that is, to see that the person who is legally entitled to the position shall occupy it.

In discussing the rigth of a municipality to employ legal counsel, Dillon on municipal corporations, says at section 307:

> "Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defense of the suit, or appropriate its money to pay the judgment therein."

This principle should apply in determining the duties of the city solicitor. While a city is not directly concerned as to who shall hold a particular office, or position, yet it is interested in a measure in having the rightful person occupy the position. Therefore, where an effort is made to require a mayor or other appointing authority to make an appointment or re-instatement which is clearly unauthorized, the city solicitor may defend the mayor in such suit, even though the city is not a party. Under certain circumstances it may be his duty to do so.

There is no obligation upon the city solicitor to uphold the mayor if the city solicitor is honestly satisfied that the mayor is in the wrong.

The suit for mandamus in question is a proceeding to determine the right to a position, as between two claimants. The city solicitor may defend the mayor in his official capacity, or he may decline to do so. There is no obligation upon him to represent the mayor in such case, especially where the solicitor is of opinion that the mayor has not acted according to law.

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

738.

ISSUING WARRANTS TO ASSIGNEE OF A CLAIM—DUTY OF THE STATE AUDITOR IN MATTERS OF THIS KIND—DUTIES OF THE STATE TREASURER—HOW THE CERTIFICATION OF SUCH CLAIM SHOULD BE MADE.

Where an appropriation is made by the legislature for the United Electric Company and the County Electric Company is the assignee of this claim, if the state auditor is fully convinced that the County Electric Company is the assignee of the claim in question, he would be authorized to recognize the receipt of the United Electric Company by the County Electric Company, assignee of the claim, duly attested by the proper officers of the County Electric Company, and issue a warrant for the payment of the money from the state treasury. The state treasury should likewise be fully satisfied that the County Electric Company is the proper assignee of the claim to be paid by such warrant.

COLUMBUS, OHIO, January 17, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—A few days ago you handed this department a voucher drawn by your department to the *United Electric Company* of Canton, Ohio, for a refund of corporation tax paid in error for the years 1902 to 1904 inclusive, amounting to the sum of eighty-four dollars and eighty ($84.80) cents, said voucher is payable from the unauthorized deficiency appropriation passed April 28, 1913, and filed in the office of the secretary of state May 10, 1913.

The appropriation made in said bill is found on page 549 of the 103 Ohio Laws in the words and figures following:

> "United Electric Company, Canton, O., refund of corporation tax paid in error for the years 1902 and 1904 inclusive in the following respective amounts, viz.: $28.20, $28.20 and $28.40_____$74.80"

From an affidavit which you submitted with the voucher it appears that on or about the 26th day of June, 1911, *The County Electric Company,* a corporation organized and existing under the laws of the state of Ohio, acquired all of the corporate property and assets of the United Electric Company, including all physical property and accounts receivable and chosen in action and credits of every kind, and that The County Electric Company is the owner of the claim for taxes paid by The United Electric Company to the state of Ohio for the years 1902, 1903 and 1904 amounting to $84.80. In other words, it appears that prior to the passage of the unauthorized deficiency bill, 103 O. L., 594. The County Electric Company had as to all credits become the assignee of the United Electric Company. You inquire whether under such circumstances you would be authorized in issuing a voucher to The County Electric Company. The claim for a refund of corporation taxes so paid in error is, as I view it, a legal claim against the state of Ohio but, of course, not enforceable against the state because of the established rule of law that the state cannot be sued without its consent. The mere fact that the state cannot be sued without its consent would not change the legal status of the claim for the refund of taxes erroneously paid.

Section 243, General Code, provides that the auditor of state shall examine each claim presented for payment to the state treasury, and, if he finds it legally due and that there is money in the treasury duly appropriated to pay it, he shall issue *to the person entitled to receive the money* thereon a warrant on the treas-

urer of state for the amount found due, and take a receipt on the face of the claim for the warrant so issued, and file and preserve the claim in his office.

The quesion as to *who* the person is who is entitled to receive the money as used in such statute is not definite and clear in an instance such as the one presented. It appears from the affidavit that the actual person entitled to receive the money in this case would be The County Electric Company, whereas the person entitled to receive the money as it appears from the appropriation is The United Electric Company. The intention of the Legislature, however, appears to be clear in this regard; that it intended to pay out the money erroneously paid for corporation tax to the party who was entitled to the same at the time the payment should be made from the state treasury. From the affidavit that we have before us it would appear that the County Electric Company claims to be that party. However, the appropriation was made to the United Electric Company and I think that the voucher should be made to the United Electric Company, as has been done in the voucher which you presented to us. I believe, however, that if you can fully satisfy yourself that the County Electric Company is the assignee of the claim in question you would be authorized to recognize a receipt of the "United Electric Company by the County Electric Company, assignee of the claim," duly attested by the proper officers of the County Electric Company, and issue a warrant for the payment of the money from the state treasury. A warrant, however, should be drawn in the name of the United Electric Company in accordance with the appropriation. In other words, you would be fully justified, if you are satisfied of the correctness of the assignment, to accept the receipt of the United Electric Company given by its assignee.

The matter, however, should likewise be taken up with the treasurer of state for the reason that he will be called upon to pay the warrant when issued, and will be responsible to the state should he pay the money out to an improper party. The warrant having been made in the name of the party appearing in the appropriation bill, and he likewise must be fully satisfied that the County Electric Company is the proper assignee of the claim to be paid by such warrant.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

739.

STEPS NECESSARY TO ESTABLISH EASTERN STANDARD TIME IN THE CITY OF CLEVELAND—IN THE STATE OF OHIO—POWER OF THE LEGISLATURE IN THIS RESPECT—POWER OF THE LEGISLATIVE DEPARTMENT OF THE CITY GOVERNMENT.

In reference to adopting eastern standard time in the city of Cleveland, the city is empowered to establish eastern standard time only to the extent of matters over which the city is given jurisdiction, and so long as there is no conflict with the proper state authorities; this can be done through the legislative department of the city government. In order to establish eastern standard time in the state, action by the legislature will be required.

COLUMBUS, OHIO, December 23, 1913.

HON. HERMAN FELLINGER, *Member House of Representatives, 57 Alpason Road, Cleveland, Ohio.*

DEAR SIR:—In your letter of December 16, 1913, you request my opinion as follows:

"I beg to renew my request for a ruling from your office as to the steps required to be taken in providing for eastern time in the state of Ohio. I would also ask for a ruling as to what would be necessary to establish eastern time in the city of Cleveland alone.

"There is considerable agitation for this change especially in Cleveland and no doubt it will be the standard time used here. Our chamber of commerce and other leading organizations have taken the matter up and report very favorable progress."

Section 5979 of the General Code, is as follows:

"The standard of time throughout this state shall be that of the ninetieth meridian of longitude west from Greenwich, and shall be known as 'central standard time.' Courts, banks, public offices, and legal or official proceedings shall be regulated thereby; and when, by a law, rule, order or process of any authority, created by or pursuant to law, an act must be performed at or within a prescribed time, it shall be so performed according to such standard time."

As regards state offices and functions the time prescribed by this statute undoubtedly should be observed since it stands as the spoken direction of the authority from whence they derive their existence and powers. I am of the opinion that the chief import of this statute lies in its presentation of a rule of statutory construction or a legislative effort to present a norm for the maintenance of a definite order in the execution of all statutory directions in which the time of performance is an element. Whenever time of performance, therefore, is involved in the carrying out of a state law, the time prescribed by this statute must be adhered to. Notwithstanding the recent home rule amendment to the constitution, I am of the opinion that the matters of general law or judicial process are still absolutely and exclusively under the supervision and control of the state government, and that rules of construction provided for by legislative enactment will govern in all such matters. Under this principle, therefore, all contracts and other undertakings will be construed by the courts, in the absence of evidence of intention to the contrary, to have read into them the presumed intention to be governed by the time prescribed by the above statute.

Further than this, I am of the opinion that this statute is not to be given any sway. It cannot operate as a mandatory requirement upon individuals in their daily private activities, except insofar as time is an essential element for compliance with acts properly within the jurisdiction of the state legislature, for the statute is clearly merely directory in its force in any further connection. There is no sanction attending the provision, and no consequences are prescribed for non-compliance, nor is there anything to show the legislative intent that its rule is to be regarded as an absolute and exclusive obligation in the conduct of all matters and things. In brief, section 5979 of the General Code is not intended to operate as an exercise of the police power regulating the time by which all individuals in all their activities are to be governed. Since, therefore, this statute is not a police regulation, it cannot be construed as prohibiting municipal corporations from prescribing a different time for the conduct of all matters properly within their powers of supervision and regulation. The same is, of course, true with reference to matters within the domain of the federal government.

I am of the opinion that all matters properly within the jurisdiction of either of these departments may be required to be performed by such jurisdiction in accordance with their own time, since it would very apparently be an inconsistent and unthinkable delegation of any legislative or supervisory power which denied

the right to prescribe a rule of operation for the things required by such power. It is self evident that whatever is within the domain of municipal supervision and regulation is within the power of the same authority to prescribe the mode and method of compliance as regards time or any other direction incidental to such prescription.

The conflict which might arise by virtue of different times being prescribed for conformance with different governmental functions in the carrying out of the respective state and city functions presents questions of policy and convenience with respect to which it is not within my province to treat.

You request me, however, to point out steps required to be taken in providing for eastern time in the state of Ohio. This is primarily a question for the legislature, and should be taken up with that body. Whilst the legislature might very readily change the statute above quoted so as to provide eastern instead of central standard time in this state, I have very grave doubts as to whether or not such a provision could be made of any greater force in the requirement of eastern time than is the present statute in the requirement of central standard time.

In brief, I doubt the power of the legislature, under the guise of a police regulation, to so interfere with individual liberties as to specify the time to be adopted in the conduct of all private activities, except insofar as time becomes an essential element in the performance of all acts properly required by the state within the domain of its legislative authority.

As regards your second question asking for a ruling as to what would be necessary to establish eastern time in the city of Cleveland alone, I am of the opinion that the city is empowered to establish a time different from that prescribed by the state only to the extent of matters over which the city is given jurisdiction in accordance with what I have stated above, i. e. where there is no conflict with proper state authority. This can be done, of course, only through the legislative department of the city government.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

740.

HOUSE DRAINS—HOUSE SEWERS—PLUMBERS—SEWER MEN—LINE OF DEMARCATION BETWEEN THE WORK OF PLUMBERS AND SEWER MEN.

The line of demarcation between the plumber's work and the sewer man's work is three feet without the borders of a structure, there the plumber ceases to have jurisdiction and the sewer mans jurisdiction begins. This proposition is according to the provisions of the statute and according to the rules of authorities on plumbing and sewerage.

COLUMBUS, OHIO, January 9, 1914.

HON. CORNELL SCHREIBER, *City Solicitor, Toledo, Ohio.*

DEAR SIR:—On October 3, 1913, you asked this department for a construction of sections 12600-176, et seq., General Code, relative to the demarcation line between the work of the plumber and sewer contractor in the installation of the house drain and house sewer.

Similar inquiries have been made by W. C. Greeniger, state inspector of plumbing. John H. O'Leary, attorney for the Master Plumbers' Association of Toledo, D. D. Lewis, chief deputy plumbing inspector of Columbus, and others. (Copies of this opinion will be sent to all the above parties and others directly interested.)

The hearing of the matter was continued from time to time for several weeks, in order to hear experts and other evidence, together with arguments on the subject. Many persons were heard and documents submitted. I have given the matter my best consideration, and have reached the following conclusion thereon:

There *is* a line of demarcation between the two classes of work, when applied to *house drains* and *house sewer*. These two classes of work are defined, established and distinguished, by the statutes, building ordinances and codes in cities, state board of health and standard works on plumbing and sewerage. The evidence submitted, embraced a consideration of all these elements and their practical application to plumbing and sewerage work.

A controversy has arisen in some parts of the state, owing to the fact that the sewer contractors claim the right to install that part of the house drain from the house sewer to the top of the basement floor. The Master Plumbers' Association are insisting that the installation of the entire house drain is their work. There arises the question as to who should make the tests, required by law, of the house drain, if a part thereof is laid by the plumber and the remainder by the sewer contractor?

Let us get clearly fixed in our minds just what constitutes *"house drain"* and "house sewer," and what tests thereof are to be made, and by whom.

Section 12600-176, General Code, provides:

> "All house drains shall be of extra heavy cast iron pipe, with well leaded and calked joints, or of earthenware pipe jointed with mortar composed of one part best Portland cement and one part clean, sharp sand."

Section 12600-178, General Code, provides:

> "The drain containing the house sewer, beginning three (3) to five (5) feet outside the building wall, shall consist of iron pipe or of earthenware pipe not less than the size of the slant or opening in the main sewer.
>
> "They shall not be laid closer than three feet to any exterior wall, cellar, basement, well or cistern, or less than two (2) feet deep. * * *."

On September 14, 1911, the state board of health defined the house drain to be:

> "That part of the horizontal piping of a house drainage system which receives the discharge of all soil, waste and other drainage pipes inside the walls of any building and conveys the same to the house sewer *three feet outside the foundation wall of such building.*"

The state board of health also defined the house sewer to be:

> "That part of the horizontal pipe beginning three feet from the foundation walls to its connection with the main sewer or cesspool."

The different definitions are found in the report of the state board of health and in a small note book issued by the state board of health, at page sixty-five.

The ordinance adopted by the city of Toledo on plumbing and drainage, sections 133 and 144, also defines "house sewer" and "house drain" as follows:

> "The term house sewer is applied to that part of the drain or sewer extending from a point three feet outside of the outer wall of the building, vault or area to its connection with a public or private sewer."

"House drain" therein is defined as follows:

> "The term house drain is applied to that part of a main horizontal drain and its branches inside the walls of the building, vault or area, and extending to and connecting with the house sewer."

It would appear from all of the above, that the house sewer ends three feet from the foundation walls, and the house drain begins at that point and goes through the entire house.

It seems to me that it is evident from the plumbing and draining ordinance of said city (section 122) that it was intended that the plumber should do drainage work. That section provides as follows:

> "Once in each year every master plumber installing any plumbing or drainage work in any building in the city of Toledo, shall register his name and address in the office of department of building inspector of the city, etc."

By section 12600-235, General Code, the plumber is required to give all house drains the water, smoke or air test. Said section reads as follows:

> "The house drain shall be tested with the water, smoke or air test. All alteration, repairs or extensions which shall include more than ten (10) feet, shall be inspected and tested."

Section 12600-233, General Code, provides:

> All piping of a drainage or plumbing system shall be given two (2) tests by the plumber in charge; first, the roughing in with water, smoke or air test; second and final, with smoke in the presence of the proper authorities."

Section 12600-234, General Code, provides:

> "The material and labor for the tests shall be furnished by the plumber.
> "The tests shall be made in the following order; 1st, the house drain; 2nd, the soil and waste vents and all vertical piping; 3rd, the final on the whole system. The first and second tests may be combined, but the second shall not be made until after the first."

On July 23, 1913, the state board of health of Ohio, at a meeting held, rendered the following interpretation:

> "'Plumbers work' shall include all piping in a building upon which tests are required to a point three (3) feet outside the foundaton walls and shall include the house drain, soil and waste stacks, conductors and roof leaders."

The above definitions and statutory provisions are universally agreed to by authorities throughout the United States as fixing the demarcation line between plumbers' and sewer contractors' work.

The sewer contractor's license permits him to install sewers, and as a sewer begins three feet outside of the wall of a building (and in some instances from

three to five feet), his work must necessarily end at that point, and a plumber's license is required to continue the work from that point on and within the building.

From the expert evidence before me, and the authorities as found in the works on sewerage and plumbing, I think the following rule can be laid down:

That a sewer contractor's or sewer tapper's license should not permit them to do a plumbers' work, and that the demarcation line between the work of a plumber and that of a sewer contractor is at a point three feet outside of the foundation walls of a building, known in practice as the the connection between the house drain and the house sewer.

The position taken by some that the sewer contractor may do part of the plumbing work beyond the three feet limit outside the walls seems to be based upon the kind of material which the statute says may be used. I do not think this position is well taken. It is wholly immaterial what sort of material is used. The work from a three foot point without is necessarily done by the plumber and not by the sewer tapper or sewer contractor. The latter's license, in my opinion, alone, does not permit him to do plumbing work within the building and within the three foot limit. Moreover, as has been stated above, the plumber is made responsible for the tests of the house drain. He furnishes the material therefor and makes the tests, and whether he uses earthen pipe or any other material, the same tests are required to be made by him of this particular work, and it cannot, in my opinion, be said that he is required to make tests of work performed by the sewer contractor and be responsible therefor. I think this line of demarcation between the plumber and the sewer contractor, is firmly established as that of being three (and in some instances from three to five feet) feet outside of the wall where the one begins and the other ends.

If the building code of Toledo, or any other city, contains provisions which directly conflict with the General Code on the subject of drainage, plumbing, etc., such provisions are void and must yield to the General Code. This is true both as to construction and tests above referred to.

Licenses are required to be issued to sewer contractors and plumbers in the construction of a drainage system. The sewer contractor and tapper of sewers receives his license for the particular kind of work he is required to do, and it does not authorize him to do plumbing inside of the house or at a point on or beyond which the work of plumbing commences. If he desires to do plumbing he must have a license for that purpose. If he desires to do both he must have a license for both purposes. A plumber's license, as I take it, from the statutes and building codes, authorizes him to do the work of plumbing, commencing at a point from three to five feet on the outside of the wall and completing it on the inside. With a plumber's license he cannot tap the sewer, nor construct that part of it leading up to the three foot point; to do that he would be required to have a sewer worker's license.

There is evidently a great difference in the character and responsibility of a plumber's work and a sewer contractor's work. In some instances, for instance in Columbus, a person desiring to work at the trade of plumbing, either as a master or general plumber, must first make application to the board of examiners of plumbers and undergo a written and practical examination as to his qualifications and ability to do plumbing work; but any one desiring to do sewer work in said city, has only to pay a fee of about five dollars and file an indemnity bond for five hundred dollars and he may procure such sewer tapper's license, and he is not required to take any examination as to his qualification to do the work. If sewer tappers were permitted to go beyond the line of demarcation and do plumbers' work, there might be, and would be a great many incompetent persons engaged in doing plumbers' work, which requires a high degree of skill in order to insure safety as a result of their work. An inspection of the licenses granted to plumbers

and sewer tappers will disclose a great difference in the two. A higher degree of test is required of the plumber, and a greater knowledge of construction and detail than that of a sewer tapper or sewer worker.

From the very nature of the work, and from the statutes and the ordinance and building codes of the cities of Ohio which have been submitted to me, I am of the opinion that the line of demarcation between the plumber's work and the sewer tapper's work is an absolutely fixed point at from three to five feet outside of the walls of the building or structure; that the plumber has absolute jurisdiction up to that point, and the sewer tapper from thereon to the sewer. Health, safety and all the elements of successful and useful plumbing sewerage depend upon the work being done by these two classes of artisans in their respective spheres. Neither should trespass upon the domain of the other. The plumber, above all, is responsible for the sanitary and safe condition of the whole plumbing system from the three foot point in and through the house extending through all its ramifications. He must make the tests above enumerated by the statute, and when the same is turned over, he is responsible for all defects that may occur. The state board of health has jurisdiction in all instances where plumbing is constructed, if the city building code does not govern the same, and even then, the state board may step in and supervise the plumbing and see that it is safe and sanitary. All building codes which are in conflict with the state law, as I have stated, are void, and insofar as they seek, in any instance, to confer rights, privileges and duties, they cannot be enforced.

In conclusion, I will state that the line of demarcation between plumbing work and sewer men's work is three feet without the walls of the structure; there the plumber ceases to have jurisdiction and the sewer man begins. This is a practical proposition, and the result and conclusion I have reached is plain from the statutes above quoted, rules of construction, consultation with authorities on plumbing and sewerage and oral evidence heard by me from experts on the subject.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

741.

LONGVIEW HOSPITAL — APPROPRIATION — MAINTENANCE FUND — APPROPRIATION FOR ORDINARY REPAIRS AND IMPROVEMENTS — BOARD OF ADMINISTRATION.

Where an appropriation of twenty thousand dollars is set aside for ordinary repairs and improvements at Longview hospital, if the entire twenty thousand dollars was originally set aside from the appropriation for ordinary repairs and improvements, then it must be returned to that fund, because it was not in the first place lawfully set aside therefrom, but if it was set aside from the appropriation for maintenance, then it should be by no means placed in the appropriation for ordinary repairs. All the needs of Longview hospital are to be met out of the appropriation for maintenance.

COLUMBUS, OHIO, January 29, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 29th, which I quote substantially in full as follows:

"I am directed to call your attention to section 1867 of the Code, which provides that, (referring to Longview hospital). 'Out of the

moneys appropriated for the *maintenance* of state institutions, the board shall provide a proper allowance for said hospital.'

"I also wish to cite a paragraph from an opinion contained in the annual report of the attorney general of 1911-12, volume 2, page 945, which reads as follows: 'section 33 of the said act provides specifically in what division, or class, of appropriations the said Longview hospital shall participate 'maintenance and no other.'

"In apparent violation of the above section and opinion, the board of administration has set aside certain funds from the gross appropriation made by the general assembly for ordinary repairs and improvements to Longview hospital for the year beginning February 15, 1913, and ending February 15, 1914, as follows:

"Balance in fund O. R. & I.	$180 74	
"From the partial appropriation	3,000 00	
"From the general appropriation for maintenance	16,819 26	
		$20,000 00

"Owing to the fact that certain funds were drawn from the appropriation for ordinary repairs and improvements to make good a specific appropriation made for a laundry and industrial building at the girls' industrial home, the funds for ordinary repairs and improvements have been depleted to such an extent that the board has been compelled to stop work on several needed improvements, notably at the school for the blind, the girls' industrial home and the Dayton state hospital.

"Your opinion is requested as to whether or not the $20,000.00 referred to above ought not to be transferred back to the appropriation for ordinary repairs and improvements, and an amount sufficient for the needs of Longview hospital for O. R. & I. be set aside from the gross appropriation for maintenance."

I find that I have in previous opinions, particularly that of April 15, 1913, addressed to the Ohio board of administration, held that the board of administration has the power to provide for the making of certain repairs and improvements at Longview hospital, therefore, though your question seems to invite it, I shall not reconsider that opinion inasmuch as the board of administration has acted in accordance with it, though, as you say, seemingly in violation of an earlier opinion to which you refer.

Under the opinion to which I refer I must conclude that it is proper for the board to apply maintenance moneys to ordinary repairs and improvements purposes, so far as this institution, i. e., Longview hospital, is concerned. This, however, would not hold good as to any other institution under the care of the board.

Your question also refers to the situation respecting the girls' industrial home. As the situation of which you speak was created with my verbal assent I do not desire to comment upon the legality of the acts done.

It appears that by reason of all the things which have been done the funds for ordinary repairs and improvements have been depleted, and the question is as to whether or not maintenance moneys set aside for ordinary repairs and improvements at Longview hospital can be "transferred" to the general ordinary repairs and improvement fund.

It is sufficient as to this question to say that there is no authority anywhere to "transfer" moneys from the general appropriation for maintenance to the general appropriation for ordinary repairs and improvements or from either one of these to one for specific purposes.

The general assembly provides the appropriations in question, and no authority other than the general assembly itself can make a "transfer" such as that of which you speak. The board of administration possesses the power to create for its own internal purposes subdivisions of each of these appropriations, apportioning the moneys appropriated generally for maintenance, for example, among various institutions under its care according to their needs. This apportionment may be changed from time to time as the board sees fit, but such changes can take place only within a given appropriation made by the general assembly and in accordance with the laws of such appropriation.

The only seeming exception to this rule is in the case of Longview hospital, in which case, by reason of the peculiar language of section 33, as I have heretofore construed it, the appropriation for "maintenance" may be used to make ordinary repairs and improvements at Longview hospital. Even here the situation is not essentially different, because, though maintenance moneys can be used for ordinary repairs and improvements at Longview hospital, ordinary repairs and improvement moneys, i. e., any part of the general appropriation for that purpose, may not be used for Longview hospital at all.

This seems to be your own impression of the state of the law in the light of my former opinions. This principle, however, cannot be brought to the support of an unqualified affirmative answer to your question, for you ask whether or not the entire $20,000 set aside for the making of ordinary repairs and improvements at Longview hospital should not be "transferred back to the appropriation for ordinary repairs and improvements," and whether or not in its stead "an amount sufficient for the needs of Longview hospital for ordinary repairs and improvements be set aside from the gross appropriation for maintenance."

Your question naturally falls into two parts; the second part may be answered in the affirmative. That is to say, as I have already stated, all the needs of Longview hospital are to be met out of the appropriation for maintenance.

The first part of your question, however, seems to pre-suppose that the entire $20,000 for ordinary repairs and improvements at Longview hospital has been set aside from the general appropriation for ordinary repairs and improvements; whereas the detailed statement made by you shows that the bulk of this amount, $16,819.26, was set aside from the general appropriation for maintenance. This may be a clerical error in the drafting of your letter, but if this statement is correct, then the $16,819.26 could, in no event, be transferred to the general appropriation for ordinary repairs and improvements, because it did not come from that source in the first instance. The reasons for this conclusion have already been stated.

I must answer the first part of your question, then, by saying that if the entire $20,000 was originally set aside from the appropriation for ordinary repairs and improvements, then it must, as a matter of course, be returned to that fund—not technically "transferred" thereto—because it was not in the first place lawfully set aside therefrom but if, as seems to follow from your detailed statement, the sum of $16,819.26, or any other part of the entire $20,000 was set aside from the gross appropriation for maintenance, then it can by no means whatever be placed to the credit of the gross appropriation for ordinary repairs.

I trust I have made myself clear.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

742.

POOR RELIEF—POWER OF COUNTY COMMISSIONERS TO RAISE FUNDS—ISSUING OF NOTES—BOND ISSUE—TAXES AND TAXATION—EMERGENCY.

The county commissioners should be able to secure money for their immediate needs for the relief of the poor by issuing notes themselves, conditioned upon the subsequent issue of bonds. Persons lending money on notes of this kind should first see that the county is able to float its bonds when issued.

COLUMBUS, OHIO, February 6, 1914.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Verbally you inquire whether or not, under section 2434, General Code, the county commissioners may, for the relief of the poor, borrow money on the notes of the county, provided these notes are subsequently funded by the issuance of bonds.

As I understand it, the commissioners contemplate issuing bonds but there is an emergency necessitating the prompt raising of the necessary funds. It is therefore desired to have a local bank advance the money necessary on account of the note, and as soon as the bonds are issued take up the outstanding note and fund the indebtedness.

Section 2434 provides in part as follows:

> "* * * For the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

Were it not for the language, "to secure the payment of the principal and interest thereof," section 2434 might be so interpreted as to afford to the commissioners a choice as to whether they should issue notes or bonds; Commissioners vs. State, 78 O. S. 287; (although so to hold would necessitate reading the word "and" as "or").

But when force is given to the phrase, "to secure the payment of the principal and interest thereof," it at once appears that the commissioners must at all events issue bonds in order to properly execute the power conferred upon them by this section.

In my opinion, however, if the commissioners should seek to borrow money on their note, or that of the county, agreeing in writing, and as a part of the act of borrowing, to issue bonds to secure or take up the note, a lender of money would be justified in advancing the funds sought to be raised.

Section 2294, General Code, of course, requires the sale of bonds issued by the county commissioners to be advertised for three weeks, and to be made to the highest bidder. It seems to me that, with respect to the purpose now under consideration, i. e., the relief or support of the poor, the two sections cited should be so construed together as to permit the procedure above outlined to be so followed. Such an interpretation does no violence to section 2434, which expressly mentions the borrowing of the money and the issuing of the bonds as two separate acts, and merely requires that the bonds be issued to secure the money which may have been already borrowed.

In other words, this interpretation of the section makes it mean that the execu-

tion and delivery of the note may lawfully precede the issuance of the bonds; but that the bonds must be issed in any event; so that the subsequent issue of the bonds is a condition of or limitation upon the power of the commissioners to issue the note.

Therefore, as already suggested, commissioners should be able, in my judgment, to secure money for their immediate needs by issuing notes themselves, conditioned upon the subsequent issue of bonds. Of course, the lender upon such an instrument of indebtedness would do well to look into the ability of the county to float its bonds when issued.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

743.

ARTICLES OF INCORPORATION—"BLUE SKY" LAW—INSURANCE COMPANIES—COMMISSIONS—CAPITAL STOCK.

The superintendent of insurance as the commissioner for the purposes of the "blue sky" law, may issue his certificate upon the payment of the proper fees to the incorporators of an insurance company other than life, who have entered into a contract with one or more persons to pay them commissions for the sale of its stock. Such commissions together with other organization expenses, coming within the fifteen per cent. prescribed by section 12 of the "blue sky" law.

COLUMBUS, OHIO, February 7, 1914.

HON. EDMOND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 22nd, in which you state that you have been informed that the secretary of state has invited the opinion of this department upon the question as to whether or not a certificate of subscription of ten per cent. of the authorized capital stock of an insurance company, other than life, is required or permitted to be filed with the secretary of state. Your letter requests that, in the event that my holding in answer to the secretary's question is that such a certificate may not be filed, I advise you upon the following questions:

> "1. May the incorporators of an insurance company, other than life, enter into a valid contract to pay commisions for the sale of stock of such company prior to the time when all of the original capital stock of such company has been sold and the organization referred to in section 9515, General Code, completed?
>
> "2. In view of the provisions of sections 12, 14, 16 and 19 of the "blue sky" law, is the superintendent of insurance in a proper case authorized to issue his certificate provided for in such section 16 to such embryo insurance ccmpany, where it apepars that a contract to pay commissions for the sale of its stock are outstanding or contemplated, and where such commissions, together with other organization expenses, come within the limit of fifteen per cent.?

I enclose herewith copy of an opinion rendered to the secretary of state, in answer to his question, to which you refer. You will observe that I have held therein that a certificate of subscription of ten per cent. of the authorized capital

stock, such as that referred to in section 8633, General Code, may not be filed in the process of the organization of an insurance company, other than life, subject to the provisions of sections 9512 et seq., General Code.

It therefore devolves upon me to answer your questions. Considering the first of them, I quote section 9513, General Code, which is as follows:

> "The persons named in the articles of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they deem proper, and shall keep them open until the full amount specified in the articles is subscribed."

The powers of those who are designated by the statute as "commissioners" to open books for the subscription of stock of an insurance company, other than life, are identical, so far as the statute itself is concerned, with those of the incorporators of an ordinary corporation for profit before ten per cent. of the authorized capital stock of such a corporation has been subscribed. On this point section 8630, General Code, provides as follows:

> "The persons named in the articles of incorporation of a corporation for profit, or a majority of them, shall order books to be opened for subscriptions to the capital stock of the corporation at such time or times and place or places as they deem expedient."

It is of course apparent that even in the case of an ordinary corporation for profit there must be a time when the "corporation" consists of its incorporators, that time being the interval between the issuance of the certificate of incorporation and the time when one-tenth of its authorized capital stock is subscribed. In this respect an insurance company, other than life, differs from an ordinary corporation only in that the interval during which the condition above referred to exists is prolonged until the *entire* capital stock of the corporation is subscribed.

Both the statutes last above cited refer to the "opening of books" and constitute the incorporators commissioners for that purpose. The assumption of the legislature seems to have been that, upon notice being given that books are open, the investing public would at once, without further solicitation, visit the place mentioned in the notice, at the time therein mentioned, and subscribe for stock in the new enterprise. But in the practical sense, if there ever was a time when capital was as anxious as this to find investment, that time has certainly passed by. With the exception of such corporations as amount to little more than incorporated partnerships and individuals solicitation is necessary, in order to secure subscriptions to the capital stock of an embryo corporation.

Obviously, whatever solicitation is found to be necessary prior to the time when complete organization may take place falls properly within the province of the "commissioners of subscription."

Practically this has always been so; and in the usual course of the organization of a company the function known as "promotion" has found its necessary place.

So the authorities have come to recognize, out of the very necessities of the case, the right of what are known as the "promoters" of a corporation to make contracts and incur liabilities, primarily their own but subject to ratification by the corporation when fully organized, and when so ratified, either especially or by mere acceptance of benefits, ultimately binding upon the corporation itself. See generally,

Thompson on Corporations, Vol. 1, Chapter 4.
Commercial Company vs. Miller, 1 C. C. n. s. 569.
Bank vs. Fence Post Company, 3 C. C. n. s. 372.
Third Ward Association vs. Latze, 11 Bull. 285.

Building Association vs. Zahner, 10 Am. L. Record, 181, 6 Bull. 389.

However, I am of the opinion that the incorporators of an insurance company other than life have definite corporate powers greater than those of mere promoters. Section 8627 of the General Code provides as follows:

> "Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with: also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization."

That this section applies to insurance companies, other than life, is disclosed by the legislative history abstracted in the opinion to the secretary of state, copy of which is enclosed herewith. That is to say, it is one of the provisions not at present found in the insurance code, and which is a necessary provision in the sense that without it the exact status of the incorporators as to power to open books etc., is not provided for; and when reference is had to the legislative history mentioned it appears that the original insurance code provided that the incorporators should have the same powers and be subject to the same duties and liabilities as provided with respect to incorporators of a general corporation. The conclusion necessarily follows, I think, that a corporation, as such, comes into existence as soon as the articles of incorporation are filed and is composed of the incorporators. The corporation at this stage of the proceeding has the general power to contract and be contracted with, etc., but only for the specific purposes for which a corporation may exist at this stage of its organization. That is to say, it may not do business in the technical sense, nor pursue the objects of its specific incorporation; but with respect to the doing of its constituent acts and all those necessary to complete its organization, it enjoys the corporate franchise and the powers flowing therefrom.

I am therefore of the opinion that the incorporators of an insurance company, other than life, after the filing of the articles of incorporation, but before the complete organization of the corporation as a business company, do possess all the powers that the corporation has with respect to securing subscriptions for its capital stock. That being the case, I am of the opinion that a contract of the kind mentioned in your first question is a valid one and binds not only the "commissioners" in their personal capacity, but also the corporation itself when organized.

Your second question requires consideration of some of the provisions of the "blue sky" law. Section 12 is prohibitory in character; it provides in part as follows:

> "No person or company shall, for the purpose of organizing or promoting any insurance company * * * dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription * * * shall be in writing, and contain a provision substantially in the following language:

"'No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of ---- per cent. of the amount actually paid upon separate subscriptions * * * and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers * * * and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority.'

"The amount of such * * * expenses shall in no case exceed fifteen per cent. of the amount actually paid upon the subscription.

"Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided by (certain) sections of the General Code until such company has been licensed as aforesaid."

Section 14, also mentioned by you, refers to and operates upon the "dealer." This term is defined in section 2 of the act as follows:

"The term 'dealer,' as used in this act, shall be deemed to include any person or company * * * disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever; except (here follow certain exceptions of no interest in this connection)."

The same section also defines the term "company" as follows:

"any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized."

Coming now to section 14, its operative provisions are as follows:

"No dealer, for the purpose of organizing or promoting any company * * * shall, within this state for or on behalf of the issuer or any underwriter thereof, dispose or attempt to dispose of any such security unless such dealer be licensed as provided herein and until, together with the filing fee of five dollars, there be filed with the 'commissioner' the application of such issuer for the certificate provided for in section sixteen of this act, and, in addition to the other information hereinbefore required (here follow certain items of information, some of which could only emanate from a company already organized. However, these items of information so required cannot, in my judgment, be held to alter the meaning of the provision already quoted from section 14, which clearly includes within the purview of that section dealers engaged in promoting a company before its organization, as well as dealers existing in the floatation of its securities after organization)."

Before going further it is necessary to define the phrase "dispose of securities," as used in section 14. This is also defined in section 2, as follows:

"'dispose of' shall be construed to mean * * * obtain subscription for."

Therefore, it is apparent that section 14 applies, although in reality there is

no "security" in existence during the technical "promotion" of a company. In other words, while the statute uses the phrase "dispose of securities," this phrase is intended to include obtaining subscriptions for securities to be thereafter issued.

The word "securities" is defined by section 1 of the law so as clearly to include stocks.

You next refer to section 16. This section authorizes the issuance of a certificate to the applicant who applies under section 14. It contains certain provisions which are somewhat inconsistent with some of those of section 14, in that it empowers the "commissioner" to make an examination of the "issuer of securities," and authorizes him to issue his certificate only in the event that "he shall find that the law has been complied with, and is satisfied that said company is solvent, that its business is properly and legitimately conducted, and that its proposed disposal of its securities or other property is not on unfair terms." No such investigation of the "issuer" could be had while the "issuer" is not yet in existence as such; clearly, no investigation of solvency or method of conducting business could be made as to a corporation still in the embryonic stage; yet section 14 clearly authorizes an application on behalf of a dealer engaged in organizing or promoting a company, as well as on the part of one engaged in assisting in the floatation of the securities of an organized company. Therefore, I am of the opinion that not all of the conditions in section 16 apply universally, but that where the certificate is sought by a promoter or by a dealer operating in behalf of promoters, the "commissioner," if he finds that the law has been complied with, and is satisfied that the business venture is a sound one, and that the proposed disposal of securities is not on unfair terms, may issue a certificate upon the payment of a fee without satisfying himself of the solvency of any company as a going concern, or the proper and legitimate conduct of its business. To hold otherwise would deprive the first provision of section 14, and many of the other provisions of the act, including some of the definitions in section 2, of all meaning whatsoever, and would limit the issuance of certificates to those engaged in assisting in the floatation of the stock of an organized company.

Section 19, to which you also refer, provides that:

> "If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions 1 and 2, division 3, title IX of the General Code (evidently the legislature contemplated title IX of *part second*) the 'commissioner' for all the purposes named in sections 14 and 16 of this act shall be the superintendent of insurance of this state * * *."

This section operates, in my judgment, upon a situation such as that concerning which you inquire, because, although the "issuer" in the case of the promotion of a company is not yet in existence, yet, the corporation to be formed in the future is for all the purposes of the act the "issuer." For the promoters, while they are securing subscriptions, have no authority whatever as a matter of course to issue any security; that must be done by the corporation when organized.

I am therefore of the opinion that when the securities to be sold are those of a corporation yet to be organized, which when organized will be "a company * * * organized * * * to make any insurance named, etc., as provided in section 19, the "commissioner," for the purposes of section 14 and 16, supra, is the superintendent of insurance.

Considering all the sections above quoted and referred to, together, I am of the opinion that the superintendent of insurance, as the "commissioner" for the purposes of the "blue sky" law, may issue his certificate upon the payment of the proper fee

to the incorporators of an insurance company, other than life, who have entered into a contract with one or more persons to pay them commissions for the sale of its stock; such commissions, together with other organization expenses, coming within the fifteen per cent. prescribed by section 12 of the act.

Inasmuch as the incorporators constitute the company during its embryonic stage, the certificate may be issued to or with respect to the company as such, using the corporate name.

Only in the way which I have outlined could the "blue sky" law operate upon or apply to the securing of subscriptions to the capital stock of an insurance company, other than life; and as the intention to make its provisions applicable to the securing of such subscriptions is very clear, I have reached the conclusion that whatever inconsistencies and verbal difficulties may be encountered in the language of the "blue sky" law must be subordinated to that controlling intention.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

744.

CONVEYANCE OF PUPILS IN A SPECIAL DISTRICT—BOARD OF EDUCATION—TRUANT OFFICER—COMPULSORY ATTENDANCE AT SCHOOL—SPECIAL DISTRICT.

A board of education of a special school district, through its truant officer, can compel pupils of a special school district who reside more than one and one-half miles from the school in such special district to attend school of such district, without providing conveyance therefor, provided that such pupils are within the age limitation fixed by section 7763 of the General Code, and provided they are not excused from attending school in the manner provided by said section.

COLUMBUS, OHIO, January 22, 1914.

HON. JAMES A. TOBIN, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Under date of November 8, 1913, you submitted to this department a request for an opinion, as follows:

> "The New Salem special school district was formed from the village and outlying territory, including part of subdistrict No. 8, after which the school in said subdistrict was abandoned. Under section 7763, General Code, as amended in 103 O. L., page 898, can the board of education (the truant officer) of such special district, compel pupils residing more than one and one-half miles from the school in such special district, to attend that school, without providing conveyance therefor?"

In answer to your inquiry, I desire first of all to consider and comment upon all sections of the school code which bear upon the matter of providing for conveyance of pupils of the respective school districts of the state.

Section 7730 of the General Code, provides for the suspension of schools in subdistricts of township districts and for the conveyance of pupils of such districts, as follows:

> "The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board *must* provide for the conveyance of the pupils re-

siding in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. *Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expenses thereof to be paid out of the funds of the district.* * * *"

Section 7731 of the General Code, provides for the centralization of township schools, and further provides that when transportation of pupils is provided for, conveyance must pass within at least one-half mile of the respective residences of all pupils, as follows:

"No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Section 7748 of the General Code, provides that in certain instances, the board of education must pay the tuition of all successful applicants who have complied with the provisions of said section and who reside more than four miles from the high school provided by the board, by the most direct route of public travel, when such applicants attend a nearer high school, or, that such board, in lieu of paying such tuition, may pay for the transportation of the pupils living more than four miles from such school, as follows:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupils for more than four school years; except that it *must pay the tuition* of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or *in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school,* maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township

or special district in this state, before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate."

Section 7733 of the General Code, provides that a board of education of any village school district may at its option provide for the conveyance of the pupils of the district or any adjoining district, to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district wherein such pupils reside, as follows:

"At its option, the board of education in any village school district *may provide for the conveyance of the pupils of the district or any adjoining district,* to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district in which such pupils reside. But such boards as so provide transportation, shall not be required to transport pupils living less than one mile from the school house or houses."

Section 7732 of the General Code, provides that boards of education of special school districts *may provide* for the conveyance of the pupils of such district to the school or schools of the district or to a school of any adjoining district, as follows:

"Boards of education of special school districts *may* provide for the conveyance of the pupils of such districts to the school or schools of the districts or to a school of any adjoining district, the expense of such conveyance to be paid from the school fund of the special school districts. But boards of education of such districts as provide transportation for the pupils thereof, shall not be required to transport pupils living less than one mile from the school house; and such boards of education shall not discriminate between different portions of said districts or between pupils of similar ages or residing at similar distances from the school house."

If the legislature had intended to make the conveyance of pupils in special school districts mandatory, it would have specifically provided that such conveyance *"must"* be provided, as in the case of section 7730 of the General Code, supra. Or, the legislature would have mandatorily required that one of two things *"must"* be done by the board of education, such as either paying the tuition of pupils residing in its district, who live over a certain distance from the school provided and who attend a nearer school than the one provided in their own district, or provide for the payment of the transportation of such pupils to its own school in lieu of paying such tuition, as in the case of the provisions contained in section 7748 of the General Code, supra.

Instead of making the conveyance of pupils mandatory upon the boards of education of special districts, the legislature has seen fit to make it only directory, and seems to special districts, the legislature has seen fit to make it only directory, and seems to have left the matter of such conveyance somewhat within the discretion of the boards of education of special school districts by merely providing that such boards *"may"* provide for conveyance of the pupils of such districts. In other words, the legislative intent seems to be that the conveyance of pupils in special school districts is optional with the boards of education of such district, the same as it is optional with the boards of education of village districts, as provided by section 7733 of the General Code, supra.

Section 7763 of the General Code, as amended in 103 O. L., p. 898, mandatorily requires that every parent, guardian or other person having charge of any child

between certain specified ages, *"must"* send such child to a public, private or parochial school, for a certain specified time, as follows:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fifteen years of age if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having a superintendent or by the principal of the private or parochial school, upon satisfactory showing, either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section."

The conveyance of pupils residing in special school districts being optional with the board of education of special school districts, as provided by section 7732 of the General Code, supra, and the attendance of pupils between certain ages being mandatorily required by the provisions of section 7763, as amended in 103 O. L., p. 898, supra; it is therefore my opinion, in direct answer to your inquiry, that a board of education of such special school district, through its truant officer, can compel the pupils of such school district, who reside more than one and one-half miles from the school in such special district, to attend the schools of such district without providing conveyance therefor, provided that such pupils are within the age limitation fixed by said section 7763, and provided that they are not excused from attending school in the manner provided by said section; and provided further that such pupils are not attending a school in their own district wherein they reside, or a school in an adjoining district which is nearer than the school to which they are assigned in their own district wherein they reside, as provided by section 7735, G. C., as follows:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

745.

INDETERMINATE SENTENCE—PAROLE PRISONERS—FORMER IMPRISONMENT IN A PENAL INSTITUTION—INDETERMINATE SENTENCE LAW.

Where a prisoner has served an indeterminate sentence under the new indeterminate sentence law, and such prisoner has served a previous term in a penal institution, the board of administration cannot parole such prisoner, although the board may, by virtue of section 2160 grant to any such prisoner an absolute release at any time between the expiration of the minimum and maximum terms provided for by law for the crime for which such prisoner was convicted.

COLUMBUS, OHIO, January 15, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of December 20, 1913, asking as follows:

"Can the Ohio board of administration parole a prisoner serving an indeterminate sentence under the new indeterminate sentence law, when such prisoner has served a previous term in a penal institution?"

The indeterminate sentence law (103 O. L., 229) reads:

AN ACT

"To provide for indeterminate penitentiary sentences and to repeal section 2166 of the General Code.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. That section 2166 of the General Code be amended to read as follows:

"Section 2166: Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced, and, for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. If through oversight or otherwise, a sentence to the Ohio penitentiary, should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section.

"Section 2. That original section 2166 of the General Code is hereby repealed."

This section is substituted for section 2166, chapter 2, division 4 of the General Code entitled "penal institutions."

Inasmuch as this law provides that "all terms of imprisonment of persons

in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter" we must look to the other provisions of the chapter to find in what manner the board may act.

Section 2160 of the chapter provides:

> "The board of managers shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment, and their arrest and return to custody within the penitentiary. A prisoner shall not be released, conditionally or absolutely, unless, in the judgment of the managers, there are reasonable grounds to believe that his release is not incompatible with the welfare of society. A petition or application for the release of a prisoner shall not be entertained by the board. A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum term provided by law for the crime of which he was convicted; and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense."

Section 2169 provides:

> "The board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted and not previously convicted of felony or not having served a term in a penal institution, or a prisoner under sentence for murder in the first or second degree having served such sentence twenty-five full years, may be allowed to go upon parole outside the buildings and enclosures of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner."

If the words "conditional release" used in section 2160 do not mean "parole," the question you ask would be easily answered in the affirmative. But a careful reading of the statutes has convinced me that these words mean one and the same thing, and even without such investigation it would be hard to imagine a conditional release that would not be a parole, or a parole that would not be a conditional release. So in the discussion of this question I shall consider the two words as synonymous.

Sections 2160 and 2169 were originally sections 5 and 8 respectively of "an act relating to the imprisonment of convicts in the Ohio penitentiary and the employment, government and release of such convicts by the board of managers." These sections are found on pages 74 and 75 of volume 81, Ohio Laws, and read:

> Section 5. "Every sentence to the institution of a person hereafter convicted of a felony, except for murder in the second degree who has not previously been convicted of a felony and served a term in a penal institution, shall be, if the court having said case thinks it right and proper to do so, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced, may be terminated by the board of managers as authorized by this act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which the prisoner was convicted.

Section 8. "The said board of managers shall have power to establish rules and regulations under which prisoners sentenced to imprisonment under section 5 of this act, may be allowed to go upon parole outside of the buildings and enclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the enclosure of said institution; and full power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, certified by its secretary, shall be a sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process."

Section 8, above quoted, was amended in 82 O. L., p. 236, to read as follows:

"That said board of managers shall have power to establish rules and regulations under which any prisoner who is now, or hereafter may be, imprisoned under a sentence other than for murder in the first or second degree, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously been convicted of a felony, and served a term in a penal institution, may be allowed to go upon parole outside of the buildings and enclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the enclosure of said institution."

It will be noted that section 5 of the act withheld from the court the power to impose an indeterminate sentence in cases where the prisoner had been "previously convicted of a felony and served a term in a penal institution," and that section 8, as amended in 82 O. L., p. 236, made such prisoner ineligible for parole. For this reason, at that time, the question you now ask could not have arisen, since a prisoner previously convicted could not have been given an indeterminate sentence under section 5, nor paroled under section 8 as amended.

Section 5 of the act referred to appears in the Revised Statutes in practically the same form as when originally enacted, and section 8 appears in the revised statutes in the same form as amended in 82 O. L., p. 236, above quoted.

These sections were carried into the General Code by the codifying commission as sections 2160 and 2169, but the codifying commission omitted entirely that part of section 5 which conferred on the courts the power to impose general sentences. The part omitted by the codifying commission read:

"Every sentence to the penitentiary of a person hereafter convicted of a felony, except murder in the second degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary."

So that in the General Code we find section 2160 providing for the parole and absolute release of prisoners serving general or indeterminate sentences, but nowhere in the code do we find any authority for the court to impose such sentences, nor any mention of any class of prisoners being precluded from receiving such sentences.

But in 103 Ohio Laws, page 29, the legislature again conferred on the courts

the power to impose such sentences, and made it compulsory for the court to so sentence all prisoners regardless of the fact that they may have been previously convicted, and said "all terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, as authorized by this chapter."

This they did with sections 2160 and 2169 before them, section 2160 providing that all prisoners who should be given indeterminate sentences could be paroled or absolutely released by the board, and section 2169 providing that no prisoner could be paroled who had previously been convicted of a felony or had served a term in a penal institution. The question now is—did the legislature, when they declared in 103 O. L., in the face of these two provisions that all sentences to the penitentiary, except for treason and murder in the first degree, must thereafter be indeterminate, mean to allow all prisoners so sentenced to receive paroles by virtue of section 2160, or only those prisoners so sentenced not previously convicted of a felony in accordance with section 2169?

Under section 2160 the board can absolutely release such second term prisoner sentenced to an indeterminate sentence any time between the expiration of the minimum and maximum term provided by law for the crime of which he was convicted, and in the absence of any further action on the part of the legislature, it might be held that in enacting the indeterminate sentence law (103 O. L., 29) it was the legislative intent to make all prisoners sentenced under that law eligible to parole under section 2160, regardless of the fact that some may previously have been convicted of a felony. Such holding it would seem would arrive at the real intention of the legislature and harmonize with the spirit of the indeterminate sentence law, for surely if the board has power to absolutely release a prisoner so sentenced, it should have the power to conditionally release, in order to determine after a trial whether the prisoner has reformed to such an extent as to warrant his absolute release.

But on April 14, 1913, about a month and a half after the indeterminate sentence law was passed, the legislature repealed section 2169 of the General Code and re-enacted it in a different form, making provision for the paroling of prisoners sentenced for murder in the second degree, and granting to the Ohio board of administration the power to designate geographical limits to which a paroled prisoner may be confined. This action on the part of the legislature settles the question beyond a doubt and compels the conclusion that the legislature intended, in enacting the indeterminate sentence law, to withhold the parole privilege from a prisoner sentenced under that law when such prisoner had previously been convicted of a felony and served a term in a penal institution, for when they repealed section 2169 and re-enacted it in a different form, surely if they intended that all prisoners were to be paroled they would have taken advantage of such an opportunity to remove the clause withholding the privilege of parole from prisoners previously convicted. The fact that they did not do this is, in my mind, confirmatory of their intention in enacting the indeterminate sentence law, to withhold such parole privilege from prisoners previously convicted, and it is, therefore, my opinion that the Ohio board of administration cannot parole any prisoner sentenced under the indeterminable sentence law passed February 13, 1913, when such prisoner has previously been convicted of a felony, or has served a term in a penal institution, although the board may, by virtue of section 2160 grant to any such prisoner an absolute release at any time between the expiration of the minimum and maximum terms provided by law for the crime for which such prisoner was convicted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

746.

INDETERMINATE SENTENCE LAW—MAXIMUM AND MINIMUM SENTENCE—POWERS OF PAROLE BOARD—CONCURRENCE SENTENCES.

Under the indeterminate sentence law, it was the intention of the legislature to treat prisoners serving concurrent sentences as serving one term. The only way this can be done is to add the minimum and maximum terms for the different felonies and treat the prisoner as serving one term for the different felonies of which he was convicted, with such combined minimums and maximums as the limiting one which the board may act.

COLUMBUS, OHIO, December 13, 1913.

HON. P. E. THOMAS, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 20th, 1913, inquiring substantially as follows:

> "Under the indeterminate sentence law how are we to enter a prisoner on our records, and what is his maximum and minimum time in so far as the parole board is concerned in each of the following cases:
>
> "A prisoner is sentenced to serve two terms for two different crimes, for which the maximum and minimum penalties provided by statute differ, the sentence providing one term is to begin at the expiration of the other; for example, John Smith is sentenced to an indeterminate sentence for burglary from one to fifteen years, and an indeterminate sentence for perjury from three to ten years, the term in one case to begin at the expiration of the other.
>
> "2. A prisoner is sentenced for two terms for two different crimes, for which the maximum and minimum penalties provided by statute differ, but nothing is said in the commitment paper in regard to one sentence beginning at the expiration of the other; for example, William Jones is sentenced to an indeterminate sentence from one to fifteen years for burglary, and an indeterminate sentence from three to ten years for perjury, nothing being said in the sentence in regard to when the terms shall commence."

This department has heretofore held that where the court sentenced a prisoner to two or more terms, one to begin at the expiration of the other, the terms ran consecutively, but that in the absence of such provision in the sentence the two terms ran concurrently.

The new indeterminate sentence law (103 O. L., p. 29) reads:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced, for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms

of all the felonies for which he was sentenced and, for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. If, through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

Particular attention is called to that part of the above section which reads as follows:

"If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced, and for the purposes of serving one continuous term of imprisonment."

In the use of these words the legislature has, I think, taken away from the courts of this state the power to impose concurrent sentences to the Ohio penitentiary, and in every instance when a prisoner is sentenced to the penitentiary for two or more felonies, the Ohio board of administration may, if they see fit, cause him to serve the aggregate of the maximum terms for all the felonies of which he was convicted.

This is clear from a careful reading of the statute, and is in harmony with the spirit of the indeterminate sentence law the object of which is to vest in the prison authorities the power to determine when a prisoner can safely be released.

While the statute clearly states that when a prisoner is sentenced for two or more felonies his term of imprisonment may equal the aggregate of the maximum terms, no mention is made of when the prisoner becomes eligible for release, and you ask to be advised as to the earliest date upon which the board may order his discharge.

Inasmuch as the legislature has made provisions for combining the maximum terms in such cases, and has said that the prisoner "shall be held to be serving one continuous term of imprisonment," I think it was clearly the intention to treat all such terms so imposed as one term, and the only way in which this can be done is to add the minimum and maximum terms for the different felonies and treat the prisoner as serving one term for the different felonies of which he was convicted, with such combined minimums and maximums as the limits within which the board may act.

Applying this rule in the specific cases referred to by you, it is my opinion that John Smith must serve not less than four years and not more than twenty-five years, and Wm. Jones the same, there being no such thing as concurrent sentences under the new indeterminate sentence law in the state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

747.

BANKS AND BANKING—PRIVATE BANKS—STOCKS—POWER OF A PRIVATE BANK TO HOLD STOCK IN A STATE BANK.

A private bank has the right to hold stock in a state bank. There is no doubt but what the state legislature could pass laws to prohibit private banks from purchasing shares of stock in state banks and other corporations, but so far no legislation has been enacted along this line. There is nothing to prevent a private bank from so dealing in the stocks of other banks and corporations.

COLUMBUS, OHIO, January 7, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of October 10, 1913, in which you ask my opinion as follows:

> "Has a private bank the right to hold stock in a state bank? The state bank laws prohibit a state bank from holding stock in another state bank."

Section 8683, General Code, applying to corporations generally, provides:

> "A private corporation also may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, domestic or foreign."

As to banks, however, section 9761, General Code, forbids any commercial bank, savings bank, safe deposit company or trust company to be the purchaser or holder of shares of its own stock, unless the same be purchased or taken as security to prevent loss upon a debt previously contracted in good faith, while section 9765, General Code, in directing the manner in which the funds of a savings bank may be invested, provides:

> "No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter."

Section 9684, General Code, provides:

> "* * * No banking company shall be the holder or purchaser of any portion of its capital stock, or the capital stock of any other incorporated company, unless such purchase be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure its payment, independent of any lien on such stock. * * *"

This section just noted is a part of the free banking act, (49 O. L., 41, sec. 12); and it has been held, though not with respect to this question, that the provisions of this free banking act apply only to banks organized thereunder.

> "State vs. Gibbs, 7 N. P. n. s., 345, 351.
> "Coppock vs. Kuhn, 3 C. C., 599, 602."

Whatever may be the correct construction as to the application of section 9684, it is certain that the term "banking company," as therein used, cannot be construed to cover private banks, whether conducted by an individual or a partnership.

"State ex rel. vs. Kilgour, 8 N. P., n. s., 617."

The precise question here is whether or not a private bank has the right to own and hold stock in a state bank. In the consideration of this question it is to be borne in mind that, excepting the right to issue bills to circulate as money, the business of banking is not a franchise eminating from the state, but a common law privilege belonging to all citizens generally.

"Bank of California vs. San Francisco, 142 Cal., 276.
"State vs. Richcreek, 167 Ind., 217.
"Coppock vs. Kuhn, supra."

Of course, the agency of a corporation, in the conduct of banking business, is a franchise and such corporation has only such powers as are expressly or impliedly given it in the necessary and proper conduct of its business. And as to banking business conducted by private persons, either as individuals or partnerships, it is recognized that the business is one so vitally affecting the welfare of the people, that the state, in the exercise of the police power, may make reasonable and proper regulations as to the conduct of the business; (State vs. Richcreek, supra.) and with respect to the question at hand, the legislature would undoubtedly have power to place limitations on the manner in which the funds of private banks as such might be invested, and prohibit the purchase therewith of shares of stock in state banks or other corporations. The fact remains, however, that no such regulation has been attempted, and there is nothing to prevent the owners of private banks investing bank funds in such shares. The depositors in a private bank undoubtedly have some interest as to how the funds so deposited are invested by the bank, but as a matter of law, such depositors occupy towards the bank only the position of general creditors. As general creditors they have not, of course, any lien or charge on the funds in the bank, nor any such interest therein as would affect the right of the bank to invest the same if it saw fit.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

748.

UNION CEMETERY—TRUSTEES AND COUNCIL ACTING AS A JOINT BOARD— VILLAGE CEMETERY—CEMETERY TRUSTEES.

Without additional legislation, the trustees of townships and council of municipalities, acting as a joint board in the control of union cemeteries, have the same power and duties for managing and controlling such cemeteries that a city or village has in controlling its own, and all difficulties arising because of the abolition of the office of cemetery trustee may be cared for under the provisions of section 4189, *General Code, as amended, with the aid of section* 4193, *General Code.*

COLUMBUS, OHIO, February 5, 1914.

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

GENTLEMEN:—I have your inquiry as to the status of union cemeteries, since the passage of the act of April 18, 1913, 103 O. L., 272. I also have a letter from E. E. Jackson, village solicitor of Rockford, Ohio, one from W. P. Meeker, of Greenfield, Ohio, and one from A. J. Layne, city solicitor of Ironton, Ohio, upon the same subject, and all of which go to the effect of the above mentioned act which amends section 4189 and repeals sections 4184 and 4185 of the General Code.

The effect of this enactment and repeal is to abolish boards of trustees of union cemeteries and place the control and management of such cemeteries in the hands of the trustees of townships and council or councils of municipal corporations.

Said section 4189 as amended, reads:

> "The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

Attention is first called to that part of the language therein:

> "and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

"Corporation" in this connection must be construed as meaning a municipal corporation and to include both cities and villages. The evident intention of this act was to abolish joint boards of cemetery trustees and at the same time, by reference, grant to the township trustees and councils of municipalities in charge of union cemeteries, all the powers and duties possessed by either cities or villages, in regard to the same subject. Such being the case, and the language appearing to be apt and clear, the question arises as to the manner in which this grant may be carried out.

Section 4193, General Code, reads:

> "The trustees of such township or townships, or the council or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose

of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

Section 4201, General Code, reads:

"The clerk of the corporation shall record in a book provided for that purpose, a plat of all grounds for cemetery purposes laid out into avenues, walks, paths, and lots, and he shall execute to the purchasers of lots such conveyances as may be necessary to carry into effect the contracts of sale. The conveyance shall, at the person receiving it, be recorded in a book to be kept for that purpose, by the clerk of the corporation."

This last section was first enacted on May 7, 1869, when our municipal laws were first codified and was found therein as section 391 (66 O. L., 214); was applicable to municipal corporations, whether cities or villages, and was at that time a perfectly clear provision, but the change of other laws since then, the providing for clerks in villages and clerks of council and auditors in cities, and various changes of grades of cities and officers therein, makes the application of this section of considerable difficulty at this time. When originally enacted, as above stated, it was applicable to all classes of municipalities and clearly so, and the fact that it has not been amended nor changed in language, affords greater aid in its construction than is the position in which it was placed by the codifying commission. I therefore conclude that it is to be construed in the light of its original language, independent of its position in the code.

Again referring to section 4193, General Code, attention is called to the following language thereof:

"for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

Under favor of this section and in virtue of the power granted in section 4189, as amended, all joint boards may create a superintendent, manager, board of trustees, or such other officer or officers as it deems best and proper for the government of the cemetery and the application of all moneys belonging to such cemetery, and including the selection of a treasurer, provision for his bond, and the loaning, investment, reinvestment of moneys belonging thereto.

At this point I deem it proper to suggest because of having learned that some joint boards have selected some of their own members to act as superintendents, trustees, managers and the like, that the doing so is very bad policy, to say the least of it, and in no instance should any member of this joint board be appointed or selected as one of the persons to manage or control the cemetery, sell lots, receive, disburse, handle funds, or to do anything for which he should report to or be held accountable by such joint body.

It has been suggested that members of a village or city council may not act as members of this joint body on account of the provisions of sections 4207 and 4218, General Code, wherein it is provided that members of council shall not hold any other public office or employment except that of notary public or member of the state militia and then when a member of council ceases to possess any of the prescribed qualifications, he shall forfeit his office.

The answer to this is that under the provisions of section 4189, added duties are prescribed for councilmen as such, in the case of joint or union cemeteries, the same and not different from duties of councilmen with regard to city or village cemeteries. Or, to state it differently, council of cities or villages having union cemeteries, are permitted and required to act in conjunction with township trustees in managing and controlling them, and there is neither an added duty, office or employment as to council, but rather permission is granted for the township trustees to act with them, and they with the trustees, in managing and controlling union cemeteries, or, such explanation is not conclusive or satisfactory, the act of April 18, 1913, (103 O. L., 272) as the later enactment, is special and must therefore be read as an exception to or modification of the general section prescribing the qualifications of councilmen and the objection is answered.

I am, therefore, of the opinion that without additional legislation, the trustees of townships and council of municipalities, acting as a joint board in control of union cemeteries, have the same powers and duties in managing and controlling such cemeteries that a city or village has when controlling its own and that any and all difficulty arising or supposing to arise because of the abolition of the office of cemetery trustees, may be readily cared for under the provision of section 4189, as amended, with the aid of section 4193, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

749.

COUNTY COMMISSIONERS OFFERING A REWARD—TERMS OF SUCH OFFER—TO WHOM AWARD MAY BE PAID.

Where a felonious assault is made upon a man rendering him unconscious, and the county commissioners offer a reward for the capture of the man making the assault, and the injured man after regaining consciousness gives information which leads to the capture of the person being sought, the county commissioners, if they find that the person furnishing the information acted in good faith and has complied with the terms of the offer made, may give him the award.

COLUMBUS, OHIO, January 20, 1914.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your letter of January 2d, in regard to the claim of Fred Weinert, of $100.00, being the amount of a reward offered for information leading to the arrest of a person who, on May 10, 1913, made a felonious assault on the claimant.

The facts are—that the assault was a very brutal one, Mr. Weinert was rendered unconscious and so continued for several days, and as I understand it, until after the commissioners offered the reward; upon his revival he furnished the information, the person he charged was arrested, indicted and plead guilty, and is now under sentence to the penitentiary for the offense.

That Weinert furnished the information for which the reward was offered is not questioned, but I am not advised as to whether at the time of furnishing the information, he had any knowledge of the reward having been offered. Consequently, the matter will be considered upon the assumption that at the time of giving the information, Weinert had no knowledge of the reward having been offered.

"According to the weight of authority, the person rendering the service must have knowledge of the offer in order to be entitled to the reward. 34 Cyc., 751."

A careful examination of all available authorities will sustain the above stated proposition, provided number is considered as determining weight as against a consideration of the character of the courts, their opinions and reasoning.

The statute under which this reward was offered, reads:

"When they deem it expedient, the county commissioners may offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of felony, and on the conviction of such person, pay it from the county treasury, together with all other necessary expenses, not otherwises provided for by law, incurred in making such detection or apprehension. When they deem it expedient, on the collection of a recognizance given and forfeited by such person, the commissioners may pay the reward so offered, or any part thereof, together with all other necessary expenses so incurred and not otherwise provided for by law."

This, and the section following, in relation to the detection and apprehension of horse thieves, are so worded as to be susceptible of the construction that the reward may only be offered for the detection or apprehension of some known person. Inasmuch as they use the language "any person *charged* with a felony," this might involve knowledge of the identity of the criminal before an offer could be made and would not authorize the doing of that which is the primary object in both sections, that which is most frequently called into action and but for which there would be no call to use the word "detection."

The Century dictionary defines "detection" as follows:

"The act of detecting, finding out, or bringing to light; a discerning; the state or fact of being detected or found out; as, the *detection* of faults, crimes, or criminals."

The fact is, this section has, in practice, always been construed as though it read with the words "to be charged" included after the word "charged" and before the words "with" or "convicted of a felony." In order to avoid the question as to whether matters of this kind rest in contract and accepance must be with knowledge of the offer, the case of Williams vs. Carwardine, 4 Barn. & Adolph, 621, has been given various constructions, and in a note found in 9th L. R. A., N. S., 1057, it is said:

"Following the supposed doctrine of Williams vs. Carwardine, a few cases have held that one may earn the reward although he performed the service without knowledge of the offer.

"Drummon vs. U. S., Ct. Cl., 356.
"Eagle vs. Smith, 4th Houst. Del., 293.
"Dawkins vs. Sappington, 26 Ind., 199.
"Everman vs. Hyman, 26 Ind., App., 165.
"28—N. E., 1022.
"84 Am. St. Rep., 284."

The trouble with this statement lies in the fact that what is stated as the supposed doctrine of Williams vs. Carwardine is the true doctrine of that case when it is more than casually considered.

The informant in that case had knowledge of the offer beyond cavil; the prevalent idea then, and now for that matter, was that the giving of the information, in order to justify recovery, must be with knowledge of the offer and with a view of getting it. The defense in the Carwardine case assumed knowledge on the part of the claimant, but insisted that the giving of the information was not done in acceptance of the offer as made, nor in compliance with its terms and conditions, but was based on another and very different motive. The jury found especially, under the direction of the court, that the giving of the information which was voluntary, was not induced by the offer of the reward, but by other motives. The pleading set forth a reliance on the promise of reward. The plea was a general issue.

The claim was made that as the plaintiff was not induced by the offer of the reward to give the information, the law would not imply a promise; and as he jury found that the plaintiff was not induced by the offer of the reward but by other motives to give the information, counsel for the defense insisted that there was no right of recovery. That the defense ignored the matter of knowledge and acceptance and went beyond it and to the effect that a claimant must not only have the knowledge but in order to recover he must have been controlled by the motive arising from its acceptance, cannot be questioned. Curwood for the defense moved for a new trial, in disposing of which it was said:

> "Denman C. J.—The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.
>
> "Littledale J.—The advertisements amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.
>
> "Parke J.—There was a contract with any person who performed the condition mentioned in the advertisement.
>
> "Patteson J.—I am of the same opinion. We cannot go into the plaintiff's motives."

That the finding of the jury and the language of the justices refusing the motion, eliminated all questions of knowledge, acceptance with knowledge, and of contract other than as the latter might exist upon the performance of the conditions of the offer, independent of knowledge, seems too clear for argument.

Of course, where as in an Indiana case, (not the one in 26) the offer is statutory, performance of the act entitles the performer to the reward, fee, compensation or whatever it may be termed. The distinction made by White J. in U. S. vs. Mathews & Gunn, 173 U. S., 381, between offers made by public authorities and private individuals, affords no aid on the subject. If the mater must rest in contract and the contract can only exist by the doing of the act, with knowledge of the offer, the rule is as applicable to a public as to a private offer. To my mind, the true rule is correctly stated by Parke J., when he says:

> "There was a contract with any person who performed the condition mentioned in the advertisement."

In Kentucky it has been held:

"The person performing such service is entitled to the reward offered, even if at the time of the performance he was not aware that it had been offered.

"(26 Ind., 199.)

"Auditor vs. Ballard, 9 Bush Ky., 572."

In this case the arrest was made as a matter of fact prior to the offering of the reward, and in course of the opinion Peters J., very aptly says:

"If the offer was made in good faith, why should the state inquire whether the appellee knew that it had been made? Could the benefit to the state be diminished by a discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and bring a felon to trial? And it is not well that all may know that whatever in the community has it in his power to prevent the final escape of a fugitive from justice, and does prevent it, not only performs a virtuous service, but will be entitled himself to such reward as may be offered therefor? Dawkins vs. Sappington, 26 Ind., 199."

The case in 26 Ind., 199, is left to rest upon that of Williams vs. Carwardine, 4 Barn. & Adolph, 621, and the language of Peters J., as above written, is copied from 26 Ind., 201.

I feel that the doctrine of the Indiana and Kentucky cases, based as they are upon Williams vs. Carwardine, are founded upon better reasoning and are entitled to more consideration than the authorities which go to the effect that a claimant to a reward is only entitled to receive it when he acts with knowledge of its existence and with a view to getting it.

This, of course, is based upon the assumption that Mr. Weinert gave the information in ignorance of the offer of the reward, and leaves undecided the real question as you put it, and concerning which you state.

"While it may be argued that it was his duty to reveal this information, it would seem that his duty to reveal this information was no greater than if the information had been in the possession of some other private person who had been a witness to the commission of the crime.

"In the latter event, we think there would be no question that the person giving the information would be entitled to receive the reward."

I think a full consideration of all the authorities bearing upon the question, will force the conclusion that although the right to receive a reward may be based upon contract, that knowledge of the offer nor action with intention of securing the reward are neither of them necessarily conditions precedent to a recovery, but that the contract as stated by Parks J., in Williams vs. Carwardine, 4th Barn. & Adolph, 621, (24 Eng. C. L., 126, 457), was with any person who performed the condition mentioned in the advertisement. In fact, in a state where the majority rule is followed, and in a case where knowledge of the offer is conceded, it is said:

"The compliance by any one with the terms of a general offer or reward for the apprehension of a felon, if authoritively made, makes the offer a binding contract between the person and the county.

"Cummings vs. Clinton Co., 181 Mo., 162."

This, however, leaves the question you present undecided, which so far as I have been able to ascertain, is absolutely novel and probably never has arisen before, but as the offer was general and must be assumed to have been made in good faith, and as there does not seem to have been any condition attached to the offer, excluding Mr. Weinert from making the claim, I am of the opinion that the commissioners, if they find that while acting in good faith he has complied with the terms of the offer, may make the allowance to him.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

750.

MISTAKE OF CLERK OF COURT IN CERTIFYING A PRISONER—EFFECT OF SUCH MISTAKE—OHIO STATE REFORMATORY—OHIO PENITENTIARY—PAROLE PRISONER.

Where the clerk of courts in copying a judgment of the court erroneously made it read as a sentence to the penitentiary instead of the reformatory, and certified such erroneous copy to the warden of the Ohio penitentiary, the warden has no jurisdiction in the case and the clerk through his error could confer none. The clerk's action in this case is of no effect, and it still remains his duty to certify the judgment of the court to the superintendent of the Ohio State Reformatory. When this has been done, it will be the duty of the superintendent of the reformatory to issue a parole to the prisoner, providing he complies with their requirements; if he has fled after his release, he should be treated as a prisoner escaped from the county jail.

COLUMBUS, OHIO, January 6, 1914.

HON. P. E. THOMAS, *Warden Ohio Penientiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 29, 1913, inquiring as follows:

> "On October 10, 1913, we received certificate of sentence in the case of one George Kristoff, who was convicted of larceny at the September term of court of Erie county, Ohio. The certificate of sentence provides that the said George Kristoff, having plead guilty, it is therefore the sentence of the court that he be imprisoned in the penitentiary of this state, etc.
>
> "The journal entry, however which accompanied this certificate of sentence provides that the defendant be committed to the Ohio State Reformatory at Mansfield, and the sentence suspended and the defendant placed on probation.
>
> "The difference between the place of confinement designated in these two documents was overlooked at the time the case was received, and the defendant was certified to probation supposedly as an inmate under sentence to this institution.
>
> "Since he has been certified, he has been declared a violator, and advertised as such.
>
> "However, since he has been declared as a violator, the discrepancy in these documents has been discovered.
>
> "Query: If he is captured have we authority to accept him as a probation violator; if not, have the authorities at the reformatory, or shall the matter be handled by the court officials of the county from which he was committed, and the commitment and certification to probation on file at this institution be disregarded, and considered void?"

Sections 13706, 13709 and 13710, General Code, provide:

Section 13706: "In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

Section 13709: "When it is the judgment of the court that the defendant be placed upon probation and under the supervision of the penitentiary of the reformatory, the clerk of such court shall forthwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reasons therefor, and certify them to the warden of the penitentiary or to the superintendent of the reformatory, to which the court would have committed the defendant but for the suspension of sentence."

Section 13710: "Upon entry in the records of the court of the order for the probation provided for in the next preceding section, 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 properly and fully met."

It is clear from the above sections that in the case before us the clerk of courts should have made a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder, to the superintendent of the Ohio State Reformatory, and the prisoner should not have been released from the county jail until he had complied with all the requirements and conditions imposed by the Ohio board of administration with reference to suspended reformatory sentences.

The clerk, however, in copying the judgment of the court erroneously made it read as a sentence to the penitentiary instead of the reformatory, and certified such erroneous copy to you, the warden of the Ohio penitentiary. You, as such penitentiary warden, had no jurisdiction in the case, and the clerk, through his error, could confer none. What the clerk did in the case is of no effect, and it still remains his duty to certify the judgment of the court to the superintendent of the Ohio State Reformatory. When his has been done, it will be the duty of the superintendent of the reformatory and the Ohio board of administration to issue to the prisoner a certificate of probation (which certificate authorizes the release of probation prisoners from jail), provided he complies with their requirements; but if the prisoner has been released and has fled from the county in which he was sentenced, and does not comply with the requirements which the board has made essential to the issuing of a certificate of probation, then the prisoner will not come within their jurisdiction, and he should be treated as a prisoner who has escaped from the couny jail between the time of his sentence and his delivery into the hands of the proper prison authorities.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

750-A.

STATE SENATOR — SALARY — RESIGNATION — APPOINTMENT TO STATE OFFICE—LIEUTENANT GOVERNOR.

If a state senator has drawn his salary for the current year, and the session has been concluded, and he resigns from the senate and is appointed to another state position, he may retain the salary that he has drawn as senator and receive his salary from the time of his induction into his new office, this office being that of lieutenant governor.

COLUMBUS, OHIO, February 10, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of October 22, 1913, as follows:

> "If a state senator has drawn his salary for the current year, and the session has been concluded, and later on he resigns from the senate and is appointed to another state position, is he entitled to the salary for the other state position for the full time that he holds it, or is he only entitled to the difference between his salary as state senator and the salary of the new office to which he was appointed?"

Section 50 of the General Code, reads as follows:

> "Each member of the general assembly shall receive as compensation a salary of one thousand dollars a year, which shall be paid in monthly installments of not exceeding two hundred dollars during the year, but in any year in which a session of the general assembly is held the balance of the salary for such year shall be paid at the end of the session. Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

As you state in the closing part of your letter, that your inquiry grows out of the resignation of Senator Greenlund and his appointment as lieutenant governor, my answer will be directed at that particular situation.

Under section 50, General Code, as above copied, Senator Greenlund was entitled to draw, and as I understand your letter did draw his full salary for the year 1913, at the close of the late session of the legislature. His doing so was perfectly legal, and in compliance with the law, and entirely dissimilar to a case presented some time ago when it was claimed that a like salary was drawn at a time when a resignation was intended, and where it was not expected on the part of the recipient of the salary that he would hold himself in readiness for the balance of the year to perform the duties of the office, if any should be presented.

This situation is more nearly analogous to that of Judge Lawrence when he made claim to his salary as supreme court reporter.

"Where the duties of an office are specified and limited in their character and not continuous during the year, an annual salary is prescribed by law as the compensation will be payable and apportioned with reference to the duties performed and not to the lapse of time.

"William Lawrence, ex parte, 1 O. S., 431."

The only material difference between the case of Lawrence and that of Greenlund is that section 50 of the General Code carries with it, that which the court construed as attaching to a similar situation when the law was silent as to time of payment of salary.

The senator having drawn his salary at the time it was made payable, under section 50 of the General Code, is entitled of right, to retain it, and under no conceivable circumstances could he be compelled to refund any portion of it unless there was a called session and he should fail to attend and subject himself to the forfeiture, or reduction of compensation provided in the latter part of said section 50, General Code.

There is no question of incompatibility of offices arising here because Senator Greenlund doffs his senatorship before he dons the lieutenant-governship.

I have been convinced that there is necessity for legislation with respect to the salaries of members of the general assembly. I have been more than doubtful of the constitutionality of the present act in that respect. The present statute was passed over the veto of Governor Harmon on May 31, 1911. Without having before me what Governor Harmon said, my personal recollection is that one of his reasons for vetoing the statute was that he believed it unconstitutional. The great objection to the present statute is that it seeks to pay the members for the second year of their term at the end of the session held in the first year.

I have in mind an instance wherein one member of the general assembly received his salary at the end of the session held in the first year for the whole second year and then resigned. Under a demand from this department the member was required to return the second year's salary. But I am unable to see any well-founded objection to a member of the general assembly receiving his salary for one year at the end of the session held in that year, as he really renders all the service to be rendered.

I would not care to suggest the invalidity of the statute beyond the fact that certainly a member should not draw the second year's salary in the first year, and at least not before the end of the second year session. The salaries are fixed at the amounts they now are doubtless upon the theory of compensation for services rendered in each year for the session held in each year—the regular session as regularly held, and the extraordinary session when one is so held.

I am unable to see any objection in your case, either legal or moral, to Lieutenant Governor Greenlund's receiving his salary from the time of his induction into that office.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

751.

PUBLIC HIGHWAYS CROSSING RAILWAYS—CONSTRUCTION AND REPAIR OF SUCH BRIDGES OVER RAILWAY—MAINTENANCE OF SUCH BRIDGES—COUNTY COMMISSIONERS—BRIDGES TO BE MAINTAINED BY RAILWAY.

Where a railroad crosses a public highway below grade, which necessitates the building of wagon bridges across the railroad track, and no agreement was made between the county commissioners and the railroad company as to the construction and repair of these bridges, it is the primary duty as between the county commissioners and the railroad company for the railroad company to construct and keep the bridges in repair. It the company fails to do this, the county commissioners should repair or reconstruct the bridges and bring action against the railroad company for the costs thereof.

COLUMBUS, OHIO, February 5, 1914.

MR. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of August 1, 1913, in which you say:

> "A great many years ago a certain railroad crossed some of our public highways below grade, which necessitated the building of wagon bridges across the railroad track. It is my understanding that the county commissioners built the bridges and perhaps have kept the same in repair from that time up until the present time but our present board of commissioners do not feel that it is their duty to do so and are demanding that the railroad company maintain said bridges, which they refuse to do. So far as I know, the various records in the commissioners' office do not show any contract or arrangement between the board of county commissioners and said railroad company."

On the above stated facts you ask my opinion as follows:

> "First: Can a railroad company be compelled to build and maintain the overhead bridges?
>
> "Second: If so, what would be the proper procedure to compel them so to do?"

In 1893 an act was passed making provision for the elimination of grade crossings. (90 O: L., 359. Sec. 8863 et seq., G. C.)

Section 5 of this act is now section 8869, General Code, which reads as follows:

> "After the work is completed, the crossing and its approaches are to be kept in repair as follows: When the public way crosses the railroad by an overhead bridge, the frame work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the surface of the bridge and its approaches, by the municipality or county in which they are situated. When the public way passes under the railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the public way and its approaches, by the municipality or county in which they are situated."

It is clear that the act, of which this section is a part, applies to existing grade crossings and as to overhead bridges. Section 8869 has reference only to such as may be constructed for the purpose of separating the grades of a highway and of a railroad, as provided for in the act.

"Grinnell vs. County Commissioners, 6 N. P., n. s., 180, 182)."

This section has, therefore, no relevancy to the question here presented, and is here noted for the reason that same is mentioned in correspondence attached to your inquiry.

Sections 8773 and 8914, General Code, provide as follows:

> Sec. 8773: "When it is necessary in the construction of its road to cross a road or a stream of water, a company may divert it from its location or bed, but without unnecessary delay it shall place such road or stream in such condition as not to impair its former usefulness."

> Sec. 8914: "Before operating such road, such company or person shall maintain at every point where a public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattleguards sufficient to prevent domestic animals from going upon such railroad; and such company or person shall be liable for all damages sustained in person or property by reason of the want or insufficiency of such fence, crossing or cattle-guard, or neglect or carelessness in the construction thereof, or in keeping them in repair."

These sections, first enacted respectively in 1852 and 1874, are but declaratory of the common law with respect to their application to the question at hand.

In the case of Railroad Company vs. Defiance, (52 O. S., at page 314,) the court, referring to section 3284, Revised Statutes, now section 8773, General Code, says:

> "This provision, it seems, is substantially the common law rule on the subject, which, it is held, imposes the duty upon a railroad company constructing its road across a public highway, to restore, or reunite the highway at its own expense, by reasonably safe and convenient means of passage, although the charter, or statute authorizing the construction of the railroad contains no express provision to that effect; and the duty so imposed, it is held, has reference to future contingencies, and requires the company, from time to time, to put the highway in such condition as changed circumstances may render necessary.
>
> "Where a new way or road is made across another already in existence and use, the crossing must not only be made with as little injury as possible to the old road, but whatever structures are necessary for such crossing must be erected and maintained at the expense of the party under whose authority and direction they are made.
>
> "(Eyler vs. County Commissioners, 49 Maryland, 258).
>
> "Where a railroad crosses a public road already in use, the railroad company and its successors must, if not relieved by statute, not only restore the public road but erect and maintain perpetually all structures and keep up all repairs made necessary by such crossing, for the safety and convenience of public travel.
>
> "(Dyer County vs. Railroad, 87 Tenn., 712).

"A railroad company that constructs its track over a highway must restore such highway to its former condition of usefulness and safety and so maintain it; and if this cannot be done by a grade crossing, the company must do it by constructing its tracks over or under such highway, or by constructing the highway over or under its tracks.

"(Wabash Railroad Company vs. Railroad Commission of Indiana, 176 Ind., 428)."

All of the foregoing cases were decided with reference to bridges carrying highways over railroads which had intersected such highways at such grades or levels as to make necessary the construction of the bridges for the purpose of restoring the highways to their former state of usefulness.

Of other decisions to the same point, as to the common law duty and liability of railroad companies to construct and maintain such bridges, I note the following:

"Pennsylvania Railroad Co. vs. Irwin, 85 Pa., St., 336.
"Chesapeake Railroad Co. vs. Jennings, 98 Va., 70.
"State vs. St. Paul, etc. Railroad Co., 35 Minn., 131."

Speaking with reference to section 12 of the act of 1852, which is now section 8773, General Code, the court, in the case of Railroad vs. Commissioners, (31 O. S., p. 347) says:

"There is little doubt that the legislature did not intend to require a railroad company in crossing a public highway to restore the same to its actual former condition. This would be practically impossible. Substantial restoration is all that was contemplated or intended. Some inconveniences to public travel are necessarily incident to all public railroad crossings, and such as are inseparably connected therewith, must be submitted to by the public.

"But it was never intended to invest the company, without the burden of compensation, with the right to narrow the width of the highway or materially to interfere with its facilities for public travel. * * * The company was prohibited from impairing its *usefulness.* This word implies capabilities for use, and appertains to the future as well as to the present. The fact that the public travel over the road may, for the time being, be limited, does not lessen the duty to restore. Roads and highways are established to subserve the future needs of the public as well as the present."

In the case of Toledo vs. The L. S. & M. S. Ry Company, (17 C. C., p. 265), the court, considering the application of section 3284, R. S., (Sec. 8773 G. C.), to the case there at hand, held:

"It is not necessary that a street should be placed in prime condition for public travel in order to lay upon a railroad company passing over it the obligation to maintain a bridge over it."

It further held that this duty came to the railroad company when it constructed its road across the highway.

In Railway vs. Troy, (68 O. S., 510-514), the court held that section 3324 R. S., (Sec. 8914, G. C.), relates only to cases where the construction of the highway precedes that of the railroad and does not impose any duty on the

railroad company to construct a bridge over a street projected and laid out across its tracks.

In the case of McNulta, Recvr. vs. Ralston, (5 C. C., 330), the court, considering the application of section 3324, R. S., (Sec. 8914, G. C.), to the facts there presented, held:

> "Where a railroad crosses streets within the limits of a municipal corporation, the railroad company is bound to construct and maintain safe and sufficient crossings, and the approaches thereto.
>
> "When the street and railroad track are not upon the same level, and the street crosses the railroad track by means of a bridge, the railroad company is bound to construct the bridge, and the approaches thereto."

Many other states have similar statutes and under them it has been uniformly held that where a railroad intersects a highway in such manner as to make necessary the construction of a bridge in order to restore the highway, it is the duty of the company to construct and maintain the same.

> "County Commissioners vs. Duluth, etc. Ry. Co., (67 Minn., 214.)
> "Bush vs. Del. etc. Railway Co., (166 N. Y., 210, 218.)
> "Erskine vs. Railway Co., (105 Maine, 113.)"

At the time, therefore, that the railroad here in question was projected across the highway of your county at such grade or level as to make necessary the construction of bridges over the railroad in order to restore the highways to public use, it was the duty of the railroad company to construct such bridges, and inasmuch as the duty and liability of the railroad company with reference to such bridges is continuing, it is their duty to maintain the same and keep them in repair, unless, on the facts stated, or in some other manner, they have been absolved from such duty and liability.

> "Eyler vs. County Commissioners, supra.
> "People vs. New York Central Ry. Co., (74 N. Y., 302.)
> "Toledo vs. L. S. & M. S. Ry. Co., supra.
> "Toledo, etc. Ry. Co. vs. Mammet, (13 C. C., 591, 595)."

You do not advise whether or not the public roads, in and upon which these bridges are constructed, are such as the board of county commissioners are required, by law, to have in its charge, and to keep in repair, but from the fact that the commissioners constructed these bridges in the first place, and have kept them in repair, I infer that the public roads in question are such as the commissioners have in charge and are required to keep in repair. Now, though a duty rests upon the railroad company with respect to the construction and maintenance of these bridges, they, and each of them are a part of the highway and as such have been and now are under the control of the county commissioners.

> "State ex rel. vs. Davis, (55 O. S., 15-22).
> "R. R. Company vs. Defiance, (52 O. S., 262-300-309)."

Moreover, as these bridges are a part of the highways, in and upon which they are constructed, the commissioners, as to the people, are likewise under duty to keep them in repair in case the railroad company refuses or neglects to do so. (Sec. 2408, General Code).

The case of Eyler vs. County Commissioners, supra, was one for damages by reason of injury sustained on account of a defective bridge. The bridge was one constructed by a canal company which had intersected a public county road in constructing a canal. The court held that the duty of maintaining and keeping the bridge in repair developed upon the canal company, but that inasmuch as to the county commissioners a statute provided "they shall have charge of and control over the county roads and bridges," the obligation of the county commissioners to the public was unqualifying, and the fact that the canal company was bound to repair, did not absolve the county commissioners from their duty to the public, nor was their liability affected by the fact that the action could have been brought against the canal company.

Many other cases to the same point might be cited, of which I note the following:

"Zanesville vs. Fannan, (53 O. S., 605, 617, 618).
"Toledo, etc., Railroad Co. vs. Sweeney, (8 C. C., 298, 304).
"State vs. Gorham, (37 Maine, 451).
"Batty vs. Duxbury, (24 Vermont, 155).
"Lowell vs. Lock Proprietors, (104 Mass., 18, 23).
"Sides vs. Portsmouth, (59 N. H., 24).
"Newlin Township vs. Davis, (77 Pa. St., 317).
"Welcome vs. Leeds, (51 Maine, 313)."

Though as to the public, the duty of the county commissioners to keep these bridges here in question in repair is absolute, yet, unless the railroad company, on the facts stated, has been absolved from its duty to maintain and repair these bridges, the county commissioners can collect the cost of the repairs made by them, from the railroad company. This follows from the reason that, as between the commissioners and the railroad company, the primary duty with respect to the repair of these bridges, is upon the railroad company. On this point, the court, in the case of Eyler vs. County Commissioners, supra, held:

> "That while the county commissioners were liable to the appellant in this action, the canal company was not discharged from its obligation to maintain and repair this bridge; nor were the commissioners left without remedy against the company, but had their remedy against it for whatever damages might be recovered against them in this action; and if they expended money in necessary repairs, they could recover it back from the company in an action on the case.
>
> "Newlin Township vs. Davis, supra.
> "Pennsylvania Ry. Co. vs. Irwin, (85 Pa. St., 336).
> "Chicago vs. Robbins, (2 Black, 418) (4 Wall. 657).
> "Chesapeake, etc. Railroad Co. vs. Dyer Co., (87 Tenn., 712).
> "Welcome vs. Leeds, (51 Maine, 313, 317).
> "Rocheser vs. Campbell, (123 N. Y., 405).
> "Morris vs. Woodburn, (57 O. S., 330, 335)."

Likewise, if the duty of the railroad company to maintain and repair these bridges still obtains, the county commissioners can compel the railroad company to make necessary repairs thereon by mandatory injunction.

> "Toledo vs. L. S. & M. S. Railroad Company, (17 C. C., 265).
> "Jamestown vs. Chicago, etc., Railway Company, (69 Wisconsin, 648)."

The sole remaining question is whether, on the facts stated, the railroad company has been absolved from its duty to maintain these bridges and keep same in repair. Your letter advises that the commissioners constructed these bridges in the first place, and have since kept the same in repair, and it does not appear that the railroad company has done anything in the way of maintenance or repair as to these structures.

More or less pertinent to this precise question, I note the following from Elliott in his work on roads and streets at section 33:

> "A bridge may, however, be free and open to the public, yet the person by whom it was constructed be charged with maintaining it in safe and convenient condition for travel. This is often so in cases where the facts show that the bridge was erected for private benefit, and not for public use. In such a case there is no presumption that the public has accepted the bridge and relieved the person by whom it was built from responsibility. Thus, where a private corporation digs a race way or canal across a highway and builds a bridge over it, there is no presumption of acceptance by the public, and the builder is charged with the duty of keeping it in a safe condition. In such case the benefit is to the builder, for the public, but for his act, could have traveled on the solid road. Where, however, the bridge is of public utility, and is used by the public, and is not made necessary by the act of the person who built it, acceptance by the public will be presumed, and the builder will not be responsible for keeping it in safe and fit condition for travel. Bridges originally built by an individual for his own benefit, but which in time become of public benefit or utility, and are generally used by the public, may be deemed public bridges. This would probably not be so if the builder, by his own act in interfering with a safe and convenient road, had created the necessity for the bridge, for, having created the necessity for it, he must, upon principle, be held bound to supply that necessity."

With respect to the situation here presented, it does not appear why the county commissioners constructed these bridges in the first instance, or why they have repaired them from time to time. Inasmuch, however, on the assumption here made with reference to the character of the public roads in and upon which these bridges were built, it was and has been the duty of the county commissioners to the public to keep these roads open and in a safe condition for travel, their action in constructing the bridges and repairing same is to be referred, I think, rather to this duty than to any desire or intention on their part to relieve the railroad company from its primary duty to construct the bridges and to keep them in repair. In this view I do not see that the county commissioners could have done otherwise than to construct these bridges and keep them in repair in case the railroad company neglected to do so.

Pertinent to this point, the court, in the case of Newlin Township vs. Davis, supra, speaking with respect to the duty of a township to keep in repair a bridge which had been made necessary by the construction of a railroad, says:

> "Suppose some private individual, owner of the land over which a road passes, cuts a race across that road, as he may of right do, he must bridge it at his own expense; but in the event of his neglect of this duty may the supervisors permit such an obstruction to remain, on the ground that the duty to bridge or fill it up, was with him who created it, and therefore they and their township have no responsibility with respect to it? Or take the same case, and suppose he does build the

necessary bridge, he is bound to keep it in repair. But if the bridge dilapidates, and he does not repair it, may the supervisor refuse so to do, and thus risk the life, limbs and property of the citizen? Conceding the doctrine as contended for by the plaintiff in error, that there is no liability upon townships in the cases above mentioned, and the result must be, that the party injured may be wholly without redress; for he who created the obstruction, from which the damage arose, may be insolvent, dead, or out of the state."

As throwing some light on this, I note the case of Township of Burdell vs. Grand Rapids & Indiana Railway Co., (157 Mich., 255), the syllabus of which is as follows:

"No duty rests on a railroad company to maintain in repair a highway bridge across its right of way because from the time the track was built under the bridge, which already existed, and which it became necessary to raise, the company voluntarily maintained it."

In this case a bridge had been constructed by the township over and across a ravine. Sometime afterward the railway company constructed a spur track down the ravine and under the bridge; the bridge being too low to admit the safe passage of trains, the railway company elevated the bridge a foot or more, and during the time that it used the spur track, the railway company kept the bridge in repair. Afterward it discontinued the use of this spur track and after doing this, it refused longer to repair the bridge. The action was one by the township to compel the railroad company to do so. The court says:

"There is no obligation in this case resting upon contract. The township evidently acquiesced in the elevation of the bridge. The respondent properly fixed it and its approaches, made it safe, and left it in good condition. Manifestly no obligation would have rested upon the respondent if its cars could have been run under the bridge with safety. There is no evidence that the public are inconvenienced by the change, or that it will cost the township any more to rebuild or repair the bridge at its present height than as it formerly existed. The mere elevation of this track (whether a foot or more does not appear) cannot be held to transfer from the township to the railroad the legal duty to forever thereafter rebuild and repair the bridge."

In the case just cited, the primary duty with respect to the repair of the bridge there in question was on the township, and the court held that the township was not relieved of such duty by the fact that the railroad company voluntarily maintained the bridge during the course of years.

In the case presented by your inquiry, the primary duty with respect to the construction and maintenance of the bridges was as between the county commissioners and the railroad company upon such company; and though the question is one of some difficulty, I am inclined to the view that the railroad company has not been relieved of its primary duty with respect to the repair of these structures. It is to be borne in mind, however, that as to the public, the county commissioners are likewise liable for these repairs, and if the condition of the bridges is such as to call for repairs, the commissioners should either take proper steps to compel the railroad company to make these repairs, or do it themselves, and bring action against the company for the cost thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

752.

COUNTY COMMISSIONERS — POWER TO EXPEND MONEY — CONSTRUCTION OF A CHILDREN'S HOME — SUBMISSION OF QUESTION OF EXPENDITURE TO VOTE OF THE ELECTORS.

Where county commissioners contract for the construction of a new children's home at a cost of thirteen thousand ($13,000.00) *dollars, without submitting the question for making the improvement to a vote of the people of the county, and such contract does not include heating and lighting of such building, the county commissioners may not, without submitting the question, install these necessities under a separate contract, if the amount of such contract added to that already expended exceeds the sum of fifteen thousand* ($15,000.00) *dollars.*

COLUMBUS, OHIO, February 7, 1914.

HON. E. W. COSTELLO, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 22, 1913, in which you request my opinion upon the following facts:

> "The county commissioners without submitting the question as to the policy of making the improvement to a vote of the people of the county, let a contract for the construction of a new children's home at a cost of $13,000.00, which contract does not include the heating, lighting and plumbing of the building.
>
> "May the commissioners now, without submitting the question, install these necessities under a separate contract or contracts, if the amount of such contract or contracts added to that already expended or contracted for exceeds $15,000.00?"

This question has not been determined so far as I am able to ascertain under the provisions of section 5638 and succeeding sections of the General Code. The first of these sections provides as follows:

> "The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings * * * the expenses of which will exceed $15,000.00, except in case of casualty, as hereinafter provided; * * * without first submitting to the voters of the county, the question as to the policy of making such expenditure."

The remaining provisions of this group of statutes throw no light whatever upon the question now under consideration.

A fair analogy, however, is afforded, it seems to me, by decisions under statutes like section 4328, General Code, a part of the Municipal Code, which provides that no contract involving the expenditure of more than $500.00 shall be entered into by the director of public service without competitive bidding.

The decisions, which I need not cite, are to the general effect that an improvement which is in point of fact a single one may not, for the purpose of avoiding a limitation of this sort, be split up into parts, and contracts separately let for each part. Of course, officers in their discretion may make several different improvements which, when superimposed one upon the other, may make a single improvement, as the improvement of a street in sections. So also the county commissioners may construct what would ultimately be a single children's home or court

house, by building different sections of the building at a time. If done in good faith, such action might be taken as to avoid submission of any question to a popular vote.

But in the case submitted by you, the situation is different in that the edifice which had been or will be erected by the expenditure of $13,000.00, is an incomplete one which cannot be used for the purpose contemplated without the expenditure necessary to provide the omitted details of construction. A building without artificial light, heating and plumbing would be uninhabitable, and not usable for the purpose of a children's home.

Of course, under section 5638, General Code, it is held that county commissioners may not by calling a given improvement one thing make it another, the question being in each case as to the real substance of the transaction. (State ex rel. vs. Commissioners 5 Nisi Prius 260.)

Of course the lighting, heating and plumbing fixtures when installed will become a part of the building, but this point is not conclusive in my mind one way or the other. An installation, addition or improvement might when in place become a fixture, and yet the building might be complete without it. In such a case I would be of the opinion that if the building can be made complete and fit for use without the installation or fixture in question, the subsequent addition of such an installation or fixture at a cost such as, together with the original cost of the building, should exceed the sum of $15,000.00, would not be violative of the statute, though made without a vote of the people. Where the building cannot be used for the intended purpose without something that is left out of the principal contract, and separate contract are let for the addition of that necessary thing the "expenses of the building" within the meaning of section 5638, General Code, in my opinion, include both the main contract and such additional contracts.

I am of the opinion, therefore, that in the case mentioned by you the commissioners must submit the policy of the expenditure to a vote of the people before they may lawfully enter into contracts and appropriate money for the installation of the heating, lighting and plumbing fixtures in an amount sufficient to produce, with the amount of the principal contract, an aggregate amount in excess of $15,000.00.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

753.

OFFICES COMPATIBLE—DEPUTY AUDITOR—CHIEF CLERK IN THE OFFICE OF A DISTRICT ASSESSOR.

A deputy auditor who has been regularly appointed, and who is acting as such may also be appointed as chief clerk deputy in the office of a district assessor, provided the positions are such that the performance of the duties of the one would not conflict or be a hindrance to, or compel neglect of the offices of the other positions.

COLUMBUS, OHIO, January 14, 1914.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have at hand your favor of December 24th, wherein you request my opinion upon the following question:

> "Can a deputy auditor, who has been regularly appointed and who is acting as such, also be appointed as chief clerk, deputy or an employe in the office of the district assessor?"

I will take up first the position of deputy assessor, as there are many special provisions of the statutes referring to that employment which have no application in the case of chief clerk or other employes in the office of the district assessor. The position of deputy auditor is provided for by section 2563, General Code, as follows:

> "The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it."

The positions of deputy assessor and other employments in the office of a district asessor or board of district assessors are provided by section 5581, General Code, as the same now appears in 103 Ohio Laws, 787. The duties of the deputy assessor are fixed by section 5582, General Code, appearing on page 787 of 103 Ohio Laws, which provides that the occupant of such position shall have the powers and duties of the district assessor, with certain exceptions therein set out.

Section 5617, General Code, 103 Ohio Laws, 796, is as follows:

> "A district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or other employe of a district assessor or district board of complaints shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public."

The prohibition of this statute extends to all the positions enumerated in your inquiry but since its terms are limited to *offices* of profit it can have no bearing upon the question, for the reason that the position of deputy auditor cannot be considered an office under the authorities in this state.

> "9 Am. & Eng. Encyc. of Law, p. 369.
> "Vol. 11 Encyc. Digest of Ohio Reports, p. 214.
> "1911 Supp. Encyc. Digest of Ohio Reports, p. 343.
> "Opinion of Attorney General of Ohio to bureau of inspection and supervision of public offices, June 6, 1913."

Section 5619, General Code, 103 Ohio Laws, 797, provides:

> "District assessors, members of district boards of complaints, their deputies, assistants, experts, clerks and other employes shall, during their terms of office, or periods of service or employment, devote their entire time to their respective duties, provided, however, that district assessors or district boards of complaint may, with the approval of the tax commission of Ohio, employ assistants, experts, clerks or other employes with the understanding that they shall devote a part only of their entire time to their respective employments."

Under this statute, before your question may be given consideration, it is

clearly necessary that it must be established that the approval of the tax commission has been obtained for the employment of a person in any of the positions enumerated by you, to perform services during part of the time only. Your questions are, therefore, to be considered under the assumption that such approval has been obtained.

The deputy auditor, by virtue of the very designation of that office, and by confirmance of section 9 of the General Code, may perform all and singular the duties of his principal. Provisions in the statute, therefore, conferring duties upon the county auditor are applicable in the consideration of the nature of the position of deputy county auditor.

There being no prohibition of statute expressly made against the holding of the position of deputy assessor, authorized to perform the duties of that position part of the time only, and that of deputy auditor, the common law rule of compatibility of offices must apply. Under the common law offices are considered incompatible when one constitutes a check or supervision over the other; or when there exists a physical impossibility of conducting the duties of both; or when the rules of public policy prohibit the holding of both offices by one and the same individual at the same time.

Under section 5594, General Code, 103 Ohio Laws, 791, a county auditor is required to act as secretary of the board of complaints of his district, and must be present at each meeting of the board; whilst, under section 5592 General Code, the assessing officer is empowered to appear before the board at any of its hearings to defend his assessments. By these two statutes, I am of the opinion that a clear conflict of duties may be presented, where the deputy auditor is required by his chief to act as secretary of the board of complaints, inasmuch as the board may have under consideration an assessment made by the same person as deputy assessor.

Under section 5615, General Code, 103 Ohio Laws, 795, the county auditor is required to approve the bond given by a deputy assessor. I am of the opinion that such a duty is of a supervisory nature such as would prevent the person exercising it from holding both of these positions.

There are many other duties prescribed by the Warnes law, for performance by the auditor and the assessor, which might suggest an inference of incompatibility; but I am of the opinion that the reasons above set out are sufficient to sustain the conclusion that the positions are incompatible.

As regards a chief clerk or other employe in the office of the district assessor, who has been appointed with the intention of performing duties for part of the time only, with the approval of the tax commission, I have been unable to uncover any duties which would make the holding of either of these positions by deputy auditor illegal.

It is understood, however, that I so hold with reference to these positions upon the understanding that the deputy auditor, by the terms of his employment, is not required to give all his time to the duties of that position, and that the duties of that position are not as would operate as a hindrance to or compel neglect of the offices of the other positions.

You will understand that I am not passing upon the civil service feature of your question. Where any of these positions are within the civil service, it is, of course, understood that appointment may be made only in accordance with the provisions of the civil service law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

754.

LIQUOR LICENSE LAW—SALOON KEEPER—SALOON LICENSE—FAILURE TO PAY SALOON LICENSE—LEVY—PENALTY.

Where a person makes legal application to an assessor prior to the 26th day of May, 1913, as a person doing business and intending to continue doing business as a saloon keeper; he continues after May 26, 1913, but fails to pay the five hundred dollars on or before June 20th. In such a case when the treasurer levies and proceeds to make the money upon such levy, he is not authorized to collect the twenty per cent. penalty under the present statute.

COLUMBUS, OHIO, January 29, 1914.

HON. GEORGE B. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—In your letter of December 4th, you quote a letter from the auditor of state to your county treasurer, dated July 17, 1913, in which the auditor stated:

> "A person makes a legal application through the assessor prior to the 26th day of May, 1913, as a person doing business and intending to continue doing business as a saloon keeper. He does continue in business after May 26, 1913, but fails to pay the $500 due on or before June 20th. Thereupon the treasurer levies and proceeds to make the money.
>
> "The question is, how much money should be collected?
>
> "As he made his formal application and was entered upon the original duplicate there are no penalties except the 4% for expenses of collection under section 6077. * * * I am of the opinion, looking at all the cognate sections, the amount to be collected is the amount which is a lien, * * * $1,000, plus 4%."

You state that in the case referred to your county treasurer collected 20% penalty, and that the applicant now files this bill for a refunder of the penalty over and above the 4%.

I would respectfully call your attention to the case of Susan vs. Haserodt, 58 bulletin, page 183 (September 22, 1913). This case, decided by the Lorain county court, April 26, 1911, was afterwards affirmed, without report, by the supreme court, Haserodt vs. Susan, 88 O. S. ———. The syllabus reads as follows:

> "The 20 per cent. penalty, prescribed by General Code 6082, formerly section 5 of the act 100 O. L. 89, to be added to the assessment imposed by a county auditor as a tax on the liquor traffic, cannot be imposed against one engaged in such traffic without having first paid the assessment. Notwithstanding the original act authorized such imposition no rule of construction requires a court to read such intention into such statute as codified and adopted by the legislature."

This action was brought by the plaintiff to recover back a penalty paid on a liquor traffic tax. Plaintiff started in the liquor traffic on October 8, 1910, without first having paid the assessment as provided by law; on October 21st the county treasurer entered on the duplicate against him a liquor assessment in the sum of $620.88, this being the tax to the end of the assessment year in May, 1911, together with a 20% penalty of $124.18, and 4% collection fee on both amounts, making in all $774.86. In the collection of this amount the treasurer seized and distrained

plaintiff's goods and chattels and threatened to sell the same as upon execution. The next day, October 22, 1910, the plaintiff filed an affidavit of discontinuance of the liquor traffic, which entitled him to a rebate of $420.88 for the unexpired portion of the assessment year and in order to save his goods from sale, under protest paid the sum of $353.98 which included said 20% penalty, amounting to $124.18, for which amount plaintiff brought his action.

In the case of Susan vs. Haserodt, supra, Judge Winch says:

"That before the enactment of the General Code in February, 1910, the plaintiff would have been liable for the penalty in question there seems no question; the point is conceded.

"The statutes then existing are found in Bates R. S. (6 ed.) sections 4364-9 to 4364-13 inclusive, originally enacted May 14, 1886, 83 O. L. 157. That law had several sections, the first providing for a tax on the liquor business; the second that the tax shall be a lien and fixing the time for its payment; the third providing for the refunding of part of the tax, if the business is discontinued; the fourth, collection of tax in case of non-payment and the fifth providing for assessors' returns and certain penalties. The concluding sentence of this section reads as follows:

"'And if any assessment aforesaid shall not be paid when due, there shall be added a penalty thereto of 20 per centum, which shall be collected therewith.'

"Manifestly the word 'aforesaid' referred to any assessment provided for in the fifth or any preceding section of the act and it was so held in the case of Simpson vs. Serviss, 2 Cir. Dec. 246 (R. 433).

"The code commission chopped up theses sections into smaller parts and we now find said section 5 of the original act in General Code 6081 and 6082. General Code 6081 provides that each assessor shall return to the county auditor a statement as to each place within his jurisdiction where the liquor business is conducted, showing the name of the person, corporation or co-partnership engaged therein, signed and verified before the assessor by such person, etc.

"General Code 6082 reads:

"'If such person, corporation or co-partnership, on demand refuses or fails to furnish the requisite information for the statement, or to sign or verify it, such fact shall be returned by the assessor, and thereupon the assessment on said business shall be fifteen hundred dollars. If such assessment is not paid when due, there shall be added a penalty thereto of twenty per cent. which shall be collected therewith.' * * *

"Whether the legislature intentionally or unintentionally changed the law as to penalties in cases like the one here before us when it enacted the General Code, is immaterial. * * *.

"Construing this statute, not strictly, in a sense, but literally, according to the ordinary meaning of the words used, the plaintiff was not liable to a penalty on his assessment.

"We do not feel required to read into this statute some other meaning than its language intends. If the legislature has made a mistake in enacting it, and did not intend the consequence necessarily following from the change in wording of the law on this subject, it can easily remedy its mistake and correct the law. Until it does so, we hold that the 20 per cent. penalty cannot be assessed in a case of this kind."

The judgment of the court below was reversed, and judgment was rendered for plaintiff in error in the amount claimed.

In view of this right recent case upon the exact question I have no hesitation in holding that under the present statute in such cases, the treasurer is not authorized to collect the 20% penalty.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

755.

SUPPORT OF INMATES OF INSANE ASYLUMS—HUSBAND OBLIGED TO SUPPORT HIS WIFE, IF HE IS able.

Where a woman is confined in a state hospital for the insane, and her husband is possessed of sufficient income to pay for her support, as long as he is able to support her, he must do so, regardless of the fact that she holds in her own name an estate sufficient to meet such expense.

COLUMBUS, OHIO, January 31, 1914.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 22, 1914, as follows:

"In the administration of the law set forth in section 1815 to 1815-12 we have come upon a question of doubt. A patient whom we will designate as Mrs. Doe has an estate in her own name that is sufficient to pay her support while an inmate in a state hospital for the insane. Her husband is also possessed of sufficient income to pay for her support. He insists that the guardian of his wife's estate shall be held liable; the guardian insists that the husband shall be held liable. Which one in your judgment is first liable under the law?"

Section 1815-1, General Code, reads:

"When any person is committed to a state hospital for the insane, to the Longview hospital, to the Ohio hospital for epileptics, or the institution for feeble minded, the judge making such commitment shall at the same time certify to the superintendent of such institution, and the superintendent shall thereupon enter upon his records the name and address of the guardian, if any appointed, and of the relative or relatives liable for such person's support under section 1815-9."

Section 1815-9, General Code, reads:

"It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

Section 7997, General Code, reads:

"The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able."

These sections make it clear that the husband is held liable for the support of his wife while she is an inmate of a state hospital.

Your letter states that the husband is possessed of a sufficient income to pay for her support as long as this is the case he must do so regardless of the fact that she holds in her own name an estate sufficient to meet such expense.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

756.

COUNTY DETECTIVE—SECRET SERVICE OFFICER—AMOUNT THAT COUNTY MAY PAY FOR DETECTIVE SERVICE—PROSECUTING ATTORNEY.

Under the provisions of section 3004, *General Code, a prosecuting attorney may not pay out of the funds therein provided, for the service of a county detective, a greater sum than is allowed him under the law, although the work amounts to more than the sum allowed under the law.*

COLUMBUS, OHIO, January 5, 1914.

HON. CARL SCHULER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Under date of January 1st, you request my opinion as follows:

"Can a prosecuting attorney, under section 3004, General Code, pay out of the fund therein provided for the services of a county detective, whose work amounts to more than can be allowed him under the law, if these services are in the furtherance of justice?"

The portion of section 3004 which is material to your inquiry is as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for."

The act providing for the appointment of a secret service officer appears on page 501 of 103 Ohio Laws, and is as follows:

AN ACT

"To amend section 2915-1 of the General Code, relative to the appointment of secret service officer by prosecuting attorney.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. That section 2915 of the General Code be supplemented by the enactment of section 2915-1 to read as follows:

"Section 2915-1. The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

The terms of section 3004, above quoted, are general in their application, and apply to all expenses incurred by the prosecuting attorney in the performance of his official duties, and in the furtherance of justice. The provision regarding the secret service officer, however, is a special one, and I am of the opinion that this statute must be construed as an exception to the expense provisions set out in section 3004. The legislature has seen fit to place specific restrictions upon the amount which may be expended for a secret service officer's services, by a county, and has furthermore provided restrictions upon the manner of this expenditure, viz.: approval by the judge of the court of common pleas.

In view of the well established rule of statutory construction, that special provisions must be construed as exceptions to a general provision, I am of the opinion that any attempt on the part of a prosecuting attorney to pay a secret service officer an amount in excess of that provided by section 2915-1, General Code, would amount to an indirect violation and disregard of the restrictions and safeguards provided in said section. I am of the opinion, therefore, that this latter section controls, and that the prosecuting attorney is without power to pay a secret service officer any funds whatever under authorization of section 3004, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

757.

DEFECTIVE MACHINERY — INJURY — MUNICIPAL CORPORATION POWERS OF A CITY TO COMPENSATE FOR INJURIES RECEIVED.

Where a claim is presented to the city auditor asking payment to a physician for his services for attendance upon an employe of the service department injured in the operation of defective machinery. In the absence of authority from council, the city auditor should not honor the voucher for payment to such physician for his attendance upon such employe of the service department, so injured.

COLUMBUS, OHIO, January 31, 1914.

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

GENTLEMEN:—In your letter of October 13, 1913, you request my opinion upon the following question:

> "A claim is presented to the city auditor asking payment to a physician for his services in attendance upon an employe of the service department injured in the operation of defective machinery. Said claim was approved by the director of service upon the understanding that if the same was paid by the city, the employe would not press a claim for damages. Can the city auditor legally make payment of said claim?"

The nature of the claim comprehended in your inquiry is not disclosed by your letter. The facts presented are not sufficient to permit a statement as to whether or not the injury to the employe was such as would present a basis for a legal claim against the city. If neglect could be shown on the part of the city and the city had been acting in a proprietary capacity there could be no dispute as to the city's liability. If, on the other hand, the city had been acting in a governmental capacity it could not be charged in any way with liability. The facts may be such that it is not clear whether the city was acting in either capacity, thereby presenting a claim subject to a bona fide dispute as to the right of the parties before a court of law.

Under the power to sue and be sued, conferred upon a municipal corporation by section 3615, General Code, a city is impliedly given the power to compromise a suit. If the legality of the claim is doubtful, therefore, suit might be entered against the city and judgment confessed for the amount which council see fit to allow. If there exists no doubt as to the legality of the claim there can be no question as to the power of council to pay the same under its general legislative power to compromise claims against the city.

I am aware of no other method by which a settlement could be satisfactorily accomplished in this matter. The statutes nowhere provide for the payment of physicians' fees in behalf of employes by the department of public service, and I am unable to see how it might be concluded that the director of public service would have such power by implication. I am, therefore, of the opinion that in the absence of authorization by council, through the methods above described, the city auditor should not honor a voucher for payment to a physician for his services in attendance upon an employe of the service department injured in the operation of a defective machine.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

758.

STATE INSTITUTIONS FOR FEEBLE MINDED—INMATES—COUNTY TO PAY FOR INMATES CONFINED IN STATE INSTITUTIONS.

Where it is provided by statute that all persons over the age of fifteen years, who are now, or may hereafter become inmates of a custodial department of the Ohio institutions for the feeble minded, a sum of money may be charged to the county from which said inmate is received. The fact that the superintendent and the trustees of the Ohio institutions for feeble minded fail to exercise their right of collecting this sum of money from the counties having inmates in such institutions for a period of twelve years does not prevent them from exercising their right at any time to make such collection, based on the number of inmates and the per capita.

COLUMBUS, OHIO, December 18, 1913.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—On October 1, 1913, you wrote me as follows:

> "April 22, 1898, the legislature of Ohio passed an act to provide custodial care for the feeble minded (93 O. L. 209); section 3 of said act provides 'that all persons over the age of fifteen years who are now, or may hereafter become inmates of the custodial department of this institution, from any county in the state, *may* be charged by the trustees and superintendent of said institution against said county, a sum not exceeding,' etc.
>
> "The period of twelve years elapsed without the exercise of the discretion provided for by the above section.
>
> "On June 22, 1910, a letter was received by county auditor Fisher from E. J. Emerick, superintendent Ohio institution for feeble-minded youth, stating 'as the trustees have decided to enforce this law' (meaning the one above quoted) 'we thought it best to inform you that you may make arrangements for the same.' Nine days later, or on July 1, 1910, said auditor received from said superintendent a bill for $2,064.19, the total charge for keeping certain persons therein named, from January 1, 1910, to July 1, 1910.
>
> "I am of the opinion, that after said board had permitted twelve years to elapse without taking such a step, our county had a right to expect that that same plan would be continued until the county auditor should be notified in advance of any such charges being made and far enough in advance to give the county authorities time to make a proper levy to meet the demand."

You claim this bill should not be paid, for the reasons assigned, and ask my opinion on the matter. During the period of time covered by the account presented to your county, of which you complain, section 3, 93 O. L., 209, was substantially section 1898, G. C., and read as follows:

> "For each person over the age of fifteen years in the custodial department from any county in the state, the trustees and superintendent may charge against such county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, as shown by the annual report of the board of state charities. The treasurer of the

county shall pay the annual draft of the financial officer of the institution for the aggregate amount chargeable against such county, for the preceding year, for such inmates."

This continued to be the law on that subject until the repeal of section 1898 aforesaid, which is found in volume 103, O. L., p. 913; and it follows that the question of the payment of this account is controlled by the law as it stood, up to its repeal August 12, 1913. In my opinion, there is no ambiguity in the language of section 1898, as to the charges for maintaining custodial inmates of said institution. By inspecting the annual report of the board of state charities, the exact amount of per capita cost to each county for supporting inmates of county infirmaries, can be ascertained. Such cost having been so ascertained, the authorities of this state institution had a right to charge against your county the full amount of said per capita for each inmate therefrom, and collect it. Your county was as much bound to take notice of this statute as the officers in control of said institution. You cannot complain if the claim was not promptly presented; and mere delay in so presenting, does not excuse the ultimate payment of the claim. The fact that a claim covering only a portion of the time is presented, does not justify your county rejecting it, if, in fact, the bill is correct for the particular period in question.

On August 31, 1910, the attorney general of Ohio rendered an opinion to the superintendent of said institution for feeble-minded youth, construing said section 1898, in which he held that the amounts based on the above facts are chargeable and collectible from the county. (Attorney General's Annual Report, 1910-11, p. 678.)

On December 9, 1910, the said attorney general again construed section 1898 for the prosecuting attorney of Lucas county, Ohio, in which he emphatically reiterated the above decision and doctrine. (Attorney General's Annual Report for 1910-11, p. 844.) Moreover, the officers of your county had the opportunity of knowing *at all times* the exact number of inmates from said county in said institution, and should have provided for their support under section 1898.

I am, therefore, of the opinion that your county should pay the amount of the bill rendered, provided of course it is correct as based on the number of inmates and the per capita.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

759.

PRIVATE BANK—INSPECTION FEE—STATIONERY—INSPECTION—STATE BANKING DEPARTMENT—PRIVATE BANK ACT.

Where a private bank known as the G. C. Munn and Company, of Portage, Ohio, which carries the word "bank" on its stationery, such bank is subject to inspection and the payment of the inspection fee for examination to the state banking department, as provided for in the private bank act, 103 *O. L.,* 379.

COLUMBUS, OHIO, January 30, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of October 24, 1913, you wrote asking my opinion, and in your letter you say:

"The question has arisen whether a private bank, known as the G. C. Munn and Company, of Portage, Ohio, which carries the word 'bank' on its stationery, is subject to inspection and the payment of the inspection

fee for examinations. They rendered this office a statement of their business as of Sept. 4th, in accordance with our request. I am enclosing copy of their attorney's letter."

By reference to the letter mentioned in your communication I note that up to the time the private bank act (103 O. L., 379) went into effect this bank in question was conducted under the name of "The Munn Bank." At this time the bank had on hand a large amount of bank stationery with its name printed thereon, which it has since utilized—as stated in the attorney's letter—by having the new name of the bank and the word "successors" printed over the former name of the bank as follows: "G. C. Munn & Co., Successors to Munn Bank."

The question is whether the use of the word "bank" in this manner and in this connection brings this bank within the regulatory provisions of the act above noted.

Section 1 of this act provides as follows:

> "That no corporation not organized under the laws of this state, or of the United States, or person, partnership or association, shall use the word 'bank,' 'banker' or 'banking' or 'trust' or 'trust company,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation, as provided in this act. The superintendent of banks shall execute all laws in relation to corporations organized under the laws of this state or of the United States, persons, partnerships and associations using the word 'bank,' 'banker' or 'banking,' or 'trust' or 'trust company,' or words of similar meaning in any foreign language as a designation or name under which business is conducted in this state."

I take it that the intent of this section is that no private bank or corporation not organized under the laws of this state shall use the word 'bank' or other particular words therein mentioned, as a component part of the designation or name under which business may be conducted, unless such private bank or corporation shall submit to inspection, examination and regulation as provided for in the act, and also, though the language of the section is not altogether happy to this end, that if such private bank or corporation does use the word "bank," or other particular words mentioned in the section, as a designation or name under which its business is conducted, it thereby becomes subject to the provisions of the act.

With respect to the particular question at hand, I note that the statute does not specify the particular manner of use of the word "bank" by a private bank, which shall be effective to bring it within the provisions of the act, and as to this I am inclined to the view that any substantial use of the word, whether on its stationery or otherwise, is sufficient for the purpose. However, it must appear that the word "bank" is used as a component part of the designation or name under which the business of a private bank is conducted, before such bank is made subject to the provisions of the act.

The solution to the question here made depends on the consideration whether or not, within the contemplation of this act, the whole expression, "G. C. Munn & Co., Successors to Munn Bank," may properly be considered the designation or name under which the business of the bank is being conducted as indicated by the stationery of the bank now in use. In the consideration of this question it is pertinent to observe that, excepting the right to issue bills to circulate as money, the right of natural persons to carry on the business of banking is in no sense a franchise emanating from the state, but is a common law right.

State vs. Richcreek (167 Ind., 217).
Bank of Augusta vs. Earle (13 Pet., 519, 596).
Curtis vs. Leavitt, (15 N. Y., 9).

Though as to individuals the business of banking is one resting upon common law right, yet it is a business so vitally affecting the welfare of the people that it is subject to proper regulation by the state in the exercise of the police power.

State vs. Richcreek, supra.
Blake vs. Hood (53 Kan. 499).
State ex rel. vs. Woodmansee (1 N. D., 246).

Yet statutes, though enacted in the exercise of the police power, and though founded in wise public policy, which are effective to abridge the freedom of individuals in the conduct of their business, ought always to receive such construction as will carry out the purpose and intention of the legislature in their enactment, with the least possible interferences with the rights of such persons.

Carberry vs. People (39 Ill. Ap. 506).
Nance vs. Southern Railway Co. (149 N. C., 366).
Young vs. Madison county (137 Iowa, 515).

Keeping these considerations in mind with reference to the question at hand, it is pertinent to inquire as to the purpose and scope of the statute before noted, in view of the language therein used. It is apparent that this statute does not seek to subject all private banking business to regulation, but only such as by the use of the word "bank" or other particular words designated in the statute as a part of the designation or name under which the business is conducted, indicates or advertises the fact that the business done under that name is that of banking.

As to private bankers it was competent for the legislature to discriminate between persons carrying on the business of banking in such way as to indicate and advertise the nature of their business, and those who do not. The designation rests upon satisfactory reasons proceeding from the fact that the former will, in all likelihood, attract and command a greater volume of business than the latter, which consideration in turn presents a greater need for regulation.

The intent of the statute is, of course, to be drawn primarily from its language, and the question always is as to the meaning of that which is enacted rather than as to what the legislature intended to enact, and the spirit and purpose of an act is to be extracted from the words of the act itself and not from conjecture *aliunde*.

(66 O. S., 621, 627).
(18 O. S., 311, 341).

yet when the spirit and purpose of an act is so ascertained, that which comes within such spirit and purpose is as much within the act itself as that within its letter.

Latshaw vs. State (156 Ind. 194, 204).
Cummins vs. Pence (Ind. 91 N. E., 529).
Hasson vs. City of Chester (W. Va. 67 S. E., 731, 733).

As before noted, it is apparent from the language of this statute that its purpose is to subject all private banks to the provisions of the act that by the use of the word "bank," or other particular words therein mentioned as a part of the

name under which business is done, indicate and thus advertise that banking is their business; and with respect to the particular bank herein question it is clear that the present use of the word "bank" as effectually indicates and advertises the fact that banking is the business carried on as if the name "Munn Bank" alone were used. In other words, the present use of the word "bank," in the manner and connection before noted, within the spirit of the statute, at least brings this bank within the provisions of the act. The statute should be so construed as to make effective its purpose insofar as that purpose is manifest from the language of the statute itself, and should not, without cogent reason, be so construed as to make possible an easy evasion of that purpose.

On the considerations above noted, I am of the opinion that the bank in question is subject to inspection and examination, as provided for in this act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

760.

BANKS AND BANKING—TRUST FUNDS—ASSETS AND LIABILITIES—TAXES AND TAXATION—TAX—FEE BILL.

In computing the tax on banks under the fee bill, trust funds deposited in such banks should be taken into conisderation, as such funds in the bank's possession constitute resources within the meaning of section 9786, General Code, upon which the fee therein provided for is figured and determined.

COLUMBUS, OHIO, January 20, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of November 8, 1913, you wrote asking my opinion as follows:

> "In computing the tax on banks under the fee bill, one of our state banks has raised the question whether it should be computed on the trust funds, claiming that it is a matter distinct and apart from the bank business. It is made a part of the statement, however, the banks being compelled to report it in their assets and liabilities."

The expression, "trust funds," as applying to the business of banking institutions, has a wide range of meaning and may apply to deposits of many kinds, and speaking generally, it may apply to funds affected by a trust relation, either on the part of a depositor or the bank itself. I take it, however, from the form of your inquiry considered in connection with the correspondence accompanying it, as well as from statements made by representatives of your office to this department that your question has particular reference to funds deposited in, or otherwise accruing to the trust department of banks organized to include the business of a trust company under the statutes providing for the same. The question here presented is one arising under section 1 (103 O. L., 180), which provides:

> "That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio:

"(a) Each company, firm, corporation, person, association and co-partnership which under the laws of Ohio is subject to inspection and examination by the superintendent of banks, shall pay to the superintendent of banks on or before the fifteenth day of November in each year the sum of thirty dollars, and in addition thereto one seventy-fifth of one per cent. of the total aggregate resources of such company, firm, corporation, person, association or co-partnership in excess of one hundred thousand dollars as shown by the report of the condition of each such company, firm, corporation, person, association or co-partnership made last before October fifteenth of such year; provided, however, that in no event is such total fee to exceed the sum of twelve hundred and fifty dollars in any one year. * * *"

Sections 711 and 724, General Code, provide as follows:

"The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations.

"Sec. 724. At least twice each year, and also when requested by the board of directors or trustees thereof, the superintendent of banks or an examiner appointed for that purpose shall thoroughly examine the cash, bills, collaterals or securities, books of account and affairs of each bank, savings bank, safe deposit and trust company, savings and loan society or association incorporated under any law in this state. Such examination shall be made in the presence of the members of the executive committee or a majority thereof. He shall also ascertain if any such corporation, company, society or association is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation."

Sections 725-728 inclusive, General Code, provide means for effectuating the examination provided for in section 724, of the banking companies therein named, while section 729, General Code, provides as follows:

"The officers of any such corporation, company, society or association shall submit its books, papers and concerns to the inspection and examination of the superintendent of banks or any duly appointed examiner, and on refusal so to do or to be examined on oath touching the affairs of such company, corporation, society or association, the superintendent may institute proceedings in the common pleas court of the county in which the business is transacted for the appointment of a receiver therefor to wind up its business."

From the foregoing statutory provisions it appears that all banking concerns, subject to inspection and examination by the superintendent of banks, are likewise subject to the payment of the fees prescribed, and that trust companies are included in the list of concerns which are subject to such inspection and examination. By authority of statute one banking company may include in its activities banking business of different kinds, e. g., that of a commercial bank and that of a trust

company. In such case, of course, the right and duty of the superintendent of banks as to the inspection and examination goes to the whole business of the company and to each and all of its departments.

The specific question here made arises out of those provisions of section 1, (103 O. L., 180) which require the payment of a fee based upon a percentage of the total aggregate resources of the company, firm, corporataion, person, association or co-partnership subject to inspection or examination in excess of $100,000.00. Full and detailed provision is made by statute with reference to trust companies looking to the security of funds deposited with trust companies on trust committed to them and providing the manner of their investment. Such companies are authorized to accept and execute trusts committed to them by any person or persons, corporations, or by order or decree of the court.

Section 9777, General Code, provides that the capital of such corporations, with all its property and effects, shall be absolutely liable in case of default, while section 9778, General Code, makes a further requirement that before any such trust company, either domestic or foreign, shall accept trusts which may be invested in or committed to such company, shall have a paid in capital of at least one hundred thousand dollars and if its capital is two hundred thousand dollars or less, make a deposit with the treasurer of state in the sum of fifty thousand dollars. If its capital exceeds two hundred thousand dollars, the amount of such deposit with the state treasurer shall be one hundred thousand dollars. It is provided that the full amount of such deposit may be in cash, or may be in bonds of the United States or of this state, or of any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past has paid dividends of at least three per cent. on its common stock.

By section 9779, General Code, it is provided that the treasurer of state shall hold such funds or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but it is further provided that so long as such trust company continues solvent the state treasurer shall permit such company to collect interest on its securities so deposited.

Section 9781, General Code, provides in detail as to the manner in which money or property received on deposit or in trust by such companies shall be invested when the manner of investment is not provided for in the trust itself.

Section 9786, General Code, provides as follows:

> "All moneys or property held in trust shall constitute a deposit in the trust department, and the accounts and investments thereof shall be kept separate. Such investment or loans shall be especially appropriated to the security and payment of all such deposits, and not be subject to any other liabilities of the corporation. For the purpose of securing the observance of these requirements, it shall have a trust deparment in which all business pertaining to such trust property shall be kept distinct from its general business."

It can be easily conceived that funds may be deposited with a trust company or with any other kind of a banking institution for that matter, under such circumstances and for such purposes as that the title and ownership of the funds so deposited will not pass to the banking institution receiving it. It is apparent, however, from the statutory provisions before noted, looking to the security of funds deposited in trust companies or otherwise accruing to it by reason of trusts accepted by such companies, and from the provisions authorizing and directing the manner of the investment of such funds, it is contemplated by the statutes that trust funds committed to a trust company in the ordinary course of its business shall pass to and

become the property of such company. As to such funds deposited in or otherwise accruing to a trust company, it is clear that such funds in its possession constitute resources within the meaning of this section upon which the fee therein provided for is to be figured and determined. On the other hand, funds that are deposited with such companies under such circumstances and for such purposes that the title to such funds does not pass, do not constitute resources of such company; but any funds that such companies are authorized to invest, either by the terms of the trust or by the provisions of section 9781, General Code, are clearly the general property of the trust company, and are resources, within the meaning of section 1 of the fee bill.

The question presented is not different in the case of a company organized for the purpose and conducting a general banking business as well as that of a trust company. In such case funds deposited in the trust department of such bank in the ordinary course of business, constitute resources of such company in the trust department thereof.

In conclusion I note that the question here presented is limited to trust funds on hand, and that no question is made with reference to trust investments, and it is to be understood that the foregoing opinion is given only with reference to the actual question presented.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

761.

STATE LIQUOR LICENSING BOARD — FIXTURES AND SUPPLIES— COUNTY LIQUOR LICENSING BOARD—

The state liquor licensing board has authority to purchase furniture, books, stationery and other supplies that may be necessary for carrying on the business of the county liquor licensing board, and furnish the same to such boards.

COLUMBUS, OHIO, February 18, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—This morning you orally submitted to me the following question:

> "Has the state liquor licensing board authority to purchase furniture, books, stationery and other supplies that may be necessary for the carrying on of the business of the county liquor licensing boards, and furnish the same to such boards?"

Section 4 of the act to provide for license to traffic in intoxicating liquors, 103 O. L., 217, provides that the state liquor licensing board

> "shall adopt rules and regulations for its own government and of the county boards."

Section 5 of the same act requires this board to provide itself with the necessary furniture, books, stationery and other things that may be necessary for the proper conducting of the office; while section 13 authorizes each county board to provide itself with books, stationery and other paraphernalia, and to incur other such expenses for its operation as may be necessary to carry on its business. The following salient language appears in this section:

"All expenses, including compensation of clerks and employes shall be subject to the approval of the state board, and the county board shall certify to the state board, on the first day of each month, a statement of all expenses of such county board for the month preceding, and upon approval thereof the state board shall cause the same, together with the compensation of the commissioners and secretary, to be paid in the same manner as its own expenses are paid."

Section 46 provides for the manner in which expenses shall be paid.

It will be noted that under section 13 while each county board is authorized to incur expenses for books, stationery and other paraphernalia, nevertheless, such expenditures are subject to the approval of the state board. This can mean nothing but that the county boards cannot incur expenses unless the state board approve the same. If there be no such approval, then the action of the county boards in incurring expenses is a nullity, as it is ultra vires and without authority of law. This being true, it necessarily follows that an essential requisite to the payment of such expenses is action on the part of the state board. This action is not one of purely ministerial nature, but on the contrary, involves exercise of discretion and judgment, and the determination of the state board upon this question is final.

The language of section 5 authorizing the state board to provide itself with the necessary furniture, etc., I do not regard as important in this inquiry, as that, no doubt, has reference to such supplies as may be necessary for the state board itself. It is important, however, to bear in mind the fact that section 4, to which I have hereinbefore referred, authorizes the state board to adopt rules and regulations for the government of county boards. I think, under the circumstances, it would be perfectly proper for the state board to adopt a rule or regulation that no county board should incur any expenditure for certain supplies, and that no bill for any such supplies purchased by a county board would be approved by the state board. When this order shall have been issued, it will be a distinct disapproval of any expenditure, within the inhibition, that may be incurred by the county board. This will practically deprive the county board of its right to make such purchases. When this is done the state board can furnish to county boards those supplies which they are not authorized to buy. The authority for such purchase by the state board may be found in the concluding clause of section 5, which authorizes it to

"incur such other expenses as it deems expedient, subject to the approval of the governor."

The effect of this holding will be to authorize the state board to purchase, at wholesale, for the county boards such supplies as may be necessary for the proper operation of the business of such county boards, thereby resulting in a very great saving to the state, by reason of the fact that supplies in greater quantities can be purchased much more economically than could be done if the county boards were allowed to buy their own supplies. Not only is this true, but it will result in there being a uniformity of equipment, stationery and books throughout the state, which will undoubtedly make for more efficient and systematic administration of the law from a clerical standpoint.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

762.

MEMORIAL BUILDING—BOND ISSUE—DEPOSITORY INTEREST—GENERAL COUNTY FUNDS.

The depository interest upon the proceeds of a bond issued for the purpose of constructing a county memorial building is to be paid into the general county funds.

COLUMBUS, OHIO, February 11, 1914.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—My opinion has been requested upon the following question:

"What disposition shall be made of the depository interest upon the proceeds of a bond issue for the purpose of constructing a county memorial building?"

The following sections of the General Code have been considered in this connection:

"Section 3059. When the commissioners of a county by resolution passed by a majority vote certify to the governor that in their opinion it is desirable to erect, furnish and maintain a memorial building to commemorate the services of the soldiers, sailors, marines and pioneers of the county and to *expend* for such purpose an amount to be named by them *not to exceed* two hundred and fifty thousand dollars in any one instance, the governor shall appoint a board of trustees composed of five citizens of such county, not more than three of whom shall belong to the same political party, to be known as the 'Memorial Association of ---------- county, Ohio.' * * *

"Section 3061. Immediately upon the appointment and organization of such board of trustees, they shall certify to the deputy state supervisors of elections of the county, the fact of their appointment and organization, and direct the submission to popular vote at the next regular county election of the question of the issue of bonds in the amount so named in the original resolution, and of the erection and maintenance of the memorial building contemplated. * * * If a majority of the votes cast upon the question is in favor of the issuance of such bonds and the construction and maintenance of such memorial building, the board of trustees shall proceed as hereinafter authorized.

"Section 3062. The board of trustees shall request the commissioners *of the county* to issue, and the commissioners shall thereupon issue, the bonds *of the county* in such denominations, for such period and bearing such rate of interest as the board of trustees prescribes not to exceed the total sum determined upon in the original resolution of the commissioners. The bonds shall be sold for not less than par with accrued interest to the highest bidder after advertisement for a period of thirty days, in two or more newspapers published or of general circulation in the county.

"Section 3063. The funds arising from the sale of the bonds shall be placed *in the county treasury* to the credit of a fund to be known as 'the memorial building fund.' Such fund shall be paid out upon the order of the board of trustees, certified by the chairman and secretary. The commissioners of the county shall annually levy an amount of taxes in addition to all other levies authorized by law, that will pay the interest on such

bonds and create a sinking fund sufficient to redeem them at maturity. If upon the completion of the memorial building an unexpended balance of the fund remains in the county treasury, it shall be placed and kept to the credit of such sinking fund.

"Section 3063-1. The money in the county treasury to the credit of 'the memorial building fund' may, upon the order of the board of trustees, certified by the chairman and secretary, or the money in the county treasury raised for the purpose of erecting a monument in memory of those who died or were killed during the war of eighteen hundred and sixty-one, under the provisions of section twenty-four hundred and fifty-three of the General Code may, upon the order of the county commissioners, be paid over to the state armory board and shall be expended by such state armory board in connection with money from 'the state armory fund' for the purpose of erecting an armory within the county, as is provided in sections five thousand two hundred and fifty-three to five thousand two hundred and seventy-one inclusive of the General Code.

"Section 3068. Upon the completion of the memorial building the trustees shall turn it over to the county commissioners, who shall provide for the maintenance, equipment, decoration and furnishing thereof, not to exceed the sum of twenty-five thousand dollars in the same manner as they are authorized to care for and maintain other property of the county. The board of commissioners of the county, in addition to all other levies authorized by law, shall levy an annual tax in the year 1910, and annually thereafter to care for such building, and to make such improvements thereof as are necessary to carry out the purposes for which it was constructed. They may permit the occupancy and use of the memorial building, or any part thereof upon such terms as they deem proper.

"Section 2737. All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the credit of the county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day. All such interest realized on the money belonging to the undivided funds shall be apportioned by the county auditor to the state, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political divisions or districts bear to the entire amount collected by the county treasurer for such undivided tax funds and deposited as herein provided, due allowance being made for sums transferred in advance of settlements. All interest apportioned as the county's share together with all interest arising from the deposit of funds *belonging specifically to the county* shall be credited to the general fund of the county by the county treasurer. The county auditor shall inform the treasurer in writing of the amount apportioned by him to each fund, district or account."

As stated, I have considered all these sections and the arguments which have been predicated upon some of them in support of one or another answer to the main question, which is logically susceptible to three possible answers, viz.:

1. The depositary interest arising from the proceeds of the bond sales is to be credited to the fund itself, that is the building fund.

2. The interest is to be credited to the "sinking fund" of which section 3063, General Code, speaks.

3. The interest shall be credited to the general fund of the county.

But, though I have given what I think is due consideration to all these sections, and all possible arguments that might be predicated upon any one of them, I have resolved the question in my own mind upon the proper interpretation of section 2737, General Code, and particularly of the phrase "funds belonging specifically to the county" as therein used.

In my judgment the proceeds of a sale of bonds for the construction of a county memorial building constitute a fund belonging specifically to the county within the intendment of section 2737, General Code.

In the first place there is very little doubt in my mind that the proceeds of such a fund do actually belong to the county in the proprietary sense, both legal and beneficial. Legally, the proceeds belong to the county because they are borrowed by the the county and the faith and credit of the county and its tax duplicate, under the levying power of the county commissioners, are pledged to its re-payment.

I think that the proceeds of such a bond sale also belong to the county in the beneficial sense, in that the building when constructed becomes a county building. This is true even in case the money is turned over to the state armory board for in the section which I have not quoted it is provided that the portion of the building jointly constructed, which is to be constructed by the use of the county's money, must be used for county purposes.

Of course, it may be stated here that if the sections which relate to the state armory board be otherwise construed, in all likelihood they must be held unconstitutional under the decision of the supreme court in the case of Hubbard vs. Fitzsimmons, 57 O. S., 436.

The mere fact that the trustees for the erection of the armory, rather than the county commissioners themselves, have the immediate control of the disbursement of the fund is evidently immaterial insofar as the question now under consideration is concerned. The trustees, appointed by the governor, are to serve merely until the building is completed. They constitute what may be called, with accuracy, a "building commission" and not a permanent governmental agency. The service which they perform is performed for and on behalf of the county and not performed on behalf of the state or any other political subdivision; for the fruits of their labor is a building which is to belong to the county, and the funds over which they are given control are procured by the exercise of the county's borrowing power, and are to be repaid by the exercise of the power of taxation for and with respect to the county, so that unless the purpose of all this is a county purpose the related statutes would be clearly unconstitutional as authorizing taxation within a certain district for a purpose not pertaining to that district.

Of course there are many funds of the county which are not under the direct control of the county commissioners. Even the general county fund is subject to draft, under many statutes, upon the order of officers other than the county commissioners. The same is true, in a peculiar sense, of the judicial fund. Therefore, it must follow that the test as to whether or not a given fund in the county treasury is a county fund, in the exact sense of the word, cannot be made dependent upon whether or not it is controlled by the county commissioners. In short, it seems to me that the trustees for the erection of the memorial building bear the same relation to the proceeds of the bond issue as the infirmary directors formerly sustained toward the poor fund, for example:

I am, accordingly, strongly inclined to the opinion that in every sense of the word the memorial building fund is a "fund belonging specifically to the county." But I am quite convinced that, whether or not the fund might be said to be within the purview of the phrase quoted in every sense in which that phrase might be read, it is clearly within its contemplation as used in section 2737, General Code. This section purports to dispose of interest on all moneys deposited in the county depositary. It provides that that realized on the undivided tax fund shall be ap-

portioned to all of the districts whose levies resulted in that fund, including, of course, the county, and then provides that the interest apportioned as the county's share, i. e., of the undivided tax fund, together with all interest on "funds belonging specifically to the county" shall be paid into the general county fund.

Used in this connection, I think the phrase quoted means and embraces all other funds in the county treasury except the undivided tax fund. As a general rule, of course, subject possibly to some exceptions, the county treasurer is the custodian of county funds only, save and excepting such moneys as he may hold as undivided taxes belonging to other taxing districts. I think the act clearly contemplates the deposit of all moneys in the county treasury, and that that provision thereof which relates to the disposition of interest is as extensive as the provision which relates to the deposit itself. That is to say, when the latter provision of the section has disposed of the "interest realized on the money belonging to the undivided tax funds" and the "interest apportioned as the county's share," (of such undivided tax levies) and the "interest arising from the deposit of funds belonging specifically to the county," it has disposed of all interest arising by reason of compliance with the requirement of the preceding section (section 2736) to the effect that "such treasurer shall deposit * * * *all money in his possession* * * *." The intention to make the disposition of interest co-extensive, of necessity, with the requirement to deposit, is reasonably clear to me. The proposition of law at which I have arrived may be succinctly stated as follows:

The phrase "funds belonging specifically to the county," as used in section 2737, means "all money in his (the county treasurer's) possession" (section 2736) excepting the undivided taxes.

I am, therefore, of the opinion that the interest on the proceeds of the bond issue for the memorial building are to be paid into the general county fund.

This conclusion makes it unnecessary for me to consider the point that as a general principle all accretions to a trust fund belong to the fund. This principle is, of course, well established, but it does not control the disposition of interest derived from the use of public moneys as against other specific disposition thereof by statute, nor is it clear to me that the building fund, for the purpose of constructing a county memorial building, is a trust fund in any higher sense than the proceeds of any tax levy or of any issue of bonds.

I find it unnecessary, too, to determine in my own mind whether or not the money derived from the sale of such bonds is "county money" in every sense. I have already discussed this question, and need only say, in addition thereto, that under section 3061, General Code, these moneys are required to be placed in the county treasury to the credit of a fund therein. Being borrowed for a county purpose, being secured by the county duplicate, and being required to be placed in the county treasury, such moneys are clearly county moneys, and are even more clearly moneys in the "possession" of the county treasurer required to be deposited in the county depositary under section 2736, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

763.

COLLATERAL INHERITANCE TAX LAW—METHOD OF LEVYING INHERITANCE TAX—COLLECTING THE SAME—FEES—COUNTY TREASURER—COUNTY AUDITOR—AUDITOR OF STATE—INTEREST—PROBATE JUDGE.

1. *In computing the collateral inheritance tax the interest of each separate inheritor subject to the tax constitutes a separate taxable thing, and the exemption of five hundred dollars should be deducted from each of the separate interests, and not from the aggregate value of all interests subject to taxation.*

2. *Section* 5331, *General Code, will prevail over section* 5340, *General Code, consequently, fifty per cent. of the inheritance tax is to be paid to the village.*

3. *The cost and expense of collection of the inheritance tax continues to be borne as provided in section* 5346, *General Code, although the state now receives but fifty per cent. of the total revenue under the inheritance tax law, and although the county no longer receives anything whatever out of the proceeds of such tax.*

4. *The probate judge may lawfully charge as fees and collect from the county treasury as provided in section* 5346, *General Code, the sum of ten cents per hundred words for making the copy required to be made by section* 5340, *General Code, but he is not entitled to any fee whatever for making the act of delivery required by the section.*

5. *The county auditor is not entitled to a fee of four per cent. for his services under the act; his fees are to be computed on the basis provided by section* 2624, *General Code.*

6. *No interest is chargeable under the provisions of sections* 5331 *and* 5335, *General Code, until the expiration of one year.*

COLUMBUS, OHIO, February 11, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge reecipt of your letter of February 5th, requesting my opinion upon the following questions in connection with the amendment of the collateral inheritance tax law, found in 103 Ohio Laws 436:

"Sections 5331 and 5333, as amended, provide that the state shall receive 50% of the tax collected, and the city, village or township shall receive 50%. Section 5346 provides that the state shall bear 75% of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes, and said amount to be deducted from the amount of taxes paid into the state treasury.

Question. Did the legislature intend, under the new apportionment, that the state should bear 75% of the cost of collecting the said taxes?

"Section 5346 provides that the fees of officers having duties to perform under the provisions of this subdivision of this chapter, shall be paid by the county from the county expense fund thereof, and shall be the same as allowed by law for similar services.

"Question. Does this mean that the probate judge shall receive a fee for delivering an inventory of an estate to the county auditor, as provided in section 5340, or is the probate judge presumed to have received his fees as provided in the 'Canfield act' for probate judges in the filing of inventories of estates of deceased persons?

"Question. What are the county auditors' fees under this act? We suppose it to be 4%.

"*Question.* Is an executor or administrator compelled to pay interest from the day of death of decedent, and to the time of paying the collateral inheritance tax, if said tax is paid within the year? If so, what rate of interest must he pay?"

In connecton with your questions I have chosen to answer the questions submitted by Hon. Ray C. Carpentar, legal counsel of the village of Athens, as follows:

"'A.' dies leaving real estate situated in an Ohio village to his five brothers, share and share alike; appraised at ten thousand dollars.

"*Question.* Under section 5331 of the General Code, 103 O. L. 463, would the sum of five hundred dollars only be deducted and the balance of nine thousand five hundred dollars be taxed at five per cent.; or would the sum of five hundred dollars be deducted for each of the brothers and the balance of seventy-five hundred dollars be taxed?

"*Question.* Will section 5331 prevail over section 5340 and fifty per cent. of the tax be paid to the village?"

The manner in which the questions asked by yourself and Mr. Carpenter arise is best illustrated by the quotations of certain sections of the General Code as they are now in force:

"Section 5331. (As amended, 103 O. L., 463) All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the interstate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendent or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. *Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax orignates.* * * * Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid.

"Section 5335. Taxes imposed by this subdivision of this chapter shall be paid into the treasury of the county in which the court having jurisdiction of the estate or accounts is situated by the executors, administrators, trustees, or other persons charged with the payment thereof. If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent. shall be thereafter charged and collected thereon, and if not paid at the expiration of eighteen months after such death, the prosecuting attorney of the county wherein said taxes remain unpaid, shall institute the necessary proceedings to collect the taxes in the court of common pleas of the county, after first being notified in writing by the probate judge of the county, of the nonpayment thereof. The probate judge shall give such notice in writing. If the taxes are paid before the expiration of one year after the death of the decedent, a discount of one per cent. per month for each full month that payment has been made prior to the expiration of the year, shall be allowed on the amount of such taxes.

"Section 5340. Within ten days after the filing of the inventory of every such estate, any part of which may be subject to a tax under the

provisions of this subdivision of this chapter, the judge of the probate court, in which such inventory is filed, shall make and deliver to the county auditor of such county a copy of the inventory; or, if it can be conveniently separated, a copy of such part of the estate, with the appraisal thereof. The auditor shall certify the value of the estate, subject to taxation hereunder and the amount of taxes due therefrom, to the county treasurer, who shall collect such taxes, *and thereupon place twenty-five per cent. thereof to the credit of the county expense fund, and pay seventy-five per cent. thereof into the state treasury, to the credit of the general revenue fund, at the time of making his semi-annual settlement.*

"Section 5346. The fees of officers having duties to perform under the provisions of this subdivision of this chapter, shall be paid by the county from the county expense fund thereof, and shall be the same as allowed by law for similar services. In ascertaining the amounts due the state, seventy-five per cent. of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes shall be charged to the state and deducted from the amount of taxes to be paid into the state treasury."

Answering Mr. Carpenter's questions first, for convenience, I beg to state that it is clearly established that the collateral inheritance tax rests upon the privilege of inheriting as a subject of taxation and not upon the privilege of transmitting property by will, intestacy or gift.

Hence, the interest of each separate inheritor subject to the tax constitutes a separate taxable thing, and the exemptions of five hundred dollars should be deducted from the value of each of the separate interests and not merely from the aggregate value of all the interests subject to taxation.

Answering Mr. Carpenter's second question, I am clearly of the opinion that section 5331, General Code, as amended, must necessarily prevail over section 5340, inadvertently left unamended by the general assembly. The two statutes are in pari materia and are irreconcilably inconsistent in their provisions: therefore, the one last passed must control, and the section which the general assembly failed to amend expressly must be regarded as amended by implication—as if it read to the effect that the county treasurer upon collecting the taxes due shall thereupon place fifty per cent. thereof to the credit of the city, village or township in which the tax originates, and fifty per cent. thereof to the state to the credit of its general revenue fund, and shall so settle at the time of making his next semi-annual settlement.

Accordingly, Mr. Carpenter's second question must be answered in the affirmative.

Answering your first question, I beg to state that the principle last above referred to will not apply to the interpretation of section 5346. There is nothing necessarily inconsistent between amended section 5331 and section 5346. Although, as you seem to intimate, it seems unreasonable to presume that the legislature would have intended that the state should continue to pay seventy-five per cent. of the collection cost and other expenses when receiving but fifty per cent. of the taxes, and that the county should continue to pay twenty-five per cent. of the collection cost and expenses when it was deprived of any participation in the proceeds of the tax whatever, yet it does not appear that the legislature entertained any intention whatever as to the apportionment of expenses. It did legislate and express its intention as to the apportionment of the taxes, but the inference that it thereby intended that the apportionment of expenses should be the same is too remote to be indulged.

I am accordingly of the opinion that section 5346, General Code, was not affected in any way by the amendment to section 5331, and that the cost and expenses of collection of the inheritance tax continue to be apportioned as provided in the former section, although the state now receives but fifty per cent. of the total revenues under the inheritance tax law, and although the county no longer receives anything whatever out of the proceeds of such tax.

In answering your second question, I venture to presume that by the "Canfield act" you mean the act in 102 Ohio Laws 277.

In my opinion the fee paid to the probate judge out of the estate for the filing of the inventory and appraisement of the estate, as provided in section 1601, General Code, does not in any way enter into the costs and expenses of the collection of the inheritance tax. When the probate judge delivers a copy of the inventory and appraisement, or so much thereof as may be conveniently separated, to the county auditor, as provided in section 5340, he performs an act under the inheritance tax **law** and not one which has any place in the administration of the estate as such. That is to say, the act which the probate judge is required to perform under the inheritance tax law is a duty separate and distinct from his duty to receive and file petitions, inventories, appraisements, etc., in ordinary administration proceedings. This being the case, none of the fees provided for in the schedule found in section 1601, General Code, as amended (which I need not quote) applies to this act.

Section 1602, General Code, also a part of the so-called Canfield act, differs from section 1601, in that it provides a schedue of fees for services similar in their nature to the service required under section 5340 such as holding inquests of lunacy, acting as judge of juvenile court, appointing examiners of the county treasury, and making reports of judicial statistics to the secretary of state. In general, this section provides a schedule of fees for services required to be rendered to the public or to be paid for out of the public treasury. But this section specifies no fee for the service required in section 5340.

Section 1603, General Code, also a part of the Canfield law, provides as follows:

> "For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

On the authority of decisions like Millard vs. Commissioners, 13 C. C. R. 518; Millard vs. Conradi, 5. C. C. R. n. s. 145; and Swartz vs. Commissioners, 35 Bull. 275, as well as upon reason, it must be held that unless there can be found in the schedule of fees provided for the clerk of the court of common pleas a fee for a service similar to the furnishing of a copy of all or a part of the inventory to the county auditor, as required in section 5340, General Code, the probate judge is entitled to no fee whatsoever for performing the services required by said section.

I find in section 2901, prescribing the fees of clerk of the common pleas court, the following:

> "for making copies of pleadings, process, record or files, including certificate and seal, ten cents per hundred words."

Section 5340 requires the probate judge to "make and deliver to the county auditor * * * a copy," etc. Section 5346 clearly implies that the probate judge shall be paid whatever fees might lawfully be taxed by him for this service. In my judgment the probate judge may lawfully charge and collect from the county treasury, as provided in section 5346, the sum of ten cents per hundred words for

making the copy required to be made by section 5340, but is not entitled to any fees whatever for performing the act of delivery required by the section.

Answering your third question, I beg to state that in my judgment the county auditor is not entitled to a fee of four per cent. for his services under the act. The sections which are to be considered are these:

> "Section 2624. (As amended, 102 O. L. 277) On all moneys collected by the county treasurer on any tax duplicates of the county, other than the liquor and cigarette duplicates, the county auditor on settlement semi-annually with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:
>
> "On the first one hundred thousand dollars one and one-half per cent.; on the next two million dollars five-tenths of one per cent.; on the next two million dollars four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenues payable to the state as well as to the county, townships, corporations and school districts.
>
> "Section 2625. In addition to the compensation specified in the preceding section, each county auditor shall receive the compensation provided by law for his services as member of the boards for listing railroads, under the school laws, as county sealers, and in filing statements of taxable property; and four per cent. of the amount of tax collected and paid into the county treasury, on property omitted and placed by him on the tax duplicate."

While it is true that the auditor, by the discharge of his duties under section 5340, General Code, is responsible for placing a charge for the collection of the collateral inheritance tax upon the treasurer's duplicate, if the term may be applied, yet, this is not an instance of "property omitted and placed by him on the tax duplicate," for the reason that the charge which the treasurer has for collection does not represent "property" at all, and for the further reason that the auditor, in certifying the collection charge to the treasurer under section 5340, is not placing on the duplicate anything which has been *omitted* therefrom, as the term is used in the fee section.

In my judgment, section 2624, General Code, applies. While section 5340 contains no express provision to that effect, it seems that the certificate which the treasurer holds for the collection of the inheritance tax may be regarded as "a duplicate of the county" within the meaning of section 2624. This follows, I think, from the peculiar language of section 2624, which clearly indicates that the word "duplicate," as therein used, is not confined in its scope to the duplicate of real and personal property.

I am therefore of the opinion that the county auditor's fees under the inheritance tax law are to be computed on the basis provided by section 2624, General Code.

Answering your fourth question I refer to sections 5331 and 5335 of the General Code, as they stand. The first of these sections provides that the taxes shall become due and payable immediately upon the death of the testator or decedent; while section 5335 provides in part as follows:

> "If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent. shall be *thereafter* charged and collected thereon * * *. If the taxes are paid before the expiration

of one year after the death of the decedent a discount of one per cent. per month for each full month that payment has been made prior to the expiration of the year shall be allowed on the *amount of such taxes.*"

In my opinion no interest is chargeable under these sections until the expiration of one year. The first of the two sentences above quoted from section 5335, standing by itself, is not sufficient perhaps to establish this conclusion, because this sentence read in connection with that quoted from section 5331 might still leave opportunity for the inference that interest at the legal rate of six per cent. would be chargeable until the expiration of the year.

In my judgment, however, the last sentence of section 5335 is sufficient to indicate the true legislative intent. It appears therefrom that if the amount of the taxes is paid within the year a rebate or discount shall be allowed on the amount of the taxes. If the general assembly had intended that interest should be charged, it seems to me that this provision for a discount would have been differently phrased.

There must be taken into account here, I think, the obvious fact that although the taxes are technically due at the death of the decedent, yet they can under no circumstances be actually paid until a considerable time thereafter. I do not believe the general assembly could have intended that legal interest, the theory of which rests in penalty, should be imposed for the failure to make a payment which could not be made at the time when it is provided that it shall be technically "due." This is the very purpose of the provision of section 5335 relative to the period of one year after the death of the decedent. The general assembly has deemed that period as a reasonable one under all the circumstances within which to give the administrator or executor of the estate time to have the taxes assessed, collected and paid into the treasury. It is not consistent with these considerations to suppose that the legislature intended that interest should be chargeable during this period.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

764.

ABSTRACT OF TITLE—DEED FROM JAMES J. BAILEY, ADMINISTRATOR, ESTATE OF C. D. BAILEY, DECEASED, TO THE STATE OF OHIO—DEED SUFFICIENT TO CONVEY TO THE STATE A TITLE IN FEE SIMPLE.

Abstract of title and deed from James J. Bailey, administrator of the estate of C. D. Bailey, deceased, to the state of Ohio for property situated in Gallipolis township, Gallia county, Ohio.

COLUMBUS, OHIO, February 17, 1914.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 28th, in which you enclose abstract of title to, and deed from James J. Bailey, administrator of the estate of C. D. Bailey, deceased, to the state of Ohio, for part of lots Nos. 519, 520, 1107, 1141, 1148 and 1156 in sections No. 23 and No. 24, township No. 3, range No. 14, Gallipolis township, Gallia county, Ohio; which real estate your board desires to purchase for the Gallipolis state hospital.

A careful examination of the abstract discloses that it is little more than a copy of the indices to certain deeds in the office of the county recorder of Gallia county.

It is impossible to pass upon the legality of this title with the meagre information at hand. I suggest that an abstract be made in the usual form on the regular blanks provided for that purpose.

The description in the several instruments abstracted are so incomplete that it is impossible to ascertain whether the deed to the state of Ohio covers the portion of said lots owned by Mr. Bailey. A complete description of the real estate conveyed by said instrument should be incorporated in the abstract and a plat of the lands owned by Mr. Bailey should be furnished so as to enable me to determine the correctness of the description in the deed to the state of Ohio.

The deed to the state of Ohio is in proper form, duly signed, acknowledged and attested and is sufficient to convey to the state a title in fee simple.

I have, therefore, approved the same and will retain it in my possession until a proper abstract is furnished.

The abstract is herewith enclosed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

765.

COLLATERAL INHERITANCE TAX—JANE M. CASE HOSPITAL—TAXES AND TAXATION—BEQUEST—AGED LADIES' HOME.

Unless the Jane M. Case hospital at Delaware, Ohio, is conducted in such a manner as to deprive it of its public charitable nature, a devise or bequest to or for its use is exempt from the collateral inheritance tax.

COLUMBUS, OHIO, February 13, 1914.

HON. E. R. WILLIAMS, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—Under date of January 10th you request my opinion as to the exemption from the collateral inheritance tax of bequests and devises to or for the use of two certain institutions in the city of Delaware, the facts with respect to which are stated in your letter as follows:

> "The Jane M. Case Hospital, at Delaware, Ohio, is a corporation under the laws of this state, not for profit; the object of this organization is for the treatment of patients and the training of nurses. This hospital is open to the public, and all patients who are able are required to pay the necessary expenses at this hospital; the expenses of the indigent patients of the county are paid by the county commissioners.
>
> "The aged ladies' home is an institution at Delaware, Ohio, organized for the purpose of providing a home for aged ladies. To be admitted to this institution the inmates must give all their property to the institution, and the amount of their property must be at least $200. The institution is not open to all aged ladies upon these terms—that is, the board of managers determine who may be admitted.
>
> "No one derives any profit from either of the above institutions. Both institutions are assisted to a large extent by donations from the people."

In connection with the aged ladies' home, I am in receipt of a letter from Mrs. Eva G. Slack, in which the following statement is made:

> "The home is supported by the efforts of a board of thirty-four ladies, and the income from admission fees. No assistance is received from the county except board, $2.00 per week, for each of the ladies placed there by the infirmary directors. Admission fees are: for ladies from fifty to seventy, $600; above seventy $400. This entitles them to all care and support during life and burial at death. The board may remit the admission fee in cases of persons wholly destitute of means. This has been done in several cases."

You will observe that this statement does not precisely agree with yours, in that Mrs. Slack represents that the institution in which she is interested does admit on occasion persons wholly destitute of means without the payment of the admission fee. Furthermore, her statement does not agree with yours with respect to the exact terms or admission of those having some property. I will assume as to this fact that the conventional fee is as stated by Mrs. Slack, i. e. ladies from fifty to seventy $600, and ladies above seventy $400; provided that if the means of an applicant are less than the amount of the fee exacted, the applicant's entire means shall be paid to the institution as a condition of admission, and in no case, except by special dispensation of the board of trustees, shall admission be given to one whose means are less than $200.

I find it impossible to reconcile the two statements, however, insofar as your statement to the effect that the institution is not open to all aged ladies upon the same terms is concerned; as this fact may be material, my opinion, with respect to this institution will necessarily not be positive.

The statute involved is section 5332, General Code, which provides in part as follows:

> "The provisions of the next preceding section (imposing the collateral inheritance tax) shall not apply to property, or interests in property * * * embraced in a bequest, devise, transfer or conveyance to or for the use of * * * an institution in this state for purposes only of public charity * * *."

I observe that, as to both of the institutions concerning which you inquire, it is a fact that they are not conducted for profit and are not self-sustaining in a commercial sense, being under the constant necessity of soliciting support by voluntary donation from charitably disposed persons.

I observe also that it is a fact common to both the institutions that, with the exception of the instances named in Mrs. Slack's letter respecting the aged ladies' home, there is a charge on the part of the institution covering a part at least of the expenses of administering its benefits to a given individual. Thus, as respects the hospital, patients who are able to pay for treatment therein are required to pay such sums as may cover the expenses necessary for their treatment; while the county pays for the treatment of those who are unable to pay for themselves. So also with respect to the aged ladies' home; those who are able pay the admission fee, which, I take it, constitutes the entire reimbursement of the institution for the expenses of furnishing an abiding place for those seeking its benefits. That is to say, if an old lady has paid her admission fee of $600, for example, she is entitled to remain at the institution, free of further charge, during the remainder of her life, and possibly to receive the benefits of a decent burial at her death. Nevertheless, there is at least a conventional fee charged.

I observe also, as to both of the institutions, with the possible qualification suggested by the statement which you make relative to the aged ladies' home, and which has already been commented upon, that they are open to the public upon equal terms. This is true universally as to the hospital and true as to all aged ladies (subject to the qualification already noted with respect to the aged ladies' home.

There can be no doubt, under the decisions, that a charitably conducted hospital or old ladies' home is a "charitable institution." Citation of authorities upon this point is unnecessary. It is absolutely settled, by the overwhelming weight of authority, that the mere fact that there is a charge for the services or benefis of the institution does not deprive it of its charitable nature, nor of its public character.

Gerke vs. Purcell, 25 O. S. 229-241, and
Davis vs. Camp Meeting Association, 57 O. S. 257.

are Ohio decisions supporting this rule. But other jurisdictions afford even clearer applications of it:

Fordham vs. Thompson, 144 Ill. App. 342.
Sisters of Third Order vs. Board of Review, 231 Ill. 317.
Board of Review vs. Chicago Policlinic, 233 Ill. 268.
Hennepin County vs. Brotherhood of Church, 27 Minn. 46.
Philadelphia vs. Pennsylvania Hospital, 254 Pa. 9.
Donohugh's Appeal, 86 Pa. 312.
People ex rel. vs. Purdy, 52 Hunn. 386, 126 N. Y. 679.
St. Joseph's Hospital vs. Ashland County, 96 Wis. 636.
Brewer vs. American Missionary Association, 124 Ga. 490.
Franklin Square House vs. Boston, 188 Mass. 409.
McDonald vs. Mass. General Hospital, 120 Mass. 432.

As particularly touching the case of the aged ladies' home, I cite:

Engleside Ass'n vs. Nation, 109 Pac. 984 (Kansas); 29 L. R. A. n. s. 190.
Gooch vs. Ass'n for the relief of aged indigent females, 109 Mass. 559.

The doctrine of all these cases is to the effect that if the institution is not operated with a view to profit, but for the purpose of relieving human need or suffering, and therefore serving a communal or public need, it is a charitable one and a public one, notwithstanding the receipt of admission fees or the exaction from those who are able to pay of sums reasonably equivalent to the expense of rendering its benefits to them.

In the case of the hospital mentioned by you, payment by the county for and on behalf of the indigent persons treated therein does affect the nature of the institution on the contrary, so long as no profit is derived and the institution continues to be operated by the use of the donations of charitably inclined persons, the contribution by the county serves rather to emphasize than to destroy the public nature of the institution. In fact, while the courts of this state have, I believe, held that by reason of the inhibition of article VIII, section 6, of the constitution of this state, a county or other subdivision of the state may not make donations to private corporations, and therefore may not support public hospitals, orphanages and the like, except upon the contractual basis suggested by your letter, yet, in states where no such constitutional impediments exist, it has been held, as the

above decisions will disclose to you, that a county or a city has the right to make a donation to an institution of public charity to assist it in carrying on its work; so that, so far from an institution being deprived of its publicly charitable nature by reason of such a donation, the existence of such attributes of the institution is a condition precedent to partial support from the public treasury.

The foregoing authorities and the principles deduced from them establish the following conclusions:

1. If an institution aims at the relief of some public distress or need and is not operated with a view to profit, it is an institution of purely public charity, or, as our inheritance tax law has it, an institution for purpose only of public charity, especially where it is obliged to rely upon private donations.

2. The fact that support from the public treasury is afforded to such an institution, whether upon a contractual basis or not, does not change its character.

3. The fact that an admission fee, as in the case of the aged ladies' home mentioned by you, or a charge on account of services rendered, as in the case of the hospital exacted from those who are able to pay, *or even exacted from all alike,* is received by the institution does not alter its character.

The foregoing conclusions dispose of the case of the hospital which you describe and clearly establish the conclusion that a bequest or devise to and for its use is exempt from any collateral inheritance tax.

These conclusions would also dispose of the question respecting the aged ladies' home, but for your remark to the effect that "the institution is not open to all aged ladies upon these terms; that is, the board of managers determine who may be admitted."

There is here involved another principle applicable to such questions, which may be stated as follows:

An institution which is charitable in its nature is not a public one, and its charity is not public, if limited to a class the members of which are determined by some fact which does not concern the public at large:

Philadelphia vs. Masonic Home, 160 Pa. 572.
Commonwealth vs. Thomas, 119 Ky. 208.
Burd Orphan Asylum vs. School District, 19 Pa. 21.
Morning Star Lodge vs. Hayslip, 23 O. S. 144.

As a further extension of this principle it has been often held that an institution is not a public one which is not open to all of the designated class upon the same terms.

But I take it that this principle must not be too logically applied; there are natural limitations upon the capacity of any institution to perform its public functions. It may be regarded as an ever-present condition that the applicants for a place in the aged ladies' home, for example, are almost certain at a given time to exceed in number the capacity of the institution. Should the board of trustees or managing authorities of such an institution reserve the privilege of selecting those deemed most worthy by them from a group of applicants, when a selection is necessary, this would not, in my judgment, deprive the institution of its public character, nor the charity which it extends of its public nature. In other words, the exercise of a proper supervision on the part of the managing authorities over the character and desirability of those who may apply, provided no invidious discriminations are indulged and no improper or artificial line of demarcation is drawn, as suggested in the cases cited, would not affect the public character of the institution or its charity. It is not required that the doors of the institution shall automatically open to all who seek admission thereto, without being subject to the scrutiny of thoses who administer the charity. On this point Gooch vs. Associa-

tion, supra, is particularly helpful. The defendant in that case was almost exactly like the institution concerning which you inquire. The plaintiff was expelled from it, although she had paid the required admission fee. She sought to recover damages, alleging tort and breach of contract. The court denied her relief on the ground that the institution was a publicly charitable one, and that it had the right to prescribe by its by-laws reasonable rules and regulations to be enforced by its administrative authorities; so that when the plaintiff entered the home she entered it subject to the discipline thereof.

I know of no principle which would affirm the right to prescribe and enforce disciplinary rules as to inmates when received, yet would deny the right to enforce a similar discipline as a condition of admission.

Nor does the fact that the remission of admission fees may be made at the discretion of the board enter into the question, in my judgment. The whole situation may be summed up with the statement that the publicly charitable nature of an institution is not affected by the exercise of discretion on the part of its managerial officers with respect to the admission of persons into the enjoyment of its benefits, nor by the enforcement of such proper discipline as may be required in order to maintain it. So long as this discretion is not exercised in such a manner as actually to amount to a discrimination such as is forbidden by the principle exemplified in Philadelphia vs. Masonic Home, and other similar cases, supra, its reservation is immaterial.

With the qualification, then, that unless it should appear that the discretion reserved by the board of managers of the aged ladies' home at Delaware is exercised in such a manner as to deprive that institution of its publicly charitable nature, as already pointed out, I am of the opinion that it is such an institution, and that a devise or bequest to or for its use is exempt from the collateral inheritance tax.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

766.

GENERAL ASSEMBLY—SALARIES—THE MANNER IN WHICH SALARIES ARE TO BE PAID—WHEN SALARIES ARE TO BE PAID—MILEAGE.

The members of the 80th general assembly should be paid at a rate not to exceed two hundred dollars per month during the present extraordinary session, and the residue of their salary for the year 1914, at the end of such session to the members and only the members who are in attendance at this session.

COLUMBUS, OHIO, February 17, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of February 16, 1914, in which you inquire as to whether you are to consider the opinion rendered Mr. Fullington on February 26, 1911, as still in full force, or should you pay the 1914 salary of $1,000 to the members of the legislature when the special session over.

Section 50 of the General Code reads:

"Every member of the general assembly shall receive as compensation a salary of one thousand dollars a year during his term of office.

Such salary for such term shall be paid in the following manner: two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session.

"Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

Section 50 of the General Code was passed in May, 1911, was vetoed by Governor Harmon and passed over his veto by both houses. The governor in vetoing this bill said:

"It is said the bill follows precedents. I find that from the time biennial sessions were resumed in 1894, the law provided for monthly installments until 1904, when a law like the bill now before me was passed (97 Vol. 316). But this was repealed at the following session in 1906 and payment for the full year only authorized at the close of the session (98 Vol. 8). Though this act was in turn repealed and only monthly payments permitted (Id. 287), the provision of the earlier act for payment for the remainder of the session year got somehow into G. C., section 50.

"Beginning with 1908 there have been annual sessions. So there is the single precedent of 1904, and that promptly repudiated, standing alone against the action of all the other biennial sessions since 1894."

In his statement regarding the times and manner of payment and the condition of law, Governor Harmon was entirely correct. He also called attention to the fact that in his opinion, the act violated section 31 of article II of the constitution, which forbids any change in the compensation of members during their term of office. It will be observed that this act was a radical change from the act theretofore existing and changed the language from "the balance of the salaries for such year may be paid at the end of the session," so that the section read as above copied. The opinion to which you call attention followed the course laid down by Governor Harmon, which, as stated, I believed and still believe to be correct. But however that may be, and notwithstanding the fact that payments have been made to the 76th and 77th general assembly, in the manner prescribed by this act, yet they were unauthorized at that time and this act was an evident attempt to make payments in the manner followed in 1904 and 1906. However this may be, payments at other times were not made in advance as was done in 1904 and 1906, and as authorized by section 50, as amended in 1911. The opinion rendered in 1911 had reference to the payment to the 79th general assembly for the year 1912, in which there was no legislative session and the condition then is clearly distinguished from what we have now and I think that without in any way modifying or changing that opinion, but following the ruling that was adopted for that session, for the year 1911, rather than the year 1912, it is entirely legitimate to construe section 50 of the Code to permit the payment of the legislators at the rate of not to exceed $200.00 per month while the legislature was in session and the balance for that year at the close of the session, which would be in accordance with section 40 of the Revised Statutes, and in accordance with the payments made to the 78th general assembly and the 79th for its first year. In other words, and stating the rule more concretely, I now hold that where the legislature is in

session, they are entitled to compensation at the rate of $200.00 per month during the session and the balance for that particular year at the end of the session, and that rule to be applicable to each year, provided there is a session in each year.

I therefore advise the payment to this general assembly at the rate or not to exceed $200.00 per month during the present session and the residue of this year's salary at the end of such session to the members and only the members who are in attendance upon this session.

Whatever may be said about payments in advance, and without questioning the power of the legislature to fix salaries in such amount and to make them payable at such time as they deem proper, I regard it as a very unwise policy to make payments in advance of service and especially is that true when applied to the 79th general assembly which at its first session undertook to provide for being paid for a second year regardless of the fact of service during that second year, being ready for such service or any other contingency which might arise bteween the end of the session in the first year and the expiration of the term of office of the members of that general assembly.

I believe this places the matter in shape to be understood and hope it may prove satisfactory to everybody.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

767.

TUITION—PARENT OR PUPIL RESIDING OUTSIDE OF A SCHOOL DISTRICT AND OWNING PROPERTY WITHIN THE DISTRICT WHERE SUCH PUPIL ATTENDS SCHOOL—RIGHT OF A SCHOOL DISTRICT TO CREDIT SUCH TUITION ACCOUNT WITH THE AMOUNT OF TAXES ASSESSED ON SCHOOL.

If a parent of a non-resident pupil owns stock in an ordinary corporation which is taxed in the district no part of the same paid by such corporation under the levy for school purposes may be credited upon the tuition chargeable against such parent in that district; otherwise as to bank stock.

COLUMBUS, OHIO, November 14, 1913.

HON. KENT P. JOHNSON, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 10th, enclosing copy of an opinion written by you to clerk of the board of education of the village of Alger, Hardin county, and requesting my view as to the conclusion reached by you.

The question submitted for your opinion by the clerk is as follows:

> "We have some pupils coming into our school here from out of our district whose fathers own property in the district in the form of bank stock, stock in the company store, etc. Should we credit their tuition account with amount of school taxes assessed on this stock?"

Your conclusion on the two questions submitted is that neither the tax payable by a corporation under the provisions of 5404 et seq., General Code, nor the tax

assessed upon the shares of stock of a bank under sections 5407 et seq., General Code, constitute taxes on property owned by an individual within the intendment of section 7683, the proportion of which levied for school purposes may be under said section credited on the tuition of a non-resident pupil.

I do not entirely agree with you in your conclusion. I am of the opinion that you are correct with respect to the tax assessed against an ordinary corporation. Sections 5404 and 5405, General Code, provide as follows:

> "Section 5406. The president, secretary and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money.
>
> "Section 5405. Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district."

It is clear, as you state, that this tax is assessed upon the property of the corporation as such. (Bradley vs. Bauder 36 O. S., 28.) This section was enacted in compliance with the constitution mandate embodied in article 13 section 4, which seems to require the taxation of corporate property as property of the corporation, although as pointed out in Lee vs. Sturgis 46 O. S. 153, the taxation of all the property of a corporation is equivalent to the taxation of all the interest of every stockholder in the corporation represented by the actual value of their several shares. In deference to this principle the legislation embodied in sections 5372 and 192, General Code, was enacted, the effect of which is to accept the taxation on all or a certain prescribed portion of the property of a corporation by the state by way of an assessment against the corporation itself in lieu of the taxation of the respective shares of the stockholders. In other words, although the property of a corporation might be regarded either as the separate property of the shareholders or as that of the corporation itself for taxation purposes, the latter alternative in most cases is the one adopted.

I assume, of course, that in the particular case involved in the inquiry of the clerk, the corporation is a domestic one, or, if organized under the laws of another state, the prescribed proportion of its property is taxable in Ohio.

I am, therefore, of the opinion (in which I concur with you that if a parent of a non-resident pupil owns stock in a mercantile or other ordinary corporation

which is taxed in the district, no part of the sum paid by such corporation under the levy for school purposes may be credited upon the tuition chargeable against such parent by that district.

There is a further practical reason which may be brought to the support of this conclusion. The stockholders of an ordinary corporation are unknown to the records of the taxing authorities. The assessment being against the corporation, the respective shares of its capital stock owned by individuals do not appear on the tax duplicate or elsewhere in the office of the county auditor. Therefore, even if the theoretical conclusion above referred to could not be sustained as such, there would be no way in which to compute or ascertain the proportion of a corporation's tax which could be credited to the account of any individual stockholder.

The case of a bank is, however, essentially different. Although article XII, section 3 of the constitution seems to require the taxation of all property of banks and bankers as such, yet in the case of incorporated banks this has not been done, and for a very sufficient reason which will be hereinafter pointed out. Section 5408 is the first of the related sections which may be considered in this connection. It provides as follows:

> "*All the shares of the stockholders* in an incorporated bank or banking association, located in this state * * * shall be listed at the true value in money and taxed only in the city, ward, or village where such bank is located."

Section 5409, provides:

> "The real estate of a bank or banking association shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed."

Section 5411 provides as follows:

> "The cashier of each incorporated bank * * * shall return to the auditor of the county in which such bank is located * * * a report exhibiting in detail * * * the resources and liabilities of such bank * * * *with a full statement of the names and residences of the stockholders therein, the number of shares held by each, and the par value of each share.* * * *"

Section 5412 provides in part as follows:

> "Upon receiving such report the county auditor shall fix the total value of the shares of such banks * * * according to their total value in money and deduct from the aggregate sum so found, of each, the value of the real estate included in the statement of resources as it stands on the duplicate. * * *"

Other sections then provide for an equalization of the value of bank shares as so determined by the taxing commission of Ohio. Sections 5672 and 5673, General Code, provide for the collection of such taxes.

> "Section 5672. Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to

the treasurer of the county, in which such bank or banking association is located, as other taxes are paid and any bank or banking association failing to pay said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes.

"Section 5673. Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

It seems very clear to me that the assessment is not against the property of the bank as such save with respect to the real estate. With this exception the assessment is upon the shares themselves which are the property not of the bank but of the various stockholders. True the bank must pay the taxes, reimbursing itself in the manner pointed out by the last two sections cited, but there is a vital distinction between the duty to pay taxes and the ultimate liability for them. Under section 7683, General Code, it is not required that a parent actually pay the taxes which may be credited on the tuition of his child; it is sufficient that the parent own the property in the school district.

The shares of stock in a bank are all assessed at the place in which the bank is located. The reason for this I shall also presently state. In view of this fact, I am of the opinion that when a bank is located in a school district its shares are "property in a school district" within the meaning of section 7683, General Code.

Now the reason why the seeming mandate of article XII, section 3 of the constitution has not been carried out literally arises out of the situation respecting national banking associations, which are corporations organized under an act of congress of the United States. Under the familiar doctrine of McCulloch vs. Maryland, 4th Wheaton 316, these institutions being creatures of the federal government are not subject to taxation by the state, as of right. It is the universally accepted doctrine that national banks may only be taxed by the states by permission of congress. This permission has been given by section 5219 of the Revised Statutes of the United States, which provides in part as follows:

"Nothing herein shall prevent all the shares in any (national banking) association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. * * *"

Under this act of congress it has been repeatedly held that a state may not impose a tax assessment against a national bank as such, but whatever its laws provide in the way of machinery for the collection of the assessment the ultimate

liability for the tax must rest upon the shares of stock. See bank tax cases 3 Wallace 573; Radley vs. People; 4 Wallace 459, Bank vs. Commonwealth; 9 Wallace 353, Sumpter County vs. National Bank, 62 Alabama 464; Hirshire vs. Bank 35 Iowa 273; Bank vs. Fancher 48 New York, 524; Bank vs. Baker 65 New Jersey Laws 113; Bank vs. Chehallis County 116 U. S. 440; Whitbeck vs. Mercantile National Bank 127 U. S. 193; Bank vs. Chapman, 173 U. S. 205.

Indeed it has been directly held in the case of Miller vs. Bank 46, O. S. 424 that the listing of the shares of a national bank must be made in the name of the shareholders and not in the name of the bank under the statutes of Ohio now under discussion; and that no action would lie under the statutes as they then stood against the bank itself to recover taxes assessed on account of its resources and the value of its shares of stock.

Now our taxing statutes make no distinction between the method of taxing national banks and that of taxing state incorporated banks. This is because of the limitation in section 5133, Revised Statutes of the United States, to the effect that "taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of said state."

This limitation has been very jealously guarded by the federal courts and state statutes have been, from time to time, very carefully scrutinized for evidence of any discrimination in taxation in favor of state banks and against national banks. It is doubtless because of the fear of this legislation, if otherwise enacted, being held to violate this limitation that our statutes have made no disinction between the method of taxing national banks and that of taxing other incorporated banks.

In short, then, the legislative authority of this state has found the legislation of congress a more positive limitation upon its taxing power than the provisions of its own constitution (which, however, is not directly violated by the legislation above discussed).

The taxation of all banks, then, being governed by the same rule as laid down by the federal statute for the taxation of national banks, it follows that the assessment on this behalf must be against the shares, and not against the bank; that the property assessed must be (aside from the real estate) that of the shareholders and not that of the bank; and that the assessment must be at the place where the bank is located.

Our statutes, as I have already pointed out, not only bear a construction compatible with the federal legislation, but really do not bear any other construction. The taxable thing under these statutes is the share of stock, and not the property of the bank (except as to the real estate). The share as such is clearly the property of the individual stockholder. No authority is necessary upon this obvious point. Therefore, under section 7683, General Code, such a share when assessable in a school district in which a bank is located is "property owned in a school district" by the shareholder.

Nor is there in a case of bank stock any such practical difficulty as might exist where a conclusion different from that already reached with respect to the shares of ordinary corporations adopted. The report of the bank required to be filed with the auditor discloses the names of all stockholders and the number of shares held by each. The aggregate value of the bank stock as a whole after deducting the assessed value of the real estate being then ascertained, it is a mere matter of mathematical computation, which may be arrived at from facts appearing on record in the auditor's office to ascertain what proportion of a tax paid in the first instance by a bank on all of its shares is attributable to the shares owned by any shareholder. This computation being made one additional computation only is necessary to ascertain what proportion of the result is attributable to the school levy. The final quotient of the computation, then, is the amount which may and should be credited

on the tuition paid by a non-resident parent who is a shareholder of a bank located in a school district.

The exact language of section 7683, General Code, which has not yet been quoted, is, in part, as follows:

> "When a youth * * * or his parent owns property in a school district in which he does not reside, and he attends the schools of such district, the amount of school tax paid on such property shall be credited on his tuition."

It is only necessary for me to add to what has already been said that, in my judgment, the phrase "property in a school district," as used in this statute, is equivalent in meaning to the phrase "property taxed in a school district."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

768.

INSTITUTIONS—INSPECTION—CARING OF CHILDREN—POWERS OF STATE BOARD OF CHARITIES.

Private institutions for the caring of children are subject to investigation by the state board of charities under section 1352 *of the General Code as amended in* 103 *Ohio Laws,* 865, *and these institutions must be governed by all the laws applicable to such institutions.*

COLUMBUS, OHIO, February 14, 1914.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 22, 1914, as follows:

> "Section 1352-1 of the General Code as passed April 28, 1913, sets forth a scheme of inspection and investigation of institutions and agencies caring for children. There are a number of private institutions in this state, some of which have been incorporated under the general incorporation laws of the state and a few of the older ones were established by special acts of incorporation passed by the general assembly.
>
> "The question has been raised as to whether a private institution incorporated under the laws as in force in 1879, known as section 2181, etc., has the right to continue under the laws in force at that time or whether the amendments made from time to time since then must control such institution. These amendments have effected methods of commitment and receiving of children. Further, are such institutions required to conform to the general regulatory provisions of section 1352-1 and other sections of the act commonly gnown as the juvenile code?"

Section 1352, General Code, as amended in 103 O. L., page 865 reads in part:

> "The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and private benevolent and correctional institutions of the state and county, * * * as well as all institutions whether incorporated, private or otherwise which receive and care for children."

It is clear that the wording of the above section includes all institutions which receive and care for children, and the only question you raise in whether the legislature could bring within this section such institutions of this nature as were incorporated under laws existing in 1879.

Section 2, article I of the constitution of 1851 provides that

> "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or appealed by the general assembly."

and in connection with this section is to be construed section 2, article XIII, which declares that

> "corporations may be formed under general laws; but all such laws, may, from time to time, be altered or repealed."

State vs. Hamilton, 47 O. S., 74.
Shields vs. State, 26 O. S., 86 affirmed 95 U. S., 519.

These sections make it clear, I think, that all institutions for children, incorporated under the laws of 1879, are subject to all amendments made to these laws since that date, and to all new laws since passed concerning institutions caring for the juveniles of the state.

It is, therefore, my opinion that the private institutions to which you refer are subject to investigation by your board under section 1352 of the General Code, as amended in 103 O. L., 865, and that these institutions must be governed by all other laws applicable to such institutions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

769.

CONTRACTOR—CITY ENGINEER—WORK DONE IN EXCESS OF CONTRACT PRICE—SUPPLEMENTARY CONTRACT—POWERS OF CITY COUNCIL IN SUCH A MATTER.

Where a contractor, acting upon instructions from the city engineer, performs work for the city amounting to several thousand dollars more than the original price contracted for, and no supplementary contract was entered into by the director of public service, the city council may pass an ordinance or resolution authorizing a compromise of the claim in question, and the city auditor would be authorized to draw a warrant on the treasurer in accordance with the provisions of such ordinance or resolution.

COLUMBUS, OHIO, February 18, 1914.

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

GENTLEMEN:—Under date of September 10, 1913, you inquire:

> "A contractor, acting upon the instructions from the city engineer, performs work for the city amounting to several thousand dollars more than the original contract price. No supplementary contract in writing was entered into by the director of public service. The director would not allow the demand for 'extras' claimed by the contractor, and thereupon he entered suit against the city.

"Under a succeeding administration the council have agreed to compromise the claim by allowing the firm a reduced amount, and instructs the city auditor to draw his warrant upon the special fund created by bond issue.

"What are the powers of council in such matters, and may the city auditor legally draw his warrant in accordance with said conditions of proposed compromise?"

The "extras" were not performed according to the provisions of the statutes and there is no legal obligation upon the city to pay for the same or any part thereof.

Section 4331, General Code, provides:

"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

Section 4332, General Code, provides:

"No contractor shall be allowed to recover anything for work or material, caused by any alteration or modification, unless the contract is made in such manner, nor shall he be allowed, or recover for such work and material, or either, more than the agreed price. The general provisions of law relating to the requiring of bids and the awarding of contracts for public buildings, and improvements, so far as they apply, shall remain in full force and effect."

These sections provide how alterations and modifications in contracts may be made, and they have not been complied with. The contractor, therefore, has no enforceable claim against the city.

The city, however, has received the benefit of the work, and there is at least a moral obligation to pay for the same.

The right of council to recognize and pay a moral obligation has been recognized by the courts of this state.

In State ex rel. vs. Brown, 4 Cir. Dec. 345, it is held:

"Where equity and justice require the payment of a claim against a municipal corporation, though it may not be collectible at law, an ordinance of such city or village legally passed, directing and authorizing its payment, is legal and valid."

The nature of the claim involved in this case is not given.

This case is followed in State ex rel. vs. Wall, 15 Ohio Dec., 349, wherein it is held:

"A municipal corporation may recognize and pay claims against it of a moral and equitable nature, whether required by law to do so or not.

"Where a claim against a municipal corporation is just and equitable, and in good conscience ought to be paid, an ordinance duly passed by council

in which it recognized the claim as valid, appropriated the necessary funds for its payment, and authorized and directed the proper officer to pay the same is valid; and mandamus will lie to compel such officer to draw his warrant upon the city treasury therefor, notwithstanding the claim, in the absence of such ordinance, could not have been collected either at law or in equity."

This case arose upon a contract for public printing, where the printing company continued to publish advertisements for the city after the expiration of its contract.

On page 352, Judge E. P. Evans, quotes from State ex rel. vs. Brown, supra, and then says:

"This holding is reasonable and just, and is sustained by numerous adjudications. The allowance of such claims belongs to the power of taxation, which is embraced in the legislative power of the state, which the legislature may delegate to municipal corporations.

"'The legislature,' says Judge Cooley, 'may recognize moral or equitable obligations, such as a just man would be likely to recognize in his own affairs, whether by law required to do so or not. And what the legislature may do for the state, the municipalities, under proper legislation may do for themselves.' Cooley, taxation (2 ed.) 128. The legislature has no constitutional power to authorize the payment of a void claim, and, of course, a municipality can have no such power; but the legislature may authorize the payment of claims just in themselves, and for which an equivalent has been received, but which from some cause, cannot be enforced at law.

"And this doctrine has been repeatedly sanctioned by the supreme court of this state. Board of Education vs. McLandsborough, 36 Ohio St., 227; Warder vs. Commissioners, 38 Ohio St., 639, 643; Board of Education vs. State, 51 Ohio St., 531 and 541."

In case of Emmert vs. Elyria, 74 Ohio St., 185, Summers, J., says on page 194:

"But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street in not ultra vires. If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

A moral obligation was recognized in Board of Education vs. McLandsborough, 36 Ohio St., 227, where it is held:

"Where public money in custody of a public officer of this state, and with the disbursement of which money he is charged by law, is stolen or otherwise lost without his fault, and the legislature pass an act exonerating such officer and his sureties from the payment of such money, and direct that a tax be levied in the territory upon which the loss must fall to meet the deficit, such act is not forbidden by the constitution, state or federal."

In Warden vs. Commissioners, 38 Ohio St., 639, White, J., says at page 643:

> "There was no legal obligation, prior to the passage of the act in question, to refund the assessments; but the justice of doing so arose from the inauguration and enforcement of the new policy. The power of taxation is not limited to the payment of legal claims; but extends to those founded only in justice and moral obligation."

These cases recognize the principle that the state or a municipal corporation has the same right to do justice and equity that an individual has.

In this state it is held that moral obligation is a sufficient consideration for a contract by an individual.

In the case at bar the city has received the benefit of the labor, and it is but just and equitable that the person who performed the work should be paid therefor.

The contract in question was not ultra vires. The city was authorized to contract for the extras, but the method provided by law was not complied with. For this reason there is no legal obligation upon the city to pay for the extras. There is, however, a moral obligation.

By virtue of section 4240, General Code, council has general control of the finances of the city. This section reads:

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

By virtue of this section council would have a right to compromise claims against the city. And under the authorities above cited, council has the right to recognize a moral obligation, and to authorize its payment.

If there is neither a legal or moral obligation upon the part of the city, council cannot order its payment.

In the present question, as the city retains the result of the work, there is a moral obligation which council can recognize.

Council may, therefore, pass an ordinance or resolution, authorizing a compromise of the claim in question, and the city auditor would be authorized to draw a warrant on the treasurer in accordance with the provisions of said ordinance or resolution.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

770.

CIVIL SERVICE—FEES—TAX ASSESSOR—DISTRICT ASSESSORS—WOMEN NOT ELIGIBLE TO OFFICE—ELECTOR.

Women are not eligible to appointment for deputy assessors as provided in the tax law passed April 18, 1913, even though they meet all other qualifications laid down by the law in the rules of the civil service commission, for the reason that a deputy assessor is an officer within the meaning of section 4 of article XV of the constitution of Ohio, and no person can be appointed to such a position unless he possesses the qualifications of an elector.

COLUMBUS, OHIO, February 18, 1914.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of January 27, 1914, you inquire:

> "We desire your ruling as to whether or not women are eligible to appointment for deputy assessors as provided in the tax law passed April 18, 1913, when they meet all other qualifications laid down by the law and the rules of this commission."

The question to be determined is whether or not the position of deputy assessor is an office as contemplated in section 4 of article XV of the constitution, which provides:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

In order to determine this question we must ascertain the duties of deputy assessors.

The tax law is set forth at pages 786, et seq., of 103 Ohio Laws. Section 1 thereof, section 5579, General Code, provides in part:

> "In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio shall direct and supervise the assessment for taxation of all real and personal property in the state. * * * Such district assessor shall, under the direction and supervision of the tax commission, be the assessors of real and personal property for taxation, within and for their respective districts, except as may be otherwise provided by law. * * *"

By virtue of this section it is made the duty of the state tax commission to direct and supervise the assessment for taxation of all property in the state. The district assessor acts under the direction and supervision of the state tax commission.

Section 3 of said act, section 5881, General Code, provides for the appointment of deputy assessors, as follows:

> "Each district assessor shall appoint such number of deputy assessors, assistants, experts, clerks and employes as may, from time to time, be prescribed for his district by the tax commission of Ohio. Such deputy assessor, assistants, experts, clerks and employes shall hold their respective offices and employements for such times as may be prescribed by the tax commission."

In section 2 of said act it is provided that each district assessor

"shall be an elector of the district for which he is appointed."

No such qualification is made for the deputy assessors.
Section 4 of said act, section 5582, General Code, provides:

"The district assessor shall, annually, under the direction and supervision of the tax commission, list and value for taxation all real and personal property subject to taxation in the county constituting his assessment district, except as otherwise provided by law. The deputy assessor shall have and perform, under the direction of the district assessor, and in such territory as may be assigned to him by the district assessor, all powers and duties of the district assessor, except those provided by sections 7, 8, 12, 21, 22, 23, 28, 29, 31, 32, 47, 49, 53, 58, 63, 64 and 65 of this act, and sections 2574, 2588, 5394, 5387, 5397, 5398, 5399, 5400, 5401, 5405, 5411, 5412, 5556, 5557, 5558, 5559, 5573, 5574 and 5578 of the General Code as herein amended. Wherever in the General Code, excepting in said sections, the words 'assessor,' 'district assessor,''township assessor,' 'ward assessor,' 'precinct assessor,' 'assessor of real estate' or 'assessor of real property' are used, the same shall be deemed to mean the district assessor or the deputy assessor, as the case may be, and the offices held by such officers shall be deemed to be and are hereby abolished. The district assessor or his deputy shall, unless otherwise provided by law, perform, or cause to be performed, all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon such officers."

The deputy assessors are subject to the direction and supervision of the district assessor.

Secion 36 of said act, section 5615, General Code, provides in part:

"District assessors, deputy assessors and members of district boards of complaints shall give bond, payable to the state, for the faithful performance of their respective duties."

Section 39 of said act, section 5618, General Code, provides in part:

"* * * Each deputy assessor, shall before entering upon the discharge of the duties of *his office*, take and subscribe an oath, faithfully and impartially to assess all real and personal property, in the territory assigned to him by the district assessor and otherwise faithfully to perform the duties imposed upon him impartially to exercise the powers vested in him by law."

Section 42 of said act, section 5621, General Code, provides:

"Each district assessor, deputy assessor, assistant assessor, expert or clerk of a district assessor and member of secretary of a district board of complaints shall have power to administer oaths and to certify to official acts in any matter, relating in any way to his official duties."

These sections prescribe the duties and powers of the deputy assessors. They are required to take and subscribe an oath to faithfully and impartially assess

all real and personal property in the territory assigned to them. They may administer oaths and may certify to their official acts. They are required to give bond to the state for the faithful performance of their duties.

These are characteristics of an officer.

One of the chief characteristics of an "office" is that the incumbent exercises a part of the soverign power of the state. The assessing of property for taxation is a part of the soverign power of the state. In fact the right of taxation is one of the essential and indispensable powers of government. Without that power government would become inefficient.

While the deputy assessors are under the direction and supervision of the district assessor, yet they perform many duties in their own right. They have the power to fix the valuation of property, both real and personal, for taxation. They can make returns where the owner fails or refuses to do so. This is an exercise of a part of the soverign power of the state, and it makes them "officers" within the meaning of the constitution.

That they are officers, and that it was the intention that they should be classed as officers, is shown by the act itself.

In section 3 of this act it is provided:

> "Such deputy assessor, assistants, experts, clerks, and employes shall hold their respective *offices and employments.*"

The word "offices" as used here clearly refers to the deputy assessor.

Also in section 39:

> "Each deputy assessor, shall before entering upon the discharge of the duties of his *office,* take and subscribe an oath, * * *."

An example of "officer" who performs some of his duties under the direction and supervision of a superior, is that of a policeman. A policeman is held to be an "officer." In all cities he is subject to the direction and supervision of the chief of police and under the director of public safety. But in many of his duties he exercises a part of the soverign power of the state in his own right. This makes him an officer.

The position of a policeman is not different from that of a deputy assessor. Both are subject to the direction and supervision of their superior officers. Both exercise a part of the soverign power of the state.

I am of the opinion, therefore, that a deputy assessor is an officer within the meaning of section 4 of article XV of the constitution of Ohio, and that no person can be appointed to such position "unless he possesses the qualifications of an elector."

Therefore, women are not eligible to hold the position of deputy assessors of property.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

771.

ARTICLES OF INCORPORATION—INSURANCE—CERTIFICATE—CORPORATION—LIFE INSURANCE.

A corporation organized under the provisions of section 9510, *et seq., General Code, is not required to comply with the provisions of section* 8633, *General Code, which requires the filing with the secretary of state, a certificate of subscription. The incorporators of such a corporation are without power to compel the secretary of state to receive and file such certificate.*

COLUMBUS, OHIO, February 9, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 23d, in which you request my opinion as to whether or not a corporation organized under the provisions of sections 9510 et seq., General Code, is required to comply with the provisions of section 8633 of the General Code, and further as to what may be the duty of the secretary of state in the event that a corporation, organized as aforesaid, renders to him a certificate of subscription as required by the section last named.

Section 9510, General Code, designates certain specific purposes for which a corporation may be formed, such purposes being, generally speaking, different kinds of insurance business other than life.

Section 8633, General Code, requires all corporations, organized under the general incorporation act of the state, that before proceeding to organize finally the incorporators file with the secretary of state a certificate that 10% of the capital stock has been subscribed.

In order to appreciate the full effect of the two sections referred to in your inquiry, and to disclose the exact question embodied therein, other provisions of the General Code related to them must be noticed.

Section 9510 is the first of a group of sections constituting chapter 1, of subdivision 2, division 3, title 9, part 2d, General Code, relating to insurance upon property and against certain contingencies. As already stated, the section merely defines the purpose for which a company may be organized or admitted under this chapter, and within itself does not prescribe any of the necessary steps in the process of organization. For example, it does not specify the public authority which shall issue the certificate of incorporation; it does not specify the number of individuals who may associate themselves in articles of incorporation, nor the form of any application or other paper to be filed for that purpose.

Section 9511, immediately following the section just discussed, supplies none of the deficiencies already described, and like section 9510 itself relates only to the purpose of the class of corporations to which it applies.

Sections 9512 to 9517, General Code, however, do relate to the machinery of organization. I quote them generally as follows:

> Sec. 9512. "The articles of incorporation of a company formed for the purpose of insurance, other than life insurance, must be forwarded to the secretary of state, who shall submit them to the attorney general for examination. If found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of this state, and of the United States, he shall certify and deliver them back to the secretary. He may reject any name or title of a company applied for when he deems it similar to one already appropriated, or likely to mislead the public."

Sec. 9513. "Upon the approval of the articles by the attorney general and secretary of state, the latter shall cause them to be recorded, and copied in the manner provided for life insurance companies, and a copy thereof to be deposited with the superintendent of insurance. He shall withhold from the company the certificate of authority if its name is so similar to that of any other company as to mislead the public."

Sec. 9514. "The persons named in the articles of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they deem proper, and shall keep them open until the full amount specified in the articles is subscribed."

Sec. 9515. "Within one month after the subscription books are filled, and the articles of incorporation filed with the secretary of state, a majority of subscribers to the stock shall hold a meeting for the election of not less than five nor more than twenty-one directors, who must be stockholders or members. At any time thereafter the number may be increased or diminished between the same limits, at the will of stockholders representing a majority of the stock or a majority of the members. Each member of a mutual company shall be entitled to one vote, and each stockholder in other companies, to one vote for each share of stock he holds. If they so provide in their by-laws, mutual companies may elect directors for the term of three years, the term of office of one-third of the number elected to expire each year, and those who receive the highest number of votes at the first election to serve for the longest term."

Sec. 9516. "From their own number the directors shall choose by ballot, a president, and also fill vacancies that arise in the board, or in the presidency thereof."

Sec. 9517. "When convened at the office of the company the board of directors, or a majority of them, may appoint a secretary and other officers or agents necessary for transacting its business, and pay such salaries and take such securities as they judge reasonable. They may ordain and establish by-laws and regulations, not inconsistent with the constitution and laws of this state and of the United States, as to them appear necessary for regulating and conducting the business of the company. New by-laws or regulations shall not take effect until approved by the superintendent of insurance and a copy is filed in his office. The directors shall keep full and correct records of their transactions, which, at all times, shall be open to the inspection of the members or stockholders."

Sections 9518 to 9520 inclusive prescribe the securities in which the capital of insurance companies other than life may be invested.

Section 9522 and succeeding sections provide with respect to different classes of companies other than life for the issuance to them by the superintendent of insurance of a license authorizing them to commence business and issue policies. I think it may be safely assumed of this group of sections that they prescribe conditions precedent not to the doing of any and all business but merely to the doing of insurance business by the acceptance of premiums and the incurring of risks on policies. However, section 9524, General Code, may well be considered in this connection, it provides as follows:

"Except as hereinafter provided, no joint stock insurance company shall be organized under this chapter, or permitted to do business in this state with a less capital than one hundred thousand dollars, which must be paid up before the company can transact business. But on the payment of twenty-five per cent. of its capital stock, a live stock company may do business."

The remaining provisions of the chapter are, generally speaking, regulatory in their nature, and need not be considered in this connection.

Turning now to the group of statutes in which section 8633, General Code, is found, we find that the machinery for the organization of a corporation under the general corporation act of the state, is as follows:

Sec. 8625. "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 articles of incorporation, which must contain:

"1. The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

"2. The place where it is to be located, or its principal business transacted.

"3. The purpose for which it is formed.

"4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided. * * *"

Sec. 8626. "Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgment of deeds, the form of which shall be prescribed by the secretary of state. * * * Articles of incorporation shall be filed in the office of the secretary of state, who shall record them and shall also record certificates relating to that corporation thereafter filed in his office."

Sec. 8627. "Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization."

Sec. 8630. "The persons named in the articles of incorporation of a corporation for profit, or a majority of them, shall order books to be opened for subscriptions to the capital stock of the corporation at such time or times and place or places as they deem expedient."

Sec. 8632. "At the time of making a subscription to the capital stock of a corporation, ten per cent. on each share subscribed for shall be payable. * * *"

Sec. 8633. *"When ten per cent. of the capital stock is subscribed, the subscribers to the articles of incorporation, or a majority of them at once shall so certify in writing to the secretary of state."*

Sec. 8635. "As soon as such certificate is made, the signers thereto, shall give notice to the stockholders, as provided in section eighty-six hundred and thirty-one, to meet at such time and place as the notice designates, for the purpose of choosing not less than five nor more than thirty directors, to continue in office until the time fixed for the annual election, and until their successors are elected and qualified. But if all subscribers to stock are present in person or by proxy, such notice may be waived by them in writing."

Sec. 8737. "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern, unless it clearly appears that the provision is cumulative."

"This chapter," as used in the section last quoted, means and refers to the general corporation act of the state, being chapter 1, division 1, title 9, part 2d, General Code, in which section 8633 and other related sections last above quoted are found.

The chapter in which sections 9510 et seq., are found is one of the "subsequent chapters" referred to in section 8737.

For the purpose of this opinion it will be assumed that section 8737 may be paraphrased so as to read substantially as follows:

"This chapter shall apply unless special provision is made in subsequent chapters of this title. The special provision shall not govern unless it clearly appears that the provision is not cumulative."

I do not think this is what the section means at all, and am of the opinion that the paraphrase does considerable violence to the true meaning thereof, but for reasons which will become apparent I have chosen this rather extreme rendition of the section in order to narrow the question as much as possible.

Under such a supposed interpretation of the section it is obvious that the ultimate question involved in your inquiry would be as to whether or not there is in chapter 1, of subdivision 2, division 3 of the title, a "special provision" respecting the subject matter concerning which section 8623, General Code, makes provision. This question may be approached from two angles: First, the statutes may be examined to see whether there is on their present face a plain and unmistakable meaning which furnishes a direct answer to your question; and second, in the event that the examination of the statutes as they stand fails to disclose such a plain and unmistakable meaning, then the function of interpretation must be brought into play and extrinsic facts adduced in an effort to remove the doubt and supply the meaning.

In this instance the most appropriate extrinsic aid to the interpretation of the statutes in question will be found in their legislative history. Looking at the two groups of sections from the point of view and in the light of the assumed interpretation of section 8737, General Code, it at once appears that the group which begins with section 9510 is certainly not a *complete* scheme for the organization of the class of companies to which it applies. As already pointed out this group of statutes is entirely silent as to many of the necessary steps to be taken and under the interpretation of section 8737 adopted for the purpose of convenience herein, recourse must be had to the provisions of sections 8625 et seq.,

of the general incorporation act of the state in order to supply these proceedings. So we find the number of incorporators who may organize an insurance company other than life to be fixed, not by the chapter relating to such companies but by the general incorporation act. Similarly as to the form of the articles of incorporation, the manner and place in which they shall be filed; the legal effect in general of the issuance of a certificate of incorporation which is defined by section 8627, General Code.

From the point, however, at which sections 9512 et seq., begin, viz., the filing of articles of incorporation, it and the remaining sections do provide, at least, a workable scheme for the further organization of the companies to which they relate.

Indeed, section 9512 of itself, by inference, requires one of the things which I have already assumed must be supplied by the general laws, viz., the officer with whom the articles of incorporation of an insurance company, other than life, must be filed; for the first sentence of section 9512 provides that:

> "The articles of incorporation of a company formed for the purpose of insurance other than life, must be forwarded to the secretary of state. * * *"

The succeeding provisions of this, and the next following sections, provide for a different procedure on the part of the secretary of state from that which is authorized and required to be followed as to articles of incorporation filed under the general incorporation act; that is, he must, before filing the articles first submit them to the attorney general for examination; then when they are approved by that officer he is to receive them for filing and to record them, making a certified copy thereof to be deposited with the superintendent of insurance.

Upon close analysis, therefore, it seems reasonably clear that of the necessary steps in the preliminary organization of an insurance company other than life, the only ones not supplied by sections 9512 et seq., are the number of persons who shall execute the articles of incorporation, and the form in which they shall be executed, together with perhaps the legal effect of the issuance to the incorporators of the articles of incorporation, other than that specifically provided by section 9514, General Code.

Section 9514 is clearly an exclusive provision for the opening of books for subscription to the capital stock of insurance companies other than life. I believe it is not necessary for me to discuss my reasons for concluding that sections 8630 and 8631 at least do not apply to the organization of such companies. Whether or not section 8632, requiring the payment of 10% on each share subscribed for as a condition for a valid subscription, applies to such companies, is not necessary herein to decide, although I incline to the view that the section does not apply to insurance companies of this character.

Coming now to section 8633 of the general incorporation act, it is to be noted that so far as the mere requirement of certificate of subscription is concerned, there would be nothing inconsistent with the scheme of things provided for in section 9512 to exact this same requirement of insurance companies other than life. That is to say, if section 8633 stood alone it could be fitted into sections 9512 et seq., without doing violence to them.

On the other hand, however, it could be urged with a great show of reason that sections 9512 et seq., are complete without any such provision as is found in section 8623, although they are not complete without some of the other provisions in the general incorporation act. The choice between these two view points as tending to supply the answer to your question would largely depend, I apprehend, upon the proper interpretation of section 8737, General Code. If the paraphrase

of that section, which I have assumed, be regarded as expressing its true meaning, then the first viewpoint above suggested should be taken, and section 8633 might be read into sections 9512 et seq., because this can apparently be done without doing violence to these sections.

If, however, an opposite interpretation (and one which I believe to be the proper one) be given to section 8737, General Code, then section 8633 is not to be read into statutes providing for the organization of insurance companies other than life because it is not necessary to do so in order to make adequate "provision" therefor.

For my own satisfaction, then, I would be willing to reject the interpretation which I have already given for purposes of convenience to section 8737, General Code, and decide your question upon the basis of that rejection alone. But I think the conclusion as which I shall ultimately arrive will be rendered much more clear and satisfactory if, for the sake of the argument, the assumed interpretation of section 8737 be adhered to for the time being. That is to say, let it be supposed that section 8633 in its proper relation may be read into sections 9512 et seq., if it appears that the former provision is not inconsistent with any of the latter provisions.

Now, section 8633, General Code, standing by itself is an uninforceable and directory provision. It would be a vain thing for the general assembly to require that at a certain stage of the proceedings of organizing a corporation, a certain certificate be filed unless the consequence of failure to file that certificate were prescribed by statute or furnished by necessary implication.

In this instance there is a statute which amounts substantially to a prescription of the consequences of failure to comply with section 8633, General Code; and which, while not couched in negative and prohibitory language, nevertheless embodies the sanction by which the mandate of section 8633 is to be enforced. I refer to section 8635, General Code, which provides in effect that the first stockholders' meeting for the election of directors of a general corporation may be held substantially "as soon as such certificate (of subscription referred to in section 8633) is made." By necessary implication, of course, this section is equivalent to a prohibition upon the holding of the initial stockholders' meeting and the election of the first board of directors until the certificate of subscription is filed. This is the sole purpose of the section. More broadly considered, the scheme of things with relation to an ordinary private corporation under our laws is that such a corporation is permitted to organize fully as soon as 10% of its capital stock is subscribed and installments of 10% on each subscription are paid in, and by necessary implication is prohibited from organizng fully until this state of affairs exists.

Having regard, then, to the true meaning of section 8633 in its proper relation it at once appears that the question of fitting it into the scheme of things embodied in section 9512, General Code, takes on a different aspect.

Section 9514, General Code, constitutes a majority of the subscribers to the articles of incorporation commissioners to open books of subscription, and directs such commissioners to "keep them open until the full amount specified in the articles is subscribed."

This in itself is inconsistent with the fundamental idea which calls into existence as to a general corporation, the requirement of section 8633. Under the general incorporation act, it is a possible thing, indeed, a thing directly favored by the law, that an ordinary corporation's subscribed capital stock shall be much smaller than its authorized capital stock. This, however, is not possible as to a domestic insurance company other than life. The intention of the statutes is clearly expressed in the provision just quoted, and one to which attention will be called, being that the entire authorized capital stock shall be subscribed before certain things may be done.

Coming now to section 9515 it is to be observed that the first provision of that section is that "within one month after the subscription books are *filled,* * * * a majority of the subscribers to the stock shall hold a meeting for the election of * * * directors."

It appears from this language that by necessary inference the first stockholders' meeting for the election of directors may not be held until the subscription books are filled. What purpose, in this scheme of things, could that filing, of a certificate of subscription of 10% of the capital stock subserve?

The consequences of such a subscription are not defined in the law relating to insurance companies other than life. On the other hand the condition precedent to the organization of such companies is quite a different thing from that with respect to corporations generally. Without prolonging the discussion here I am clearly of the opinion that section 8633, considered with respect to its true meaning as reflected in other statutes which must be read in connection with it, *is inconsistent with* the provisions of sections 9514 and 9515, General Code.

That being the case, I reach the conclusion that the plain meaning of the statutes which I have considered, as disclosed by the express language used, leads to the conclusion that corporations organized under sections 9510 et seq., General Code, are not required to file the certificate of subscription referred to in section 8633, General Code. Although my conclusions are based upon the express language used in the sections, yet I have had to rely upon certain implications—clear enough, to be sure, but nevertheless implications—in order to arrive at the conclusion expressed. Possibly this fact might justify the observation that after all the statutes are not perfectly clear on their face and are, therefore, subject to what is known as "interpretation."

I have already stated that in this instance the most appropriate extrinsic means for the interpretation of the related sections is furnished by the legislative history of them. This is because section 8737 which, as already pointed out, has at least some bearing upon the question, is a codification provision. It bears evidence of this on its face in that it refers to "chapters" and "titles," but on investigation it will be found that the section in its entirety was originally a creature of the codifying commission of 1880, and was inserted in the statutes because of certain verbal changes in and omissions from the corporation acts of the state as they existed prior to 1880, made by that commission and adopted by the legislature with a view to eliminating repetition and permitting conciseness of expression. The codification in this respect is well illustrated by consideration of the other laws now being considered.

The insurance code of the state in force when the revision of 1880 was made, was that passed April 27, 1872, 69 O. L., 140, and is entitled, "an act to regulate insurance companies doing an insurance business as in the state of Ohio." Sections 1 and 2 of that act related directly to the formation of insurance companies other than life and were as follows:

> "Sec. 1. That hereafter when any number of persons as required by the first section of the act entitled 'an act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1892, and the acts amendatory thereto, shall associate to form an insurance company for any other purpose than life insurance, they shall, under their hands and seals, make a certificate specifying the name assumed by such company and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company shall be located; which certificate shall be acknowledged, certified and forwarded to the secretary of state, who shall submit the same to the attorney general

for examination, and if found by him to be in accordance with the provisions of this act, and not inconsistent with the constitution and laws of this state and of the United States, he shall certify the same and deliver it back to the said secretary, who shall have the right to reject any name or title of any company applied for, when he shall deem the name similar to one already appropriated, or likely to mislead the public."

"Sec. 2. Upon the approval of said certificate by the attorney general and the secretary of state, the said secretary of state shall cause it to be recorded and copied in the same manner as is provided in the second section of said act, and a copy thereof deposited with the superintendent of insurance. And said persons, when incorporated, and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance, as named in such certificate of incorporation, and by the name and style provided therein, shall be deemed a body corporate, with succession; they and their associates, successors and assigns, shall have the same general corporate powers, and be subject to all the obligations and restrictions of said act, and of the acts amendatory and supplementary thereto, except as herein provided."

By examining these sections it will at once appear that there are no such deficiencies therein with respect to the procedure of organizing corporations to which they related as are apparent in sections 9510 et seq., at the present time. True, there is repeated reference to the provisions of the general law where the intention is to regulate some matter by those provisions; thus, the number of persons who shall be required to associate themselves in order to form an insurance company other than life is that number "required by the first section of the act entitled, etc."

So the matter of recordation of the articles when approved by the attorney general is to be that "provided in the second section of said act." Again, the incorporators when they have complied with the provisions of "this act" are to have certain corporate powers, and in general, all the corporate powers and all the obligations and restrictions of "said act * * * except as herein provided."

But provision by adoption and reference is none the less an express provision and the scheme of the original insurance law was a complete one respecting the organization of insurance companies other than life, notwithstanding the fact that in certain instances the procedure of organization was required to be the same as that prescribed by the laws for the incorporation of companies generally.

The sections of the insurance law of 1872 immediately succeeding the ones above quoted are substantially similar to sections 9514 et seq., of the present General Code. In this connection it is interesting to note that what is at present section 9524, General Code, is found in the original insurance act as section 3 thereof. In so far as there may be any doubt as to the meaning of section 9524 in its present form that doubt may be resolved by examination of original section 3, from which it appears that the limitation of present section 9524 operates upon the company in the course of its preliminary organization and is not a mere condition precedent to the doing of an insurance business as such. That is to say, the requirement that the company have $100,000.00 of paid up capital stock is not a condition precedent merely to the doing of an insurance business, but appears also to be a condition precedent to the complete organization of the company as a corporation. This view of section 9524 strengthens the interpretation already given to sections 9514 and 9515 and indicates that no complete organization of an insurance company other than life can be made until its capital stock is

fully subscribed for. I do not find it necessary to go to the length of holding that the capital must be fully paid up before complete organization, as this provision was not in the original law, and it may be was intended as a condition precedent to the doing of an insurance business rather than as a condition precedent to the complete organization of the company.

Having regard then to the legislative history of the insurance code in so far as it applies to the organization of companies other than life, I am of the opinion that this set of laws was originally enacted as a complete scheme of organization in itself so that none of the preliminary steps required in the organization of corporations generally were intended to be required in the organization of such insurance companies, except where expressly referred to and adopted in the said insurance laws.

A further examination of the legislative history of the related statutes shows that with the exception of section 9425 already referred to, the sections commented upon have not been amended in any material respect since they were originally enacted. Hence, it follows that the present form of the statute and the several changes made therein as compared with the original insurance act and the general corporation act respectively resulted from processes of codification and revision. This being the case, the well established rule that verbal changes so made are presumed to have been made without any intention of changing the substantive law, comes into play and the original insurance code may be appropriately used to remove ambiguities which may be admitted to exist in the present statutes on that subject. So used, the original insurance code points to the conclusion that there is no place in the scheme for the organization of insurance companies other than life provided for by the present sections of the General Code, for the filing of a certificate of subscription of ten per cent. of the authorized capital stock thereof.

My conclusion and its reasons, then, may be summarized as follows:

For the reason, first, that section 8737, General Code, properly interpreted, means, in my opinion, that the provisions of the general law shall not apply in the organization of companies specially provided for by succeeding chapters of the title unless those provisions are necessary to supply some actual deficiency in the latter sections; second, that, regardless of the manner in which section 8737, General Code, is interpreted, the statutes on their face show that section 8633 interpreted according to its meaning as reflected in other related statutes not only *need not* be read into the laws providing for the organization of insurance companies other than life for the purpose of supplying any deficiency therein but, being *inconsistent* with certain of the provisions of those laws cannot in any event be regarded as a part of the scheme for the organization of such companies; and, third, that if the meaning of the statutes considered on their face be regarded as doubtful, and the legislative history, the most appropriate extrinsic evidence in aid of interpretation which is available, be looked to for the purpose of resolving such doubts, an examination of the original insurance code clearly shows that the scheme for the organization of insurance companies other than life was intended to be a complete one in which the filing of a certificate of subscription of 10% of the authorized capital stock had no place; for all these reasons, I am of the opinion that corporations organized under sections 9510 et seq., of the General Code are not required to file with you the certificate of subscription referred to in section 8633.

I am also of the opinion that it is not the duty of the secretary of state to file such a certificate if presented by such a company. The reasons for this conclusion, it seems to me have already been sufficiently disclosed. However, it may be appropriate to state that because the incorporators cannot acquire any rights by reason of the filing of such a certificate, therefore, they would be without

power to compel the secretary of state to receive and file them; because they cannot compel the secretary of state to do so he could lawfully refuse to do so; and being in this respect a ministerial officer without any discretionary power whatever, so far as the filing of such certificates is concerned, he is without authority to file any certificate which he may not be compelled to file.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

772.

CITY ORDINANCE — MAYOR'S VETO — PASS ORDINANCE OVER MAYOR'S VETO—VOTE NECESSARY TO PASS ORDINANCE OVER MAYOR'S VETO.

Where a city council passed an ordinance consisting of numerous sections and fixing the salaries of various city officials, and the same was sent to the mayor for his approval, and the mayor refused to sign the ordinance because he disapproved of parts of it, and returned the ordinance to council, unsigned, with a statement showing his objections thereto, in order to legally pass such an ordinance, it is necessary for two-thirds of all the members elected to council to concur in approving it.

COLUMBUS, OHIO, February 14, 1914.

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

GENTLEMEN:—I have your letter of December 17, 1913, as follows:

> "The council of the city of Delaware on December 1, 1913, passed a general ordinance consisting of seventeen sections fixing the salaries of the incoming city officials, the salary of each officer being fixed in a separate section. The mayor, under date of December 11, 1913, returned his communication to council vetoing several sections of said ordinance and approving certain other sections. The council, upon receipt of said veto message, (in part), did not have sufficient votes to pass the same over the mayor's veto and instructed their clerk to advertise the whole of the ordinance, declaring in a resolution that the mayor's veto was void for the reason that it was an attempt on his part to approve a portion thereof and disapprove other portions.
>
> "Has the mayor of a city the authority to veto a portion of an ordinance fixing salaries, and what is the effect of such an attempt on his part upon the attempted legislation?
>
> "If a vetoed portion of such an ordinance is not passed over his veto by two thirds vote, will it, by reason of the mayor not disapproving of the whole of the ordinance, become effective?"

After receiving your communication I wrote to the clerk of council of the city of Delaware for further information concerning the action of the mayor and have recently received from him a copy of the ordinance and of the mayor's communication to council. These papers disclose that the mayor did not sign the ordinance but returned it to council within the prescribed time with a communication announcing that sections 1, 2, 3, 4, 5, 6, 7, 8, 9 and 16 were vetoed and setting forth his reasons for such action.

The communication concluded with the following paragraph:

"The restoring of former wages to our firemen and policemen, I desire to commend you. The reduction which was made in those departments was strictly illegal.

"Very respectfully,
"(Signed) BERT V. LOAS, Mayor."

The question now is what did the mayor do, and what was the effect of his action?

Section 4234, General Code, reads:

"Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to the council with his objections, council may, after ten days, reconsider it, 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 provisions of this section shall apply only in cities."

If the mayor approves an ordinance he must sign it. This, in this case, he did not do. Therefore, he did not approve it. If he does not approve it he shall, within ten days after its passage return it with his objections to council. This is what I think he did. He returned the ordinance unsigned with his objections to certain sections, and while it is true he used the word "veto" in connection with those objections, the use of that word did not change the character of the communication nor make it anything but a statement of his objections to the ordinance. It is also true that those objections only refer to certain sections of the ordinance, but that does not affect the character of the communication either because the mayor may disapprove of an ordinance as a whole for the reason that certain parts of it are objectionable to him. Again it might be argued that in the light of the concluding paragraph of his communication, above quoted, he approved part of the ordinance. This contention, I think, can hardly be maintained for the reason that the mayor's signature to the ordinance is the statutory evidence of his approval of it, and in this case it was not given. It appears to me, therefore, that the words in the concluding paragraph, above referred to, were of no effect.

For those reasons, I am of the opinion that in the case submitted the mayor returned the ordinance to council unsigned with a statement of his objections thereto. and that to legally pass such ordinance after being so returned by him, it was necessary for two-thirds of all the members elected to the council to concur in approving it. This was not done, and it is, therefore, my opinion that the ordinance was not legally passed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

773.

ROAD IMPROVEMENT—ONE MILE LIMIT—APPLICATION OF AMENDED SECTION 6929, G. C., TO RESIDENTS OF MUNICIPALITIES.

Under the provisions of section 6929, G. C., as amended on page 198, volume 103, O. L., the county commissioners in making a count to determine whether a petition is signed by a majority of the real estate owners need not take into consideration residents of a municipality within the one mile limit, unless they own land within said limit, but outside of the municipality.

COLUMBUS, OHIO, February 23, 1914.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 14th, which reads, in part, as follows:

> "The commissioners of Putnam county, Ohio, have asked me for an opinion construing section 6926, as amended on page 198, volume 103 Ohio Laws, in reference to the meaning of 'resident owners of real estate' contemplated by said act. * * *
>
> "I am also requested to construe section 6929 on page 199 of 103 Ohio Laws, or so much thereof as follows, 'It shall not be necessary in determining such majority of petitioners to count land owners residing within the municipality.' Should this section apply to owners of real estate, situated within one mile of the public road to be improved, who do not live upon their land, but live in the municipality more than a mile from either side of such road? Or does it only contemplate that real estate owners in a municipality need not be counted providing such municipality is within the limits of one mile of either side of such road?"

Said section 6926 provides:

> "When a majority of the resident owners of real estate situated within one mile of either side of a public road, present a petition to the board of county commissioners asking for the grading and improving of such road, the county commissioners shall go upon the line of the road described in such petition. If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvement shall be partly or wholly constructed of stone, gravel, brick or other materials, and what part or parts of such road improvement shall be of stone, gravel, brick or other materials, and enter their decision on their journal."

In the case of Goff et al. vs. Gates, 87 O. S., 142, the court held that sections 6926 to 6956 were repealed by implication by the act of May 10, 1910 (sections 6956-1 to 6956-16, General Code), but the general assembly at its session of 1913 (103 O. L., 198) re-enacted sections 6926-6956 in the same form as they existed prior to the rendition of the above named decision.

Section 6926 was originally a part of section 1 of what is popularly known as the Garret act, passed May 4, 1900 (94 O. L., 96).

The supreme court in the case of Alexander et al. Commissioners of Darke county vs. Baker, 74 O. S., construed the words "resident owners of real estate," as used in said section 1 as follows:

"The words 'resident owners' as used in section one of the act of the general assembly passed April 4, 1900 (94 O. L., 96), entitled, 'An act to provide for the improvement of public roads,' mean, and were intended to designate and include, all owners of real estate who are residents of the county and own lands lying within one mile of the road to be improved, and all must be considered and counted in determining whether a majority of the resident owners of real estate have signed the petition asking for the improvement.

"A petition presented to the county commissioners under favor of this section, asking for the improvement of a public road, which is not signed by a majority of such resident land owners, does not confer upon the commissioners jurisdiction; and where said commissioners assume to act on such petition and are threatening to proceed with and make said improvement, they may be restrained therefrom by injunction."

Said section 1 was amended in 1908 (99 O. L., 489), but the provision we are now considering was not changed.

In view, therefore, of the construction given to this statute by the supreme court in the case in 74 O. S., I am of the opinion that a petition presented to county commissioners under section 6926 must contain the signatures of a majority of the residents of the county who own land within one mile from either side of the road to be improved.

The provision of section 6929, quoted in your letter, means that county commissioners in making the count to determine whether a petition is signed by a majority of the resident owners of real estate, need not take into consideration residents of a municipality within the one mile limit, unless they own land within said limit but outside of the municipality.

It would be impracticable, and in a great many cases impossible, to secure the improvement of a road under these statutes if it were necessary to procure the signatures to a petition of a majority of the real estate owners in a municipality, and that is what the framers of the statute evidently sought to avoid.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

774.

CIRCUIT COURT—COURT OF APPEALS—ALLOWANCE FOR EXPENSES TO THE JUDGES OF THE COURT OF APPEALS—TRAVELING EXPENSES.

The general assembly in the enactment of section 2253 intended to add to the office of court of appeals certain compensation for actual and necessary expenses of each judge thereof, and when the judge took this position, he accepted it with this understanding. It was not attached to the office of circuit judge, but was a part of the court of appeals judicial system.

COLUMBUS, OHIO, February 26, 1914.

HON. H. L. FERNEDING, *Chief Justice, Court of Appeals, Dayton, Ohio.*

DEAR SIR:—Under date of February 19, 1914, you say that on April 28, 1913, a bill was enacted by the general assembly authorizing an allowance of actual expenses of judges of the court of appeals, not exceeding $300.00 per annum, incurred while holding court outside of the counties of their residence. While such ex-

penses as a matter of fact greatly exceed this amount, you state that the judge of the court of appeals do not desire to receive even this allowance if there is any question about its legality, and, therefore, you request an opinion from my department as to whether or not the law in question applies to judges of the courts of appeals in office at the time of the passage of the act.

The statute to which you have reference is section 2253, which provides:

> "In addition to the annual salary and expenses provided in sections 1529, 2251 and 2252, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding $300.00 in any one year, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to the judge and upon presentation of a sworn itemized statement of such expenses."

The constitution provides that the general assembly shall fix the term of office and the compensation of all offices, "but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." (See article II, section 20.)

A similar provision with reference to judges of the supreme court and of the court of common pleas is to be found in section 14 of article IV.

In the case of State ex rel. Raine, 49 O. S. 580, it was held that a statute, the effect of which is to increase the salary attached to a public office contravenes section 20 of article II of the constitution insofar as it may effect the salary of an incumbent of an office during the term he was serving when the statute was enacted. The act there in question allowed each county commissioner the sum of $1,000.00 per annum for expenses incurred in the proper discharge of his duties. Prior to the enactment of that statute the commissioners were each entitled to $2,000.00 per annum for expenses incurred in the proper discharge of his duties. Prior to The court took the position, in this case, that a forbidden object could not be accomplished by simply using a form of words that did not name such forbidden object in express terms; and therefore if the effect of the statute was to increase the salary of those commissioners who were serving current terms of office, it was unconstitutional to that extent. This decision would seem, at first glance, to require the holding that those judges who were in office at the time of the passage of the act about which you ask, would not be entitled to receive the $300.00 for actual expenses incurred by them. It will be noted, however, that in the present instance the judge is only allowed his actual and necessary expenses, the amount mentioned being the maximum allowance, while in the case just referred to the county commissioners allowed the sum of $1,000.00 for his expenses. The amount allowed was not confined to his actual expenses but was a fixed sum, and its effect was clearly to increase the salary of the county commissioners who were in office. For this reason I am rather inclined to the belief that the allowance of actual and necessary expenses, as is provided in section 2253 of the General Code, in no way affects the salary of any officer during his existing term, and consequently all judges of the courts of appeals are entitled to this allowance.

The question is, as I have said before, not free from doubt, but the decisions of other states construing similar constitutional provisions seem to have followed the view which I here advocate.

While it is true that the supreme court in the case of State ex rel. vs. Harmon, 87 O. S., 364, held that for certain purposes the identity of the circuit court was preserved, nevertheless it must be borne in mind that this latter court was merged into and its work continued by the court of appeals. Additional jurisdiction was

vested in the latter court, and as a matter of practice such courts are operating differently throughout the state. They are given and are exercising more ample and broader powers than were executed by the circuit courts. This result was accomplished by the people through constitutional amendment, and in so doing there was no attempt made to restrict the action of the general assembly in fixing the compensation of such judges. It is true that certain judges of the circuit court were continued as judges of the courts of appeals, but, it is my opinion that the two capacities in which they served are so distinct as to justify the general assembly in allowing compensation for expenses incurred by those judges of the court of appeals who had been elected as circuit judges and were invested with the robes of the new office by action of the people through constitutional amendment. It appears that the general assembly in the enactment of section 2253 intended to add to the office of court of appeals certain compensation for actual and necessary expenses of each judge thereof, and when the judge took this position he accepted it with this understanding. It was not attached to the office of circuit judge, but was a part of the court of appeals judicial system.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

775.

BANKING CORPORATION—STOCK—RESTRICTIVE REGULATIONS IN STOCK—VALIDITY OF SUCH REGULATIONS.

Under the provisions of section 9724, General Code, banking corporations have authority to provide in their regulations and by-laws how and in what manner the stock of such corporations shall be transferred and if such regulations are carried into a certificate of stock, according to law, such regulations are valid and enforcible.

COLUMBUS, OHIO, February 18, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of February 4, 1914, in which you ask opinion of me as follows:

> "I am giving herewith copy of what will go on the back of each stock certificate in a state bank, viz.:
>
> "In order that the stock of the company may be held by such persons as in the opinion of the board of directors are most likely to promote confidence in the stability of the bank, no stockholder shall sell or otherwise dispose of the whole or any part of his stock, unless he shall, at least thirty days prior thereto, have offered in writing to the board of directors, to sell the same to such person or persons as the said board of directors may designate, upon the same terms and for the same price as he shall have been offered bona fide by his prospective purchaser, and such offer to said board of directors shall not have been accepted within that period.
>
> "I beg to ask for an early opinion as to whether this is proper and regular to permit, being made a part of the stock certificate."

In the case of Nicholson vs. Brewing Company, (82 O. S., 94, 110), the court says:

> "Effective regulations of the transfer of stock in a corporation must be prescribed in statutes or in by-laws of a corporation, which are not inconsistent with the statutes."

In general corporation law the word "by-laws" has the same meaning as that ascribed to the word "regulations" in the statutory law of this state with respect to corporations, and it would seem that the court, in the case just cited, used the word "by-laws" in this sense.

Applying to corporations generally, sections 8701 and 8702, General Code, provide as follows:

> "Sec. 8701. Every corporation may adopt a code of regulations for its government, consistent with the constitution and laws of the state.
>
> "Sec. 8702. The trustees or directors of a corporation may adopt a code of by-laws for their government, consistent with the regulations of the corporation, and the constitution and laws of the state, and change it at pleasure."

As to banks, section 9708, General Code, in the enumeration of their general powers, provides that "they shall have power to adopt regulations for the government of the corporation, not inconsistent with the constitution and laws of this state."

Section 9709, General Code, provides that the regulations of such bank corporation may be adopted or changed by the assent thereto of two-thirds of the stockholders, in number and amount or by a majority of the stockholders, in number and amount, at a meeting held for that purpose, notice of which has been given as therein provided."

Sections 9714 and 9724, General Code, provide as follows:

> "Section 9714. In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this statute.
>
> "Section 9724. The shares of stock of such corporation shall be deemed personal property and shall be transferred on its books in such manner as the regulations and by-laws of the corporation direct."

On a general consideration of the question here presented, it may be noted that many cases hold that a by-law, imposing restrictive regulations on the transfer of stock, is invalid, unless such power is given by statute.

> "Victor G. Bloede Co. vs. Bloede, (84 Maryland, 129).
> "Ireland vs. Globe Milling Co., (21 R I., 9).
> "Trust and Savings Co. vs. Home Lumber Co., (118 Missouri, 447).
> "Bank vs. Bank, (20 N. Y., 501).
> "Miller vs. Farmers, etc. Co., (78 Neb. 441)."

Other cases have taken the view that the terms of such a by-law, when incorporated in the stock certificate, are enforcible as a contract between the corporation and the subscriber for the stock represented by the certificate, irrespective of the question as to the validity of such by-law.

"New England Trust Company vs. Abbott, (162 Mass., 148).
"Barrett vs. King, (181 Mass., 476).
"Blue Mountain, etc. Asso. vs. Barrome, (71 N. H., 19)."

In this state, the courts have not decided as to the validity of a by-law of this kind in the absence of authorizing statute, but the reason of the court in the case of Stafford vs. Produce Exchange Bank, (61 O. S., 160, 169), and views expressed in the case of Nicholson vs. Brewing Company, supra, seem strongly inclined to the position that the terms of such by-law, when carried into the certificate of stock, are valid and enforcible as a contract, as against the holder of such certificate, independent of statutory authority.

Applicable to corporations generally, section 8673-15, General Code, provides as follows:

> "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

With respect to banks, section 9724, General Code, above noted, confers ample authority on such corporations to provide in their regulations and by-laws how and in what manner the stock of such corporations shall be transferred, and if such regulations are carried into the certificate of stock, in the manner indicated in your communication, I am of the opinion that such restrictive regulations are valid and enforcible.

"Tomb vs. Felch, (40 W. L. B., 186).
"Stafford vs. Produce Exchange Bank, supra."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

776.

RICHMOND CASKET COMPANY—DAYTON FLOOD—CONTRACT.

In the matter of the Richmond Casket Company furnishing caskets during the Dayton flood, the proper settlement for the adjutant general's department to make would be payment of a fair and reasonable price for the caskets used; as a matter of legal and moral obligation, no other caskets should be paid for.

COLUMBUS, OHIO, January 30, 1914.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I have at hand the following as your favor of this date:

> "I enclose herewith a letter received from the legal representative of the Richmond Casket Company, in which they submit a proposition of settlement. As this matter has been turned over to your department, I feel that I cannot make any settlement without your consent. I would request a prompt answer from you as all papers are now in your hands."

The letter which you enclosed is as follows:

"My dear General:—In reclaim Richmond Casket Co. vs. State of Ohio:

"Replying to your favor of January 22d, in which you enclose opinion rendered by Attorney General Hogan, I have conferred with my clients, and they of course are entitled to their opinion. Personally, I do not care to express mine.

"In order to bring this vexatious matter to a settlement, I submit the following adjustment which is strictly, as my clients inform me, according to the proposition as made by the state military board heretofore, viz.: that the state pay to the Richmond Casket Company $850.00 for the caskets used, and deliver F. O. B. cars Dayton, Ohio, the eighty-five unused cases, the Richmond Casket Company to pay the delivery to Richmond, Indiana.

"This, the President of the Richmond Casket Company writes, is the proposition to the best of his recollection, as made heretofore.

"This proposition, however, carries the proviso that in case the state fails to deliver the eighty-five cases as agreed in the original proposition, such cases not delivered are to be paid for on the pro rata basis of $850.00 for the cases that have been used.

" In considering this offer from clients, it seems to us eminently fair, and I trust that it will strike you the same way and that we may finally get this matter to a settlement."

Under date of January 21st, I rendered you an opinion upon the situation contemplated by the above correspondence, which opinion I concluded as follows:

"I, therefore, conclude that it would be clearly an unwarranted assumption of authority for the military authorities to attempt to pay for the balance of these caskets, and furthermore recommend that payment by the state, for the caskets actually use, is a thoroughly fair and reasonable settlement for you to make."

From my understanding of the facts, the state at the present time has no control whatever over the balance of the shipment of caskets referred to; I am informed that they are at the present time in the hands of Mr. Riessinger of Dayton.

I can, therefore, only advise you, as I did in my former opinion, that the proper settlement for you to make would be payment of a fair and reasonable price for the caskets used, as a matter of legal and moral obligation. I am not able to see how you are to be charged with any responsibility whatever for what remains of these caskets. My reasons for this conclusion are set forth in my opinion above referred to. In that opinion I overlooked the return of the papers herein referred to. You will find the same enclosed herewith.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

777.

COUNTY PRIVATE ROADS—MAINTENANCE OF A ROAD LEADING TO A SCHOOL HOUSE—RIGHT OF BOARD OF EDUCATION TO CONSTRUCT BRIDGE ON SUCH ROAD—COUNTY COMMISSIONERS.

Where a township district school house is located upon a private road, other lawful means for securing a necessary and convenient approach to the school house being absent, it is proper for the board of education to provide for the construction of a bridge on this road, under the provisions of section 7620, General Code.

COLUMBUS, OHIO, February 13, 1914.

HON. BEN. A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Answering the second question embodied in your letter of January 30th, receipt whereof is acknowledged, (the first question having been withdrawn) I beg to state that in my opinion the county commissioners may not, under section 2421, General Code, construct a bridge on a private road. I understand that your question is limited to the query as to whether or not this may be done, or whether or not the commissioners may assist in the construction of such a bridge. You mention also the fact that a township district school house is located upon this private road, but I cannot find that this fact is material, to the main question.

Section 2421, General Code, provides as follows:

> "The commissioners shall construct and keep in repair necessary bridges over streams and public canals on 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 cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

It seems to me that the conclusion which I have already stated necessarily follows from the language of this section.

In this connection I may cite section 7557, General Code, which is of similar import and is as follows:

> "The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plankroads which are of general and public utility, running into or through such village or city."

I find the following sections of the General Code which seem to be suggestive in this connection:

> "Section 3296. When the trustees of a township have determined to

issue bonds for the purpose of constructing or repairing a viaduct over any street, stream, railway tracks or other place where an overhead roadway or footway is deemed necessary, as provided by law, or when such trustees have so determined to purchase or condemn, or when the township has purchased or condemned land for the purpose of constructing or repairing a viaduct, the township trustees may construct or repair such viaduct and purchase or condemn the necessary land therefor, and the money arising from the sale of the bonds so issued shall be expended, as provided in the next section.

"Section 3297. All funds arising from the sale of bonds for the construction or repair of viaducts or for the purchase or condemnation of land for such purpose, shall be paid into the treasury of the township, and paid out and expended upon the vouchers of the board, officer or officers in the township thereof having charge of the repair of public roads or streets. Contracts for such improvements shall be made in the same manner as other contracts are required by law to be made. Vouchers to pay such contracts or for any portion of the cost of the improvements shall be drawn by such board, officer or officers upon the clerk of the township, who shall keep an accurate account of moneys so expended, and the funds created by the sale of bonds for viaduct purposes shall be known as the 'viaduct fund.'

"Section 3298. When the voters of a township determine to issue bonds for the construction or repair of viaducts, or for the purchase or condemnation of the land necessary therefor, as authorized by law, the authority to make the improvements is hereby conferred and the money arising from the sale of the bonds shall be expended in the same manner as provided in the preceding section."

These sections, however, do not seem to meet the difficulty which exists, and evidently were designed to provide against an entirely different sort of emergency. It is to be noted, however, that they do seemingly authorize township trustees to construct a viaduct, regardless of whether the viaduct is on a public road or not.

In this connection see also section 7163, which is as follows:

"The township trustees may construct on either side of a public road in the township a public footwalk or sidewalk, and also public foot bridges over streams of water crossing such road, when it appears, by petition of twelve freeholders of the township, presented to the trustees, that such walk or bridge is necessary. The trustees, if the request is deemed reasonable, may order the road superintendent of the district in which the improvement is desired, to construct such walk or bridge of such material and at such expense as they prescribe, which shall not in any manner obstruct the public highway, or a private entrance; or they may construct by contract with the lowest responsible bidder. Such improvements shall be paid for out of the township road funds."

It is to be observed that this section limits the general authority of the township trustees to the construction of foot bridges crossing a public road.

So far as the county commissioners and township trustees are concerned, with the possible exception of the sections pertaining to the construction of a viaduct, it seems that the rule is that bridges on state, county and improved roads are to be constructed by the county commissioners, and foot bridges on unimproved roads by the township trustees.

It seems to me that adequate provision for the situation which you mention may be made under section 7620, General Code, which is as follows:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as play grounds for children, or rent suitable school rooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

The power herein conferred upon a board of education is a very broad one and specifically includes that to "furnish * * * rights of way" to school houses and to "make all necessary provisions for the schools under its control." This authority is further supplemented by that to "make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

A former attorney general, Hon. Wade H. Ellis, in an opinion to the prosecuting attorney of Washington county, rendered April 18, 1907, annual report for that year, page 249, held that this authority was broad enough to enable the board of education to construct foot bridges over creeks and other streams for the convenience of public schools.

I would not be of the opinion that this authority is limited to the construction of foot bridges; if the authority to bridge a stream exists at all, I should think that it would extend to the erection of a structure of sufficient width and strength to permit the hauling of coal and other similar supplies to the school houses.

The board of education is responsible for the location of the school house on a private road, the policy of which might be subject to criticism; therefore, it seems to me that if the board of education has authority, under the section last cited, to construct a bridge it would be most appropriate for it to do so.

I am of the opinion that my predecessor was correct in his holding, and that, other lawful means for securing the necessary convenient approach to the school house in question being absent, it is proper for the board of education to provide the necessary bridge, under section 7620, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

778.

EMPLOYERS' LIABILITY ACT—POLITICAL SUBDIVISIONS—APPLICATION OF THIS LAW NOT REGULATED BY THE NUMBER OF EMPLOYES IN POLITICAL SUBDIVISIONS.

Political subdivisions employing less than five persons are subject to the provisions of the employers' liability act. This act is applicable to every person in the service of a political subdivision of the state enumerated in the sections of this act, whether they employ more or less than five persons.

COLUMBUS, OHIO, February 12, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of February 11, 1914, you ask whether political subdivisions employing less than five persons are subject to the provisions of the employers' liability act, 103 Ohio Laws 72.

Section 13 of the act in question provides that the employers subject to the provisions of this act shall be the state and each county, city township, incorporated village and school district therein and also every person, firm and private corporation, including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written.

Section 14, defining the words "employe," "workman" and "operative," as used in the act, construes these terms to mean: every person in the service of the state, or any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express, implied, oral or written, except any official of the state or of any county, city township, incorporated village or school district therein. Nothing in the act, however, shall apply to policemen or firemen in cities where pension funds are established and maintained by municipal authority for the benefit of such policemen or firemen.

Subdivision 2 of the section last referred to has reference to every person in the service of any person, firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business.

From the foregoing it seems to me clear that the act in question is applicable to every person in the service of any of the political subdivisions of the state enumerated in the foregoing sections, whether such political subdivisions employ more than five persons or less than five persons. The very fact that the act is made applicable to private employers employing five or more workmen would indicate that if the general assembly had desired to exclude those political subdivisions employing less than five workmen it would have so provided by distinct and clear language, as it did with reference to the private employers.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

779.

COUNTY COMMISSIONERS — CONTRACTS — COUNTY BUILDINGS — BOARD OF STATE CHARITIES.

1. *Section 2333, General Code, governs and must be followed by the commissioners proceeding to construct county buildings at a cost exceeding twenty-five thousand dollars.*

2. *Under the provisions of section 1353, General Code, the state board of charities shall approve the plans and specifications for all new infirmaries, whether the infirmary is constructed under the general laws or under the building commission section.*

COLUMBUS, OHIO, February 7, 1914.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 21, 1913, in which you state that the electors of Lorain county have affirmatively voted under section 5638, General Code, upon the proposition of expending 35,000 for a county infirmary building; and submit for my opinion the following questions:

> "1. Whether section 2333 governs and must be followed by the commissioners in this case.
>
> "2. If section 2333 does not apply, may they proceed under section 2343 and the following sections and construct this building themselves?
>
> "3. Who, if any one, is associated with them in the letting of contracts, approval of plans, etc.?
>
> "4. To whom, if any one, shall plans, drawings, etc., be submitted in view of the fact that the board of infirmary directors has been abolished? I refer now to the requirements of section 2349."

I hand you herewith copy of an opinion addressed to the bureau of inspection and supervision of public offices, relative to the first question submitted by you. My holding therein is that section 2333 of the General Code governs and must be followed by the commissioners when proceeding to construct a county building at a cost exceeding twenty-five thousand dollars.

I have carefully examined the briefs in MacKenzie vs. State, 76 O. S. 369, cited by you, and find in the opinion certain statements by Davis, J., to the general effect that the building commission provisions of the county building code constitute an optional method of procedure, and virtually that the commissioners have a choice as to whether they will proceed under these sections or under the general provisions of the county building code.

The case, however, was not decided upon this ground exactly; the question presented being just the reverse of that raised by you; that is to say, the question in the MacKenzie case was as to whether a building commission is bound by the provisions of the general building code, or whether, when a building commission has been appointed, it is governed solely by the provisions especially applicable to it and its proceedings. The court chose the latter alternative and held that the general provisions did not apply to or govern the building commission. In order to reach this conclusion it is not necessary to hold that county commissioners might choose which of the two methods of procedure they would follow in a given case; nor is there any holding to that effect in the syllabus of the case, which is as follows:

"The act entitled 'An act to provide for a commission for building court houses,' passed April 18, 1906 (98 O. L. 53), is constitutional, and Revised Statutes, sections 794 to 799, inclusive, do not apply to proceedings thereunder."

In view of the fact just mentioned I do not feel like receding entirely from the position taken in the former opinion, copy of which is enclosed herewith. I would be of the opinion that it is at least the safer method to follow, to regard the building commission act as exclusive when the cost of the building exceeds twenty-five thousand dollars; leaving the general statutes to apply when the cost of the building is between $15,000 and $25,000.

In this connection it will be observed that the MacKenzie case does not present an instance where the money was in the treasury and no issue of bonds was necessary; so that that fact, which is present in the case which you state, would not be a material one on account of anything in the MacKenzie case.

In the same connection I beg leave to point out that the amendments to sections 5638, et seq., General Code, found in 103 Ohio Laws, 447, and occurring subsequently to the decision in MacKenzie vs. State, may have some bearing upon the question as pointed out in the former opinion.

I repeat therefore that, while I acknowledge that the statements of Judge Davis in the opinion in the MacKenzie case are inconsistent with my former opinion, yet, because these statements were, strictly speaking, obiter dicta, I still am inclined to the view that it would be at least the safer policy to follow the building commission act in constructing a county building the cost of which exceeds twenty-five thousand dollars.

This conclusion, in one view of the case, would make it unnecessary to consider your other three questions; but if your commissioners should decide to assume any risk that might ensue from choosing to disregard the building commission section, then, they would desire answers to the other three questions. Of course, if it is decided that it is not necessary to follow sections 2333, et seq., General Code, in the construction of a county building the cost of which exceeds twenty-five thousand dollars, it would necessarily follow that they must proceed under any other statutes that might be deemed applicable to the construction of a county infirmary at such a cost. Such sections are, of course, sections 2343, et seq., or, to be more accurate, sections 2343, 2349, 2352, 2355, 2356 and all the remaining provisions of the related statutes down to and including section 2366, General Code. By examining these sections you will find an answer to your third question, in the event it is decided to assume the risk of ignoring the building commission section.

It appears that under section 2343 the commissioners are required to employ an architect or civil engineer for the preparation of plans, and that under section 2356 they are required to submit the contract when let to the prosecuting attorney for his approval. Aside from these requirements there is none in the related statutes which would compel the county commissioners to associate themselves with any other persons or officers in the letting of contracts or the approval of plans. Of course, the board of infirmary directors having been abolished and all their powers having been conferred by the act found in 102 O. L., 433, upon county commissioners, it would necessarily follow that the reference to infirmary directors, in section 2349, General Code, may be regarded as a mere nullity, and the commissioners may act under that section without associating any other person with them.

However, I call your attention to section 1353, General Code, which requires all plans for all new infirmaries to be submitted to the board of state charities for

approval. This section must be complied with whether the infirmary is constructed under general laws (assuming their application) or under the building commission sections.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

780.

ARTICLES OF INCORPORATION—CORPORATION REDUCING ITS CAPITAL STOCK—THE NUMBER OF SHARES OF CAPITAL STOCK MAY NOT BE REDUCED.

A corporation in reducing its capital stock may not reduce the number of shares into which its capital stock is divided.

COLUMBUS, OHIO, February 21, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your letter of February 6th, receipt whereof is acknowledged, you request my opinion upon the following question:

> "May a corporation, in reducing its capital stock, decrease the number of shares into which its capital stock is divided?"

In connection with this question I have considered the following sections of the General Code:

> "Section 8698. After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known. Or, the stock may be increased at a meeting of the stockholders at which all were present in person, or by proxy, and waive in writing such notice by publication and letter; and also agree in writing to such increase, naming the amount thereof to which they agree. A certificate of such action shall be filed with the secretary of state.
>
> "Section 8700. With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state."

These two sections, which are certainly in pari materia, and at least once have been the subject of amendment in a single legislative act (83 Ohio Laws, 134—the last time section 8700 was amended, save in process of codification), mention three attributes of the "capital stock" of a corporation, which may be changed, namely:

1. The "capital stock," by which is meant wherever used in the General Code, save where the context requires a different meaning, the "total authorized capital stock."
2. The number of shares into which the "capital stock" is divided.
3. The par or "nominal" value of the several shares.

The mathematical relation among these three factors is such that, obviously, any one of them cannot be changed without changing at least one of the others; but a change in one does not necessitate a change in both of the others.

Thus, if a corporation has an authorized capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, the factor 100,000 cannot be changed without changing either the factor 1,000 or the factor 100; both may be changed in order to balance the equation, but both need not be changed. So that, if 100,000 should become 400,000, 1,000 might become 4,000 without change in 100, or 100 might become 400 without a change in 1,000, or 1,000 might become 2,000 and 100, 200.

In an opinion to you under date of April 14, 1911, I analyzed the two sections above quoted. In that opinion I made the general statement that any particular change in capital stock which might be conceived of, but which might not be found to be authorized by the sections in question, could not be made lawfully. My language was:

> "Whatever may be the policy of these statutes in these respects, and whether or not they are founded upon considerations of public policy, I do not think it can be held that the omission was by accident."

I adhere to this general principle, which it seems to me is founded upon elementary considerations. The statutes now under discussion constitute grants of corporate power; where doubtful they are subject to a rule of strict construction—that rule is stated by the maxim *"Expressio unius est exclusio alterius,"* which is well said to be peculiarly applicable to the interpretation of statutes embodying grants of power. That is to say, a power or a franchise granted in a statute will not be enlarged substantively by implication. If the power be granted, implied power may flow from the grant; but if one power be granted and another similar power be not mentioned, the second is withheld and cannot be enjoyed, regardless of whether its enjoyment would violate any supposed public policy or not.

Now, in the statutes under consideration, the general assembly has been just explicit enought to indicate what, under the operation of this rule, was intended to be granted and what withheld. If section 8698 had granted the power merely to "increase" capital stock, and annexed conditions thereto; and if section 8700 had merely granted the power to reduce capital stock, and annexed conditions, then, I would be of the opinion that such a grant of power would carry with it the necessarily implied power to choose which of the two other factors, necessarily influenced by an increase or reduction in the total authorized capital stock, would be affected in a given instance. That is to say, if there were no reference in these statutes to increasing or reducing the par value of shares or the number of shares, then, I would think that the power to increase the total authorized capital stock would carry with it the power to determine whether there should be in a given instance a corresponding increase of the par value or of the number, or both. So also as to the power to reduce, if it had been stated as broadly as has been imagined.

But these two sections are not phrased in the manner just described. Instead, the one gives power to increase "its capital stock or the number of shares into which it is divided;" and the other gives power to reduce "the amount of its capital stock and the nominal value of all the shares thereof."

It will be seen, therefore, that the legislative mind fastened itself upon what may be termed the subsidiary factor with reference to capital stock and changes therein. By legislating in this form the general assembly has, in my opinion, absolutely negatived any idea of creating, by inference from the power to increase or reduce the total aggregate capital stock, any power, other than specified in the section, to change one of the other two factors referred to.

To hold otherwise would be to render nugatory several words in the related statutes. For example, to hold that the mere power to "reduce the amount of its capital stock" carries with it the power to reduce such other factors as may become subject to reduction by reason of a reduction in the total authorized capital stock would be to hold that the legislature used vain and unnecessary language, when it inserted "and the nominal value of all the shares thereof" in the section.

So, in the earlier opinion, I held that a corporation in increasing its total authorized capital stock may not increase the par value of its shares, but is limited to increasing the number of shares into which its capital may be divided. The question not being before me, I expressly withheld opinion, "as to whether or not a corporation, in reducing its capital stock, may decrease the number of shares into which it is divided," which is the precise question now under discussion.

Although opinion upon the question now submitted was not expressed in the former letter referred to, the reasons therein adduced, and repeated and amplified in this opinion, lead irresistibly to the conclusion that a corporation, in reducing its total authorized capital stock, may not reduce the number of shares into which it is divided.

This is because—to repeat— section 8700 specifically authorizes a reduction in the nominal value of the shares, thus indicating that the legislative mind was directed toward what might be called the subsidiary change necessary whenever a reduction is made in the total authorized capital stock; but fails to express anything relative to a change in the other factor, viz.: the number of shares. Therefore, under the maxim above referred to, the expression of one grant of power is the exclusion of the other.

In the case of section 8700, there is an additional reason, not of itself of much weight, but which, when taken in connection with the context, and particularly in connection with section 8698, may be cited for its cumulative effect. I have already pointed out that a change in the total authorized capital stock necessitates a change in one of the subsidiary factors. On the other hand, however, a change in a subsidiary factor does not of itself necessitate a change in the total authorized capital stock. Thus, if the total authorized capital stock is one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, it would be mathematically possible to change the number of shares from one thousand to one hundred and the par value of the shares from one hundred to one thousand dollars, without changing the total authorized capital.

So that if the power were *independently* conferred to change one of the subsidiary factors entering into the capital stock of a corporation, that power while it would necessarily involve either a change in the total authorized capital stock or in the other subsidiary factor, would not necessitate a change in the former.

So, when section 8698 provides disjunctively that a corporation for profit may "increase its capital stock or the number of shares into which it is divided," it would seem that the power has been given to increase the number of shares without

a corresponding increase in the total authorized capital stock. Such a change would, of course, necessitate a decrease or reduction of the nominal value of the shares.

Section 8700, whether by accident or design, uses the word "and" in place of "or," in the corresponding provision of section 8698. To my mind this difference between the related sections cannot be regarded as accidental, and, in view of it, section 8700 must be held to evince a legislative intent so to couple the reduction of the total authorized capital stock with that of the par value of the shares, as to indicate that the former cannot be done in any event without the latter being accomplished also. In other words, it seems to me that by the mere use of the word "and," as contradistinguished from the corresponding use of the word "or" in section 8698, the general assembly has shown that it intended to safeguard the meaning of section 8700, and to make it clear that no reduction of capital stock could be made without a corresponding reduction in the nominal value of the shares; and, conversely, that no reduction in the total authorized capital stock could be made *with* a corresponding reduction in the number of shares.

All these propositions seem to me to be self-evident. I have gone into the question so carefully because I understand that the practice for years in your department has been to the contrary. Contemporaneous executive interpretation of doubtful statutes is entitled to great weight and due weight has been given to this fact, but such practical construction is by no means controlling; (see Lee vs. Sturges, 46 O. S. 153), and where the statutes seem as plain on their face as these seem to me to be, I do not think that even so long continued a practice as that which apparently has obtained under this statute can be brought to the support of a manifestly erroneous interpretation of it.

Indeed, it would seem that the question had simply never been raised; and if an erroneous course of conduct for a large number of years, under a given statute, were followed, without the question as to the proper course of conduct being directly made, it is apparent that many such errors would never be corrected; it is in fact believed that the decisions of the courts afford numerous instances of the overthrowing of long established executive practices.

For all the foregoing reasons, then, I am of the opinion that a corporation, in reducing its capital stock, may not decrease the number of shares into which the same is divided.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

781.

CONTRACT—MEMBER OF COUNCIL—RIGHT OF MEMBERS OF COUNCIL TO BE INTERESTED IN CONTRACTS WITH THE CITY—PECUNIARY AND FINANCIAL NATURE OF SUCH CONTRACTS.

It is only an interest of a pecuniary or financial nature which makes it illegal under the provisions of sections 3808 *and* 12910, *General Code, for a member of council to be interested in a contract with a firm in which he has an interest.*

COLUMBUS, OHIO, January 30, 1914.

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

GENTLEMEN:—I have at hand your letter of January 17th, wherein you ask:

"Must the interest be of a pecuniary or financiel nature in order to make it illegal under sections 3808 and 12910, General Code, for an official to be interested in a contract with a firm with which he has an interest?"

Sections 3808 and 12910, General Code, are as follows:

"Section 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the *expenditure of money* on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other things he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.

"Section 12910. Whoever, holding an office of trust or profit by election or appointment, as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the *purchase of property*, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The term "pecuniary" is defined in Funk & Wagnall's dictionary as follows:

"Consisting of money; relating to money; monetary; * * *."

The term "financial" in the same work is defined:

"Of or pertaining to finance; monetary."

The terms are also stated to be synonymous in this work.

Section 3808 expressly forbids an interest in the "expenditure of money" and section 12910 prohibits an interest in a contract for the *purchase* of property, etc. It seems quite definite from the use of this language in both statutes that the interest pointed to is essentially a pecuniary interest. The prohibition of an interest in the expenditure of money and of an interest in a contract for the purchase of

property, etc., clearly points to a monetary or financial relation; and I am of the opinion that under these statutes the interest prohibited is intended to be a financial or pecuniary one.

I am able to find but one decision which touches upon the question. In the case of Doll vs. State, 45 O. S. 445, wherein the construction of what is now section 12910, General Code, was the matter primarily under consideration, the second paragraph of the syllabus is as follows:

> "To become interested in the contract is not necessary that he make profits on the same. But it is sufficient, if while acting as such officer, he sell the property to the city for its use, or is personally interested *in the proceeds of the contract of sale* and receives the same or part thereof, or has some *pecuniary interest* or share in the contract."

On page 451 the court said:

> "The following portion of the charge of the court was excepted to: 'What is it to become directly or indirectly interested in a contract in the sense contemplated by the statute upon which this indictment is found? To be interested in a contract is to have and to hold some *pecuniary interest* in it to have and to hold a share, portion or part of it or in it. * * *'"

On page 452 the court said:

> "We have carefully examined the whole record and fail to find error justifying the reversal of the judgment."

While the court in this case did not have the question before it as it is presented in the question before us, I am of the opinion that the language is sufficient to sustain the conclusion that it is only a pecuniary or financial interest which is contemplated by both of these statutes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

782.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—RIGHT TO PRESCRIBE AND REQUIRE THE INSTALLATION OF A SYSTEM OF ACCOUNTING TO BE USED IN CITIES HAVING A CHARTER FORM OF GOVERNMENT.

In municipal corporations still governed by the general provisions of the municipal laws, the provisions of the sections relating to the bureau of inspection and supervision of public offices still apply in their entirety. It is not true in every respect in cities where charters have been adopted.

COLUMBUS, OHIO, February 9, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 19th, 1913, requesting my opinion on the following question arising under section 13 of article XVIII of the constitution of Ohio:

"Has the bureau of inspection and supervision of public offices the authority to prescribe and require the installation of the system of accounting to be used in city offices in the event that no charter has been adopted by a city under the home rule amendment to the constitution?"

Section 13 of article XVIII of the constitution of Ohio provides as follows:

"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."

In my opinion this section of itself does not confer authority upon the general assembly to prescribe systems of accounting for any municipal corporation and to require their installation. But as to cities not exercising the home rule privilege of adopting a charter, it is clear that the general assembly possesses general legislative power. So much was held in state vs. Lynch, 88 O. S. ——.

In that case it was decided, paraphrasing the language of the syllabus, that so long as a municipal corporation failed to avail itself of the privilege of adopting a charter of its own, or adopting additional laws passed by the general assembly for such a purpose under the authority of section 1, of article XVIII, it continued to be subject to the control of such general laws of the state as might be applicable to it.

There are, of course, general laws applicable to such municipalities as to which the power of the general assembly extends, which authorizes the bureau of inspection and supervision of public offices to prescribe and require the installation of systems of accounting. (Sections 274 and 277, General Code).

The only remaining question is as to whether or not section 13 of article XVIII is a limitation on the legislative power generally, or is a special grant of power vested in the legislature for a particular purpose.

In my opinion the provisions of section 13 of article XVIII do not constitute limitations upon the general legislative power. The principle here is analogous to that underlying the interpretation of article XII, section 2 of the constitution which provides that "laws shall be passed, taxing by uniform rule all * * * property at the true value thereof in money."

It was early contended that this section, being a special grant of power, was to be interpreted strictly, so as to constitute a limitation on the general legislative power conferred by the first section of the same article. In the practical sense this contention resolves itself into the proposition that the only subject of taxation which could be reached by the legislative power of the state was property of the kinds mentioned in article XII, section 2.

In a long line of decisions the supreme court of this state has repeatedly refused to lend its sanction to this contention, holding that the purpose of the section is merely to insure that when property is taxed it shall be taxed by uniform rule and at its true value in money so that section is not to be regarded as withholding from the general assembly, by inference or otherwise, the power to tax subjects other than property. A similar rule is to be applied, in my judgment, to section 13 of article XVIII. The reason for this section is found in the earlier provisions of the same article which have the effect of withdrawing cities and villages under certain circumstances from the general legislative power of the general assembly. That is to say, when a municipality adopts a charter, the charter becomes the law of the municipality within the proper field of its operation, and,

pro tanto, the legislative power with respect to that field is withdrawn from the general assembly notwithstanding the provisions of article II, section 1, and imposed in the municipality and in its properly created legislative agencies.

The effect of the 13th section of article XVIII, then, is to constitute an exception to this general rule, and to retain in the hands of the general assembly the power to pass certain laws affecting the government of municipalities, whether they have adopted charters or not. This being the purpose of section 13 of article XVIII, it is, in my opinion, not to be regarded as a qualification of the general legislative power possessed by the general assembly of the state over and with respect to the government and affairs of municipal corporations whose inhabitants do not choose the effective means of depriving the general assembly of such general legislative power by adopting a charter.

I am of the opinion, therefore, that as to a municipal corporation still governed by the general provisions of the municipal laws, the provisions of the sections relating to the bureau of inspection and supervision of public offices still apply in their entirety notwithstanding the limited grant of power contained in section 13 of article XVIII of the constitution.

I am also of the opinion that as to any municipalities of the state which may have adopted the additional laws framed by the general assembly for their government, these same statutes continue to apply. The status of such a municipality is not exactly like that of a municipality which has taken no steps whatever to alter its former condition, but it is to be noted that the method of securing a form of government different from that prescribed by the General Code, of which I am now speaking, is referred to in section 2 of article XVIII as the affirmation of "additional laws * * * passed for the government of municipalities adopting the same." It would seem, therefore, that such additional laws would supersede the general laws operative throughout the state only to the extent that they might be inconsistent with the latter.

I find nothing in the "additional laws" passed by the last session of the general assembly, 103 O. L. 767, in any way inconsistent with the provisions of the laws relating to the bureau of inspection and supervision of public offices.

I am, therefore, of the opinion that as to cities of this class, the powers of the bureau continue unimpaired. Of course as to those municipalities which have adopted charters, only such laws relating to the bureau of inspection and supervision of public offices as provide for the "examination of the vouchers, books and accounts" thereof are applicable, and the bureau is without authority to prescribe the methods of bookkeeping and require their installation. However, the general assembly of the state is not without some authority of this kind under section 13 of article XVIII, even with respect to municipalities which have adopted charters, in that the power is also reserved to "require reports * * * in such form as may be provided by law."

Inasmuch as you do not inquire as to the extent of the bureau's power under existing laws, and constitutional provisions, with respect to charter governed cities, I express no opinion upon this question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

783.

VILLAGE COUNCIL—CONTRACT—RIGHT TO HIRE AN ENGINEER—PAY ROLL—REFERENDUM ON PAY ROLL.

Where a pay ordinance includes among other bills one for an engineer hired by council to look after certain contracts and a referendum is filed on the pay ordinance, city council has the right to settle the bill with the engineer without waiting for the result of the attempted referendum; it is their duty to pay this engineer on the contract as soon as the amount due him is ascertained and the funds are available.

COLUMBUS, OHIO, February 27, 1914.

HON. NEWTON O. MOTT, *Village Solicitor, Geneva, Ohio.*

DEAR SIR:—I have your communications of January 15 and 20, 1914, in which you state and inquire:

> "On the 8th day of December, 1913, the council of the village of Geneva passed a pay ordinance, which contained the regular monthly pay roll, and in addition the following bills which a number of people of the village thought were unfair. One of these bills was that of Mr. Cummings an engineer hired by the council to look after certain contracts.
>
> "On the 15th day of December, 1913, a referendum on the above pay ordinance was filed with the clerk of the village, but all the bills had been paid except the disputed claims, one of which was Mr. Cummings.
>
> "The new council have arranged a satisfactory settlement with Mr. Cummings, and desire to pay him. How can this be done, if at all, before the referendum is voted on."

You also state that the claim of Cummings & Downer is for services as engineers of various improvements, making plans, specifications, supervision and inspection, for which they were to be paid a commission or percentage out of the improvement funds; that the pay ordinance mentioned included various bills "for services performed" under contracts made under an employing ordinance previously passed by he council.

In making an improvement, the council must first pass a resolution declaring the necessity thereof. (Section 3814, G. C.)

The following section, 3815, G. C., provides what such resolution shall contain and section 3816 reads:

> "At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested."

It follows from this that where it is necessary to have plans and specifications, the council have full authority to prepare them, and this authorizes the enactment of the employment ordinance you mention. An employment ordinance having been passed, and a contract having been entered into with C. & D. in compliance with its

provisions, council has no more right to withhold payment in proper amount for services actually earned under such contract, than an individual would have; and I can see no reason why these men should not be paid what is due them under their contract.

You state:

> "It requires an ordinance to employ them and a separate ordinance to pay them, therefore either ordinance would be subject to referendum, and does not come within sec. 4227-3, which reads, etc. * * *"

I do not concur with that part of your statement that it requires a separate ordinance to pay them, but am of the opinion that while an ordinance was necessary to make the employment, and that it does not come within one of several, necessary to complete an improvement, and was subject to a referendum, yet I do not think an ordinance to pay was necessary, and think that payment might be made by a motion to allow the claim under the contract; but whether this is correct is of no moment, because the ordinance to employ having been permitted to become effective without a referendum, there is no authority to submit the pay ordinance, if one was needed, to a vote, as I cannot conceive that it is the intention of the initiative and referendum to submit the question of making payments under a valid contract, to a vote. To do this would authorize a referendum upon an employment ordinance, and after a vote of adoption and the making of a contract under it, another referendum and vote upon the question of compliance with the contract. I do not think the pay ordinance subject to referendum, although it comes within the liberal meaning of the language used in the act; and inasmuch as I do not think an ordinance necessary, there is no call for consideration of the emergency suggestion concerning the application of which great doubt would exist in the event of the opposite view being adopted.

Answering your question specifically, I desire to state that it is not only the right of council to settle with Cummings & Downer without awaiting for the result upon the attempted referendum, but it is their duty to pay them what they have earned under their contract as soon as the proper amount may be ascertained, provided funds are available.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

784.

CITY ENGINEER—CONSULTING ENGINEER—CITY ENGINEER MAY BE COMPENSATED FOR ASSISTING A CONSULTING ENGINEER.

Where a city engineer performs engineering work for a city and the city contemplates engaging some consulting engineer to make surveys, plats, drawings, recommendations, and supervise the construction of a water works plant, the engineer doing the work for the city may be employed by the consulting engineer and paid for doing part of the work, collecting data, etc., while acting as engineer for the city.

COLUMBUS, OHIO, February 17, 1914.

HON. JOHN SHERMAN TAYLOR, *City Solicitor, Cambridge, Ohio.*

DEAR SIR:—We have your letter of January 28th, which reads as follows:

> "Kindly give me an opinion on the following:
> "Our city engineer, Karl M. Cosgrove, receives from the city a salary of $1,000.00 per year for doing the general engineering work of the city,

street paving, sewer, sidewalks and general engineering. In fact, all the general city work is referred to him by council and the director of service. The city contemplates engaging some consulting engineer to make surveys, plats, drawings, recommendations and supervise the construction of a water works purification plant.

"Can Mr. Cosgrove be employed by the consulting engineer and be paid by him for doing a part of the work in collecting data, etc., while acting as city engineer of this city, this employment in no way interfering with Mr. Cosgrove's present duties to the city."

If the city engineer can attend to the duties of his office in a manner satisfactory to the director of service and still have some time to devote to a private employment, such as collecting data for the consulting engineer referred to, I can see no reason why he should not be allowed to do so.

I am therefore of the opinion that your city engineer may be employed by such consulting engineer, if such an arrangement is satisfactory to your director of public service.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

785.

GREENLUND LIQUOR LICENSING ACT—STATE LIQUOR LICENSING BOARD—VACANCY ON THE COUNTY BOARD—SUCH VACANCY TO BE FILLED BY APPOINTMENT—CIVIL SERVICE.

Under the provisions of section 7 of the Greenlund Liquor Licensing Act, the state liquor licensing board may proceed to fill a vacancy occurring in the Richland county liquor licensing board, through the death of one of its members, which death has occurred since January 1, 1914. *The vacancy is to be filled without regard to the civil service law of the state.*

COLUMBUS, OHIO, February 28, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours of February 28th, wherein you state:

"Will you kindly advise the state liquor licensing board whether it is its duty to proceed to fill the vacancy occurring in the Richland county liquor licensing board through the death of one of its members, which death has occurred since January 1, 1914, in accordance with the provisions of section 7 of the Greenlund act and without regard to the civil service law of the state of Ohio?"

Section 7 of the Greenlund liquor licensing act provides that in each county there shall be a board consisting of two commissioners representing the state "not more than one of whom shall belong to the same political party," and authorizes the filling of any vacancy occurring through resignation, removal, death or disability.

Section 16 of said act makes it the duty of the county liquor licensing boards, and authorizes them to grant, issue, renew and transfer liquor licenses as provided by law; also to suspend or revoke subject to the conditions and in the manner

provided by law, all licenses granted or renewed in their county, and to perform such other duties as the law requires.

These county license commissioners are endowed with certain powers and are authorized to perform duties requiring at times an arbitrary judgment, under the law no other authority can pass upon the constitutional qualifications necessary to be possessed by an applicant before he is entitled to a liquor license.

This liquor license act was filed in the office of the secretary of state May 8, 1913, and no referendum petition having been filed it went into force by the provisions of section 62 of the act on and after August 1, 1913, except the penal sections which went in force on and after the fourth Monday in November, 1913.

The civil service law was passed May 5, 1913, filed in the office of the secretary of state on May 10, 1913, and went into effect ninety days thereafter.

Section 1 of the civil service law provides that the term "civil service" includes all officers and positions of trust or employment in the service of the state, etc.

Section 2 of said act provides that on and after January 1, 1914, appointments to and promotions in the civil service of the state shall be made according to merit and fitness, to be ascertained as far as practicable by examination, which as far as practicable shall be competitive.

Section 8 of the civil service law provides for and defines the unclassified service and the classified service. Sub-section 8 of this section reads as follows:

> "The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

Section 10 of said act provides for the examination of all applicants for positions and places in the competitive classified service, and amongst other things that no questions in any examination shall relate to political or religious opinions or affiliations.

Section 13 provides that the head of the department, etc., in which a position in a competitive classified service shall be filled shall notify the commission of the fact and the commission shall certify the names of three candidates standing highest on the eligible list to which the position belongs.

Without going into a detailed discussion of the civil service act and its various provisions, but keeping in mind the particular duties that devolve upon the members of a liquor licensing board, the fact that not more than one of the members of the board can be of the same political party, and further since the civil service law expressly provides that no questions may be asked relating to one's political affiliations, I am of the opinion that in making the appointment to fill the vacancy occurring in the Richland county liquor licensing board, through the death of one of its members, such appointment should be made in accordance with the provisions of the licensing act, and that in this appointment the provisions of the civil service law have no application.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

786.

COURT STENOGRAPHER—APPOINTMENT OF ADDITIONAL OR ASSISTANT STENOGRAPHERS TO THE OFFICIAL STENOGRAPHER —PAYMENT OF SALARIES TO SUCH ADDITIONAL STENOGRAPHERS.

Section 1547, General Code, as it appears is in full force and effect, consequently the appointment of additional or assistant stenographers to the official stenographer may be made and such assistant stenographers may be paid out of the county treasury.

COLUMBUS, OHIO, February 14, 1914.

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

GENTLEMEN:—I have your letter of January 28th, wherein you inquire:

> "In view of the comment made by the compilers of Page & Adams' Annotated General Code of Ohio, under section 1547, have we any law authorizing the appointment of additional or assistant stenographers to the official stenographer, and if such are appointed may they legally be paid out of the county treasury?"

Section 1547 as it appears in Page & Adams' edition of the General Code of Ohio, was enacted in 1911 by house bill No. 459, (102 O. L., 353). The full text of the bill is:

> "Be it enacted by the general assembly of the state of Ohio:
>
> "Section 1. That section 1547 of the General Code as amended April 7, 1910, be amended to read as follows:
>
> "Section 2. In any county where the court fails to comply with the provisions of the preceding section, in the trial of criminal cases upon demand by an indigent defendant, the court shall appoint a stenographer for such case, who shall be paid for his services out of the general fund of the county such sum as the court shall approve.
>
> "Section 1547. When the services of one or more additional stenographers are necessary in a county, the court may appoint assistant stenographers, in no case to exceed ten, who shall take a like oath, serve for such time as their services may be required by the court, not exceeding three years under one appointment, and may be paid at the same rate and in the same manner as the official stenographer. Such stenographers when so appointed shall be ex-officio stenographers of the insolvency and superior courts, if any, in such county, and of the circuit courts in such county.
>
> "Section 3. That said amended section 1547 of the General Code, passed April 7, 1910, be, and the same is hereby repealed."

Governor Harmon approved sections 1 and 3 and vetoed section 2 of the bill, and in a message to the general assembly he stated his reasons for such veto as follows:

"June 13, 1911.

"To the General Assembly:

"The purpose of house bill No. 459, 'to amend section 1547 of the General Code, relating to the appointment of additional stenographers, as amended April 7, 1910, and filed in the office of the secretary of state April 22, 1910, (O. L. Vol. 101, p. 110),' was to make stenographers appointed by the common please courts official stenographers of the circuit courts in the respective counties also, there being now no provision for such stenographers in the circuit courts, and section one (1) of the bill amends section 1547 of the General Code accordingly.

"But another purpose was to permit the appointment of stenographers on demand of indigent defendants in criminal cases when no official stenographers have been appointed.

"By a mistake in both engrossment and enrollment the latter provision is inserted, as section two (2) of the bill, between the first two lines of section one (1) which declare the amendment of section 1547 and the remainder of section one (1) which gives the section as amended.

"The only course open to correct this error is to strike the misplaced section two (2) from the bill entirely by filing it with the secretary of state unapproved, with the above objections, which I herewith do.

"Judson Harmon, Governor."

In my judgment the governor's veto operated to strike out of the bill only that portion embraced within section two proper, that is the lines between section 1 and section 1547 as amended.

I am of the opinion, therefore, that section 1547, as it appears in the General Code is in full force and effect.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

787.

MAYOR OF THE VILLAGE—LIQUOR LICENSE LAW—FINES—JUDGMENT—FEES.

When the mayor of a village has collected fines to the amount of two thousand dollars on account of violations of the liquor laws, he is not entitled to four per cent. upon these collections, as a collection of a fine could not become a collection of a judgment as is contemplated by section 4534, *General Code.*

COLUMBUS, OHIO, February 27, 1914.

HON. J. OSCAR NAYLOR, *Solicitor for the Village of Smithfield, Steubenville, Ohio.*

DEAR SIR:—I have your letter of January 30, 1914, as follows:

"I enclose you herewith a transcript published by The Ruggles-Gale Co. of your city and under the head of mayor's fees, to wit, the last item 'collections made upon judgment, 4 per cent.' I respectfully ask for an opinion on this item.

"I have been acting as solicitor for the village of Smithfield when they are in need of legal services in the prosecution of violation of liquor local option laws and within the last year the mayor of said village has

collected fines in the amount of $2,000.00 or more from the violators of this law and he has submitted the proposition as to whether or not he is entitled to his 4 per cent. upon these collections and in support of the same refers me to sections 4534, 4548. 1746 and 3347 of the General Code, also volume 102, page 476 of the laws of Ohio."

Section 4534 of the General Code reads, in part:

"The fees of the mayor in all cases, shall be the same as those allowed justices of the peace for similar services."

Section 1746 of the General Code reads, in part:

"Except as otherwise provided, justices of the peace, for the services named, when rendered, may receive the following fees; * * * collections made upon judgments if not paid within ten days after rendition thereof, or within ten days after the stay of execution, if such stay is taken, the same fees as are allowed constables for money paid on execution."

Section 3347 of the General Code, reads in part:

"For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: * * * on all money made on execution, four per cent."

While it is true that the collection of a fine by the mayor might be termed a collection upon a "judgment," yet I believe a reading of the statute makes it clear that it is not a collection upon such a judgment as is contemplated by section 4534.

Bouvier's Law Dictionary says that "the term 'judgment' is more usually applied to civil, and 'sentence' to criminal proceedings." and I think it will be conceded that men using these words generally so apply them.

Section 13229 of the General Code places a penalty on the sale of intoxicating liquor thirty days after an election prohibiting the same in a township, and section 13231 provides that:

"All fines collected under section 13229 shall be paid into the treasury of the county and be accredited to the poor fund thereof."

There is no reference here to any portion of the fines being allowed the mayor as compensation for collecting them. On the contrary, I think this section shows quite the opposite intention.

Section 4270 of the General Code reads:

"All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over. All fines, penalties, and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

Neither is there any provision in this section reserving to the mayor a percentage of the fines collected.

Section 13429 of the General Code reads:

> "Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection unless otherwise provided by law."

Section 13430 of the General Code reads:

> "If a justice fails to so pay such fines, the treasurer of the county shall bring suit, in the name of the state, for the recovery thereof and interest thereon, and the court in rendering judgment therefor shall add a penalty of ten per cent. on the amount found to be due such general fund."

Inasmuch as section 4534 of the General Code makes the mayor's fees the same as the fees of the justice of the peace for similar services, section 13429 and 13430, above quoted, also tend to strengthen the theory that the mayor is not entitled to any percentage on the collection of fines.

In the light of the sections of the General Code herein quoted, and the meaning of the word "judgment" as generally used, I am of the opinion that the mayor is not entitled to any percentage on fines collected upon sentences imposed for violations of the local option laws.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

788.

DISHONORED CHECK—PROCEDURE TO BE FOLLOWED BY STATE AUDITOR, STATE TREASURER, IN HANDLING DISHONORED CHECKS—STATE DEPARTMENT.

Where a check is returned to the treasurer of state, dishonored, the treasurer of state should deduct the amount of the check from his cash account, and should also notify the auditor of state, and send him a statement fully describing the dishonored check and exhibit the same to him in order that his records may be made to correspond with the treasurer's books, and likewise the same should be done with the officer, department, board or commission which received the dishonored check and presented it to the auditor and treasurer of state, in order that the books of all parties may be made to correspond.

COLUMBUS, OHIO, February 26, 1914.

HON. J. P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—In regard to your inquiry (verbal) as to your right to deduct the amount of an unpaid check from your cash account, permit me to say:

The presumption, when a check is received either by an officer or individual, is that it is a conditional payment of the debt or claim in the absence of an express agreement of its being taken in full satisfaction of the same. Such is the rule laid down in Cyc. and the burden falls upon the party making the claim to show that it was given and received as absolute and not merely as conditional payment. Willer vs. Washington Co., 7 C. C., (N. S.) 303.

The giving of a check upon a bank carries with it, in all cases, the implied representation that there are funds in the bank upon which it is drawn sufficient to meet it. Consequently, where a check is offered in payment, it is received as such, provided the check is paid, and this condition attaches to all entries, receipts and action concerning the same. If the check is paid, the payment is absolute; if not, the matter stands as if nothing had been done and the receipt had been given and entries made by mistake. If the sum of five thousand dollars should be paid in cash and entered either as three or six in the cash account, no one would question for a moment the right of the recipient to correct his books by increasing the entry in the one event, and his duty to decrease it in the other, and such is the result when a check is returned dishonored— it is the right of the recipient, whether he be an officer or individual, to so change his books as to correct the error created, by crediting to his cash account that which afterwards proved to be of no value. The paper, in this case the dishonored check, should be retained by the state treasurer as evidence of the fact of its non-payment, and of his right to reduce his cash balance to the extent of the amount the same was increased by its entry for that which it was given, but which proved to be a mistake on the part of the treasurer, and a fraud, or worse, on the part of the maker of the check.

McIlvaine, J. has said:

> "It is not controverted that where a debtor makes and delivers a check to his creditor in payment of an account, upon a bank where the debtor has neither funds nor credit, it is not a payment of the account, although the creditor receives it as such. In such case there is no satisfaction of the indebtedness; such check is valueless. By its delivery it is impliedly represented that there are funds in the hands of the drawee subject to its payment. Relying on this representation, it is accepted as payment. Its falsity relieves the creditor from his agreement, no matter whether the act of the debtor is fradulent or bona fide. The agreement is without consideration and void. The account remains an existing and continuing cause of action."

Flieg vs. Sleet, 43 O. S., 53, citing Weddington vs. Fabric Co., 100 Mass., 422.

To the same effect see Banking Co. vs. Banking Co., 20 O. C. C., 391, and other cases here and elsewhere.

This, I think, clears the matter insofar as the books in your office are concerned; there yet remains the question of keeping the books of the auditor of state in harmony with yours, and the manner in which, under the statutes, it is to be done.

Section 24 of the General Code, reads:

> "On or before Monday of each week, every state officer, department, board or commission shall pay to the treasurer of state all moneys, checks and drafts received for the state, during the preceding week, from fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed verified statement of such receipts."

This calls for a detailed statement and authorizes the paying in of checks and drafts, as well as money, and the like. The officer, department, board or commission complying with this act should make his detailed statement in duplicate, or, which would be much better, in triplicate; file one with the auditor of state, procure said officer to certify one copy; take and file it with his checks, drafts, money, etc., with the treasurer of state and retain the third for his own files.

When a check or draft is returned dishonored, the treasurer of state should follow the course above indicated as to his own office, and send a statement fully describing the dishonored check to the auditor of state, exhibit the same to him to the end that his records may be made to correspond with the treasurer's books, and the difficulties arising from the return of the check be cared for. The officer, department, board or commission which received the dishonored check and presented it to the auditor and treasurer of state, should also be notified of the facts so that there may be no discrepancy or difference in any of the records of the state in reference to any such returned or dishonored check, draft or paper, given in payment of a claim in favor of the state, which later proved worthless.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

789.

PROSECUTING ATTORNEY—SECRET SERVICE OFFICER—SALARY—COUNTY DETECTIVE.

There can be no objections to a prosecuting attorney employing a county detective, under section 3004, *General Code. The salary to be paid to such detective should not exceed that provided for in section* 2915-1, *General Code. This procedure would be especially commendable where a prosecuting attorney is aiming as economy.*

COLUMBUS, OHIO, March 2, 1914.

HON. C. F. ADAMS, *Prosecuting Attorney, Lorain, Ohio.*

DEAR SIR:—I have your letter of December 19, 1913, as follows:

"I desire to know whether, under section 3004, General Code, in your opinion, I can employ a detective to investigate criminal matters, such employment to extend over a number of months in the year, but pay him for particular matters investigated.

"I make this request because I do not care to appoint a secret service officer under the recent act of the legislature, on account of the expense entailed, the legislature having fixed the minimum salary of $125.00. I feel that if I can secure this work under section 3004 it will be a material saving to the county."

Section 3004, General Code, provides:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county. * * *"

Section 2915-1 as amended in 103 O. L., 501, provides:

> "The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service, nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upan the warrant of the county auditor."

Attention is called to the following language in section 3004 of the Code:

> "* * * to provide for expenses which may be incurred by him (the prosecuting attorney) in the performance of his official duties, and in the furtherance of justice, *not otherwise provided for.*"

The question presents itself as to the meaning of *"not otherwise provided for."* Does it mean not otherwise provided for in law, or not otherwise provided for in fact? Suppose the prosecuting attorney had not proceeded agreeably to section 2915-1 and had not appointed a secret service officer under that section. May it then be said that we have an application of "not otherwise provided for" in section 3004? I should be inclined ordinarily to hold that the expression—"not otherwise provided for" was a legal expression and did not relate to a fact, but I am loath to come to a conclusion that would unnecessarily put the greater expense upon the county; and, too, I can conceive of a situation in which the prosecuting attorney might have his regular detective employed under section 2915-1 occupied and a situation would arise wherein it would be advisable in the furtherance of justice to employ a detective under section 3004 for special purposes.

On the whole, I am not able to see any objection to the action of a prosecuting attorney who is prompted by considerations of economy to proceed under section 3004. Certain it is that the chief guiding official in transactions under either section is the prosecuting attorney. Certain it is, also, that either section gives him the right to employ a detective. It is apparent that under either section the total amount to be expended must not exceed one-half of the official salary, and it is fair to assume that the salary to be paid under any circumstance should not exceed that provided in 2915-1, and a prosecutor is to be commended if he can secure the services of a secret service agent at a lower price than the minimum provided in section 2915 and for just such time as is necessary. I can hardly conceive of anyone raising an objection so long as the prosecuting attorney pursues the course herein indicated.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

790.

CHILDREN'S HOME—SUPERINTENDENT—VISITING AGENT—OFFICES INCOMPATIBLE—MATRON.

The positions of superintendent of a children's home and visiting agent of a children's home are entirely inconsistent, and such superintendent may not serve in the capacity of visiting agent for the home over which he is superintendent. The matron of a county children's home may act as such visiting agent.

COLUMBUS, OHIO, March 5, 1914.

HON. H. H. SHIRER, *Secretary Board of State Charities, 1010 Hartman Building, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 10th, in which you request a construction of section 3099, General Code, as amended in 1913 (103 O. L., p. 892), as to the whether the superintendent or matron of a county children's home may act as visiting agent for the home with which such superintendent or matron is connected.

Section 3099, as amended, reads:

> "Unless a children's home places its wards through the agency of the board of state charities, the trustees shall appoint a competent person as visiting agent, who shall seek homes for the children in private families, where they will be properly cared for, trained and educated. When practicable, the agent shall visit each child so placed not less than once in each year, and report from time to time to the trustees its condition, any brutal or ill treatment of it, or failure to provide suitable food, clothing or school facilities therefor in such family. The agent shall perform his or her duties under the direction of the trustees and superintendent of the children's home for which he or she is appointed, and may be assigned other duties not inconsistent with his or her regular employment as the trustees prescribe. His or her appointment shall be for one year, or until his or her successor is appointed, and he shall receive such reasonable compensation for his or her services as the trustees provide."

It will be observed that unless such home places its wards through the board of state charities, the board of trustees thereof is empowered by the foregoing section to appoint and fix the compensation of a competent person as visiting agent, whose duty it is to seek suitable homes for such children in private families and, if practicable, to visit each child so placed at least once each year. Such visiting agent is required to report to the trustees of the home the condition of such child as to food, clothing and school facilities furnished by the family with which it has been placed. It is further provided that the visiting agent shall act under the direction of the trustees and superintendent of the children's home for which he or she is appointed.

The superintendent of a county children's home, who may be appointed by the trustees under section 3084, is, by virtue of the provisions of section 3085, as amended in 103 O. L., 889, to "have entire charge and control of such home and the inmates therein, subject to such rules and regulations as the trustees may prescribe." The trustees may, upon the recommendation of the superintendent, appoint a matron, who shall perform her duties under the direction of the superintendent, or, the

trustees may, under section 3086, dispense with the superintendent and authorize the matron to assume complete charge of the home.

Incompatibility of offices is of two kinds, viz.: statutory and common law. The former exists when a statute expressly prohibits the holding by one person of two or more offices at the same time. The statutes do not prohibit a superintendent or matron of a children's home from acting in the capacity of visiting agent.

The rule of common law incompatibility, is stated by the circuit court in State ex rel. vs. Gilbert, 12 C. C. (n. s.) as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

The right of a superintendent or matron of a county children's home to act as visiting agent for such home, must be determined in the light of the foregoing principle of common law incompatibility, since no statutory incompatibility exists.

If the superintendent of a children's home were also visiting agent of such home, he would be in the position of having to pass in one capacity, upon his own acts in another capacity. As a visiting agent is subject to the direction and control of the trustees and superintendent of the home and has no independent powers, such agent is merely an employe and not an officer in the sense in which the latter word has been defined by our courts. Notwithstanding that one person occupying the place of superintendent and visiting agent would not be holding two offices, yet, it is within the spirit and policy of the law to prevent one person from holding two or more inconsistent public employments at the same time.

The positions of superintendent and visiting agent of the county children's home. are entirely inconsistent, and I am clearly of the opinion that such superintendent may not serve in the capacity of visiting agent for the home over which he is superintendent.

A matron of the county children's home would not, in my opinion, be prevented from acting as such visiting agent.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

791.

BLIND RELIEF—SURPLUS MONEYS—COUNTY FUNDS—TAXES AND TAXATION—LEVY.

The limitations as to surplus money as used in section 1 *of house bill No.* 44 *in reference to relief of the needy blind are that whenever the balance of the* 1913 *levy, that is that made in* 1912 *remaining in the fund at the end of the fiscal year ending March* 1, 1914, *is greater than the balance anticipated at the time of making up the budget, and therefore taken into consideration by the budget commission, such an excess does constitute surplus moneys within the meaning of house bill No.* 44.

COLUMBUS, OHIO, March 5, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 17th, requesting my opinion upon the following question:

"What are the limitations as to 'surplus moneys' as used in section 1 of house bill No. 44 providing for the relief of the needy blind by county commissioners under said law passed by the recent special session of the general assembly.

"The question is, may county commissioners, at the time of making their March, 1914, appropriations from the balances in the various county funds, economize as to discretionary items within said appropriations, thus creating a surplus in a particular fund or funds in excess of the amount appropriated therefrom, so as to provide a surplus in said fund that may be transferred by action of said board to the needy blind fund, the same to become available by appropriation for the relief of said needy blind of the county?"

I have not house bill 44 before me, but as I recall, there is nothing in the context to indicate any peculiar or special meaning to the phrase "surplus moneys," as therein used. The act simply authorizes the transfer, by the county commissioners, of such moneys from any of the funds of the county to the blind relief fund, in the event that, through failure to levy or otherwise, there is an insufficient amount in such fund to pay outstanding blind relief orders or those hereafter issued.

I may answer first your specific question, as to whether or not, by economizing at the time of making the first semi-annual appropriation for the fiscal year beginning in March, 1914, the commissioners may treat the difference between the aggregate of all appropriations from a given fund and the amount in the fund after appropriations are made as a "surplus."

My answer to this question is, generally speaking, in the negative. More precisely, I do not believe that the mere fact that the appropriations made at the beginning of the fiscal year fail to exhaust the fund is sufficient to create such a "surplus" as is contemplated by the act in question. It will be borne in mind that the revenues levied in a given year are intended to provide for the expenses for which they are levied for the entire fiscal year. These revenues come into the treasury in two installments, viz.: the proceeds of the December collection and the proceeds of the June collection of taxes, respectively. Theses two installments are not necessarily equal in amount: while the taxpayers have the option of paying their taxes in equal installments, yet, they may, if they so desire, pay the entire tax in December. On the other hand, there is always a considerable amount of delinquencies that is, tax charges on which nothing was paid in December, but which may be paid, with penalties, in June.

So, it is apparent, that it cannot reasonably be assumed, at the beginning of a fiscal year, and after the returns from the first half of the tax collection have come into the treasury, that the second half of the tax collections will be equal to the first half.

So, also, it cannot be assumed that moneys in a given fund, unappropriated at the beginning of the year, will not nevertheless be needed before the fiscal year is over for the purposes of the fund. Appropriations are not necessarily equal for the two halves of the year; it may be that the exigencies of certain governmental activities require a larger amount to be appropriated for the second half of the year than need be appropriated for the first half of the year. Nor is it necessarily true that the exact needs of a fund for the whole year are known at the beginning of the year. In short, it cannot be assumed at the beginning of the fiscal year, and after appropriations for the first half of that year have been made, that any unappropriated balance in a fund will not be needed for the purposes of that fund at any time during that year.

This fact suggests a definition of the phrase "surplus moneys." In my opinion the phrase means "moneys of which it can be determined with reasonable certainty that they will not be needed for the purpose for which they were levied."

Now, the purpose for which a county levy is made is reasonable expenses of the fund during the fiscal year. This year is to be treated as an entirety, as is apparent from consideration of section 5649-3d, et seq., General Code. Therefore, the mere difference between appropriations and balances in a fund could, under no circumstances, in my opinion, amount to a surplus within the meaning of the act in question, sooner at least than the time of making the appropriation for the second half of the fiscal year.

Accordingly, I am of the opinion that in March, 1914, the difference between the aggregate of all appropriations in a given fund and the balance of the fund may not be a "surplus." However, I am of the opinion that after the September appropriations from such fund have been made, the difference between the aggregate of such appropriations and the balance then remaining in the fund might possibly be so treated.

I anticipate, however, that you desire, particularly, advice as to what may at the present time, that is, the first of March, be treated as "surplus moneys."

There occurs to me a state of facts under which an unappropriated balance in a fund might constitute such a surplus. Under the machinery of the Smith law, as contained in the sections last above cited, the county commissioners, and a budget commission, in fixing the levy for a given fund, in June of one year, are required to take into account the anticipated balance which will remain to the credit of the fund at the end of the current year, if any. Thus, the levying authorities first consider what are to be the needs of the bridge fund, for example, for the fiscal year commencing some seven or eight months after their determination is made. Having determined that the needs of the fund amount to a given sum, they then examine the budget prepared and submitted, with a view to ascertaining whether or not there will be, at the end of the current year, any balance in that fund. If such a balance is anticipated the amount of that balance is deducted from the anticipated needs of the fund, for the purpose of ascertaining the amount required to be levied; for example, if the needs of the bridge fund should be fixed at twenty thousand dollars, and there were an anticipated balance at the end of the current year of two thousand dollars, the amount levied would be eighteen thousand dollars; the intention being that the two thousand dollar balance with the eighteen thousand dollar levy would produce the requirement of the fund.

Now, should it transpire that at the end of the current year, and the beginning of the fiscal year for which the levy was made, the balance remaining in the fund for which levy was made is greater than that anticipated, then, I should think that such an excess might be treated as a surplus. Take the case imagined as an example: if the actual balance found in the fund at the end of the fiscal year in which the levy was made, and the beginning of the fiscal year for which the levy was made, should prove to be three thousand dollars instead of two thousand dollars, then, the one thousand dollars would, in my opinion, be "surplus moneys."

It is true, of course, that it does not appear, strictly speaking, that this one thousand dollars will not be needed, during the fiscal year then beginning, for the purposes of the fund. Yet, the spirit of the "Smith law," if not its letter, is such that the expenditures of the county for this purpose are limited to the amount contemplated by the budget. The exact phraseology of the "Smith law" in this particular is found in section 5649-3d, as follows:

> "No appropriation shall be made * * * for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Technically, this limitation upon the appropriation does not apply to balances, but it will readily be seen that the spirit of the law is such as to limit the total expenditures for the year to the sum contemplated by the budget commissioners. And I have no hesitancy in holding that, even though the gross appropriations for the year from a given fund be not strictly limited by this section to the amount contemplated by the budget commission, including the balances anticipated by them, yet, when the balances are greater than anticipated, the excess may safely be regarded as "surplus moneys," within the meaning of an act like the one now under consideration.

I am, therefore, of the opinion that whenever the balance of the 1913 levy, i. e., that made in 1912, remaining in the fund at the end of the fiscal year ending March 1, 1914, is greater than the balance anticipated at the time of making up the budget, and therefore taken into consideration by the budget commission, such an excess does constitute "surplus moneys" within the meaning of house bill No. 44.

Other instances of "surplus moneys" might readily be imagined, such as balances remaining to the credit of a sinking fund on account of a particular issue of bonds, beyond the amount necessary to retire the bonds and other casual surpluses in special funds of that sort; but, as your question is generally phrased, I should prefer to indicate in this general way the possibility of the existence of such surpluses, rather than to attempt to enumerate all the conceivable circumstances which might give rise to such a condition.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

792.

BOARD OF ADMINISTRATION—GAS LINE—STATE LANDS.

The board of administration is without authority to grant permission to a corporation to lay a gas line through property belonging to the state and under the control of such board.

COLUMBUS, OHIO, February 26, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of February 3, 1914, you ask opinion of me as follows:

> "I am directed by the board of administration to respectfully request your opinion as to whether or not the board of administration has authority to grant permission to a corporation to lay a gas line through land belonging to the state and under control of said board."

The powers of the state, in respect to its property rights and the disposition thereof, are vested primarily in the legislature of the state, and the question, whether or not the board of administration may grant to the corporation in mind permission to lay down its gas line in and through the property of the state under control of said board, depends upon the consideration whether or not authority to make such grant has been conferred on said board for with respect to the property of the state, under its charge and control, the board possesses no powers except such as are expressly conferred by law, or necessarily implied.

State ex rel vs. Railway Company, (37 O. S., 157, 174).
State vs. Torinius, (26 Minn., 1).

Section 1839, General Code, provides as follows:

"The board on its organization shall succeed to and be vested with the title and all rights of the present boards of trustees, boards of managers, and commissions of and for said several institutions in and to land, money or other property, real and personal, held for the benefit of their respective institutions, or for other public use, without further process of law, but in trust for the state of Ohio. Said several boards of trustees, boards of managers, and commissions now charged with duties respecting the institutions above named shall on and after August 15, 1911, have no further legal existence and the board is hereby authorized and directed to assume and continue, as successor thereof, the construction, control and management of said institutions, subject to the provisions of this act."

This section preserves to the board of administration all such rights, title and interest in the property of the several institutions committed to its control, formerly possessed by the respective board of trustees, boards of managers and commissions in their control of these institutions. The nature of this interest possessed by the respective boards of trustees, etc., of these institutions, with respect to the property committed to their control, is not easily defined, but it is certain such interest was such only as was strictly germane to the execution of the primary purpose of said institutions, and was in no sense a proprietary interest in such property. It is obvious that the interest of the board of administration in such property is not greater than that formerly possessed by the respective boards of trustees, etc., controlling said institutions.

The right sought by the corporation to lay a gas line, in and through the property of the state, is one constituting, in all essential respects, an easement in gross in said lands, and is such a right as can be enforced by a corporation organized for transporting natural gas against an individual land owner, only by appropriation. (Section 10128, G. C.)

The right sought by the corporation is, in legal contemplation, a substantial one, and can be granted only by the legislature or by some officer or board in whom the legislature has vested authority to make such grant. A diligent examination of the statutes fails to disclose any provision authorizing the board of administration or any other board or officer, to make a grant of this kind, and it necessarily follows that such authority on the part of the board is denied.

I note that section 23, General Code, provides as follows:

"A street, alley or road shall not be laid out or established through or over the lands belonging to a public institution of the state without the special permission of the general assembly."

This section is without particular significance with respect to the question at hand. Its effect is to declare the policy of the state, that streets, alleys and roads shall not be established through or over lands belonging to the public institutions of the state without *special* permission of the legislature.

It would be competent, perhaps, for the legislature to vest in the board authority to grant permission to gas companies to lay down their pipe lines through property under the control of such board. With respect to the question at hand, however, the legislature has not done so, and your inquiry must, therefore, be answered in the negative.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

793.

BLIND RELIEF—COUNTY COMMISSIONERS—OLD BLIND RELIEF LAW —NEW BLIND RELIEF LAW—BLIND RELIEF COMMISSION.

The abolition of the blind relief commission by the act found in 103 *O. L.,* 60, *does not in any substantial manner affect the outstanding blind relief orders; such orders should be honored by the county auditor without approval by the county commissioner. Funds left during the period of time when the old law was in force may be expended in honoring orders issued by the old blind relief commission as well as those issued by the county commissioner.*

COLUMBUS, OHIO, February 27, 1914.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio..*

DEAR SIR:—As I understand your letter of February 23rd, receipt whereof is acknowledged, you question whether, after the act in 103 O. L. 60, became effective, a blind relief order issued by the old blind relief commission could be honored. That is to say, you raise the question, as I understand you, as to whether or not the amendment in question had the effect of either requiring an order originally issued by the blind relief commission to be reapproved by the county commissioners in order to entitle its holder to the quarterly installments, or of requiring each applicant to make an entirely new application to the county commissioners in order to secure further relief. Perhaps there is also involved in your query the specific question as to whether or not the funds levied for the relief of the blind by the scheme embodied in the statutes prior to the amendment could be disbursed under the scheme embodied in the amended statutes?

The act in question is in form of an amendment to sections 2967, 2967-1 and 2968, General Code, and a repeal of sections 2963 and 2964. This act was filed by the governor in the office of the secretary of state March 10, 1913, and became a law on or about June 9, 1913. The current fiscal year, i. e., the year for the administration of moneys raised by taxation would not end until March 1, 1914; so that this law became effective, so to speak, about the middle of the year for which money had been previously levied to be disbursed by the old blind relief commission.

Your questions involve the effect of this law upon the administration of the existing funds for the relief of the blind. The original sections relating to the relief of the blind may be abstracted as follows:

Section 2962, General Code, provided for the creation of a "blind commission" to be appointed by the probate court.

Section 2963, General Code, provided for the organization and compensation of members of the blind relief commission.

Section 2964 provided for the annual meeting of the blind relief commission which was to be on the 4th day of November and at which meeting the commission was to "examine carefully the list of applications properly filed."

Section 2965, General Code, provided the qualifications for the blind relief.

Section 2966 related to the same subject.

Section 2967 provided the machinery for relief which was initiated by the claimant filing a statement of facts with the blind relief commission. The commission was required to be satisfied from the evidence of two witnesses, one of whom should be a physician, as to the qualifications of the applicant. Upon so becoming satisfied the commission was to issue "an order therefor in such sum as it finds needed, not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the fund herein provided on the warrant of the county auditor."

Section 2967-1, General Code, provided for the making of surgical operations in lieu of relief, at the suggestion of the blind commission, and with the consent of the applicant.

Section 2968, General Code, provided that at the annual meeting the blind commission should make an examination as to the qualifications of those on the blind list, and might remove persons therefrom or modify the amounts of their respective allowances.

Section 2969, General Code, provided for the levy of a tax by the county commissioners.

Section 2970, General Code, provided a penalty for perjury in making false applications.

Now the act found in 103 O. L., 60, as already observed, amends and repeals a part only of the sections above abstracted. The effect of the repeal of sections 2962, 2963 and 2964, General Code, is quite evidently to abolish the county blind commissions, which intent is made perfectly manifest by consideration of the title of the act which in part is "an act to abolish county blind commissions." The effect of the amendment of sections 2967, 2967-1 and 2968 is merely to substitute the board of county commissioners for the blind commission. Comparison of the amended sections with the original sections in this respect will show this to be the fact, and the legislative purpose inferable therefrom is rendered certain by further consideration of the title which reads, "and to extend the duties and powers of the county commissioners."

I am, therefore, of the opinion that on or about June 9, 1913, the county commissioners succeeded to the duties of the blind relief commission and were thereafter to exercise these duties and the resultant powers in precisely the same manner as they would have been exercised by the blind relief commission.

One of the cases recently decided by the supreme court was an action in mandamus brought by the holder of a blind relief order, issued by the old blind relief commission, to compel the auditor of Franklin county to issue warrants for quarterly payments under said order for the periods of time beginning prior to and ending subsequently to the date when the amendatory act became effective, the last quarterly payment claimed being that for October, 1913. The order of the court was that the peremptory writ issue as prayed for. I think it must be conceded that this order is an adjudication of all the questions which you have in mind for it was not pleaded that the county commissioners of Franklin county had in any way acted upon or with respect to the order of relator.

I am of the opinion, therefore, that the mere change in the machinery of the administration of blind relief, consisting of the substitution of county commissioners for the old blind relief commission had no affect whatever upon the substantive privileges of holders of blind relief orders issued by the old commission. These orders were, as they always had been, subject to modification or revocation, the modifying or revoking power being now lodged in the county commissioners instead of the blind relief commission and aside from this fact they were as effective to secure relief as they would have been had no change in the law been made.

The scheme of relief was essentially the same, no new power being created and no power being diminished, but existing powers being merely transferred from one tribunal to another.

While the court's decision is of itself sufficient to dispose of this question, I might cite in this connection section 26 of the General Code, without quoting it, upon the proposition that under its provisions a blind relief order outstanding at the time of the amendment, though a mere privilege, and hence not a vested right, cannot be affected by amendments of this nature for the law providing for

blind relief of this particular kind still remained in effect, the repeal and enactment of certain sections thereof being formal merely.

For the reasons stated, I am of the opinion that the abolition of the blind relief commission by the act found in 103 O. L., 60, does not in any substantial manner affect the status of outstanding blind relief orders; that such orders should be honored by the county auditor without approval by the county commissioners; that no application *de novo* to the county commissioners is required as a condition precedent to the securing of further relief, and that the funds levied for blind relief purposes during a period of time when the old law was in force may be expended in honoring orders issued by the old blind relief commission, as well as those issued by the county commissioners since the date when they assumed control of the administration of such relief.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

794.

TAXES AND TAXATION—LISTING PROPERTY FOR TAXATION—LIVE STOCK—TAX PENALTY.

Where cattle have been contracted for and are to be weighed and delivered at a certain date, and the cattle were in the possession of the original party on the day preceding the second Monday of April, the party having possession of the cattle on that date will be obliged to pay the taxes on them. The fact that he, though acting in good faith, neglected to pay the taxes will not relieve him from the penalty thereon.

COLUMBUS, OHIO, March 3, 1914.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I am very sorry that I was unable to answer your letter of December 29th and your subsequent letter of January 14th, before the last day for the payment of taxes without penalty. The condition of the work of the department was such, however, that I could not well do this. You request my opinion upon the following facts disclosed by your letters and by the communication of Geo. W. Lindsay, Esq., enclosed in your second letter:

> "In January, 1913, K., the owner of ten certain head of cattle made and entered into a contract with D., a buyer of cattle, the terms of which were substantially as follows:
>
> "D. selected from the cattle belonging to K., the particular cattle which he desired to purchase and agreed with K., to purchase the same. K. was to place the cattle in a fattening pen on his farm and they were to be held there until D's. first shipping date preceding April 15, 1913, then they were to be weighed and delivered to D. for shipment, and D. was to pay seven cents per pound for them.
>
> "At the time contemplated by the agreement in January for the delivery of the cattle shipment was impossible owing to the destruction wrought by the floods of 1913. D. then went to K. and offered him the option of retaining the cattle and feeding them for a few weeks longer or accepting 50.00 in cash as a release from the contract of sale. K. elected to

retain the cattle and to be governed by the contract. Accordingly the cattle were in the possession of K. on the day preceding the second Monday of April, 1913, and at a subsequent date, to wit, about April 20th, when the assessor of personal property visited K. On the latter occasion K. offered to list the cattle as bailee or agent of D., but the assessor refused to accept such a return. K. then offered to list the estimated amount which he would receive from D., under the contract at delivery as 'credits' subject, however, to the deduction of debts which would have wiped out such 'credits' inasmuch as K., at the time owed A., a third party, on a note secured by mortgage given for the purchase of certain real estate. The assessor refused to accept such a return, and K. refusing to list the cattle as his own, the same were listed by the assessor himself, and taxes now stand charged on the duplicate of Pickaway county against K. on account of said cattle. K. refuses to pay the tax and seeks relief against what he considers to be an invalid assessment. The auditor, treasurer and commissioners ask to be advised as to their duty in the premises."

In my opinion the cattle were on the listing day and on the day when K. was asked to list them the property of K., and not the property of D. K. held possession of them as owner and not as agent or bailee. K. did not have on account of the transaction between him and D. a "credit" for the purpose of taxation; and whether or not the assessor technically exceeded his authority in assuming to list the cattle over K's. protest he should be held for the tax assessed against him.

The history of the law of sales appears to be somewhat evolutionary. Its rules have developed, as occasion has arisen, to meet new conditions presented by the ingenuity of men in dealing with each other. The crucial question always presented when parties bargain concerning the transfer of title to a thing which is to be delivered from the vender to the vendee at a future date, is when the title passes, the admitted consequence of a postponement in the passing of title being that the destruction of the property or any other liability on account of it, accruing or arising while the vender retains possession falls upon him and not upon the vendee. Conversely under such circumstances should the vender deal with the property as his own and dispose of it to another the vendee's remedy would be for breach of executory contract and not for the recovery of the specific articles which constitute the subject-matter thereof. Out of the multitude of the possible variations in the course of dealing among men, the best and most recent authorities have evolved a rule which will be found stated in Benjamin on sales, page 270 as follows:

"(1) Where by the agreement the vender is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. 2. Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in a state in which they ought to be accepted. 3. Where the buyer is by the terms bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled even though the goods may have been actually delivered into the possession of the buyer."

This rule is quoted with approval by Judge Spear in delivering the opinion in Bonham vs. Hamilton, 66 O. S. 89. In my opinion the second application of the above quoted rule fits the case presented by you. The price of the goods could not be ascertained until the cattle were weighed. The title did not pass until that process had been completed. As soon as the weighing had taken place, however, and the price was ascertained the title did pass although the price might not have been paid. Had the weighing taken place before the listing day then K's. position would have been exactly correct, and he would have been obliged to list the cattle as the property of D., and also to list the unpaid purchase price ascertained by the process of weighing as his "credits;" but prior to the weighing of the cattle the title to them could not pass under the rule as laid down by the authorities, and until the title passed the cattle, as such, were as fully and completely the property of K., as if he had never contracted with D. for their future delivery. He could have sold them to a third party and D's. only remedy would have been for a breach of the contract.

A case somewhat more nearly in point than the one cited is that of Gills vs. George, 8 O. C. C. n. s. 393, cited by you. The facts in that case are not quite identical with, but nevertheless are essentially similar to those in the case presented by you. The subject-matter of the contract was the same, i. e., cattle to be fattened and weighed at a future time. The court held that the title did not pass until the weighing took place, so that when some of the cattle were destroyed prior to that time the loss fell upon the vender in whose possession they were at the time. As stated by Wildman, J., at page 397:

> "* * * two things were left to be done. One was the delivery of the stock and the other was the payment of the price, which, before its payment, was to be ascertained by the weight of the cattle. It is not said in so many words that the cattle were to be weighed, but manifestly there was no other manner by which the price of the cattle could be ascertained."

Thereupon the court applied the rule as laid down in Bengamin on sales and reached the conclusion already stated.

I am, therefore, of the opinion that the cattle were properly taxable against K. This conclusion makes it unnecessary for me to consider the question as to whether or not the assessor had the authority to determine the ownership and to refuses to accept K's. list as agent or bailee. It is sufficient to note that even if the assessment should be set aside on this ground, the county auditor, under the powers vested in him by statute, might place the property on the duplicate against K. as omitted property; so that any irregularity in the assessment would become quite immaterial. In fact it has become a well settled rule that mere irregularities and technical defects in the proceedings resulting in an assessment of property for taxation will not be relieved against where the substantial rights of the taxpayer are not affected thereby.

In this case the only real damage which K. will have suffered by reason of the premises is the possibility of a penalty being charged against him because of his failure to list or because of his failure to pay the tax before the last day of payment. These damages, however, he has suffered through his own erroneous interpretation of the law, and I do not believe there is authority to relieve him from their payment, even though his action throughout has been, as you state, in good faith.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

795.

EIGHT HOUR DAY ON PUBLIC WORKS—LIABILITY INSURANCE—EDUCATIONAL INSTITUTIONS NOT INCLUDED.

The law calling for an eight hour day on public works does not apply to educational institutions such as Miami University. Such an institution is not a public work in the sense intended by the statute. Such institutions are not included within the terms of the employers' liability act and have no power to contribute to the state insurance fund and cannot be compelled to do so.

COLUMBUS, OHIO, February 13, 1914.

HON. R. M. HUGHES, *Acting President, Miami University, Oxford, Ohio.*

DEAR SIR:—I am in receipt of your letter asking my opinion on the following:

> "I have been interested to learn whether or not the law calling for an eight hour day on public works and the employers' liability act apply to Miami University at Oxford, Ohio, and when these laws should become operative.
>
> "We employ engineers, janitors and laborers in addition to those who have charge of the domestic work in the boarding department.
>
> "Any advice from your office relative to the applicability of these laws to Miami University and the other educational institutions of the state and as to the steps we should take toward observing them would be greatly appreciated."

The act of April 28, 1913 (103 O. L., 854), provides:

> "Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen."

The Miami University was organized in the early part of the last century, nearly or quite a hundred years ago. It commenced to receive students about 1825 and never received any appropriation from the state until about 1885 as stated in Howe's History. This brings us to the language of the constitution "workmen engaged on any public work carried on or aided by the state or any political subdivision thereof" and the last sentence of the act in question. "This section shall not be construed to include policemen or firemen." Under ordinary rules of construction this last sentence would be for consideration, but inasmuch as the act of April 28, 1913, is a very apparent effort to pass a law in compliance with section 37 of article II of the constitution as amended September 3, 1912, which amendment was intended to supply a want made apparent by the decision of the supreme court in The case of the City of Cleveland vs. The Construction Company, 67 O. S., 197, it becomes more necessary to construe the language of

the constitution than that of the statute. In the 67 O. S., case the controversy was as to the constitutionality of the act of April 6, 1900, (94 O. L., 357) which was entitled:

> "An act to provide for limiting the hours of daily service of laborers, workmen and mechanics employed upon public works' or for work done for the state of Ohio, or any political subdivision thereof, providing for the insertion of certain stipulations in contracts of public works; imposing penalties for violations of the provisions of this act, and providing for the enforcement thereof."

In this act it will be observed that it was attempted to include laborers, workmen and mechanics employed upon public works or for work done for the state. In the amendment to the constitution the language is "workmen engaged on any public work carried on or aided by the state," while in the statute will be found that which is absent from both. "This section shall not be construed to include policemen or firemen." The only reason for calling attention to this provision grows out of the fact that looking at the statute alone it might be thought it was the legislative intention to include all persons working for or in the employ of the state except policemen or firemen, and that this sentence was added because in its absence policemen and firemen might be construed as included within the meaning of the previous part of the section. However this may be, we will consider the matter from its presentation in the act of April 6, 1900. This shows us that the original idea was to control the hours of labor not only upon public works but upon work done for the state or any political subdivision thereof. The constitutional convention adopts the first and leaves the last, and it is not unfair to assume from this that the object of the amendment was to overcome the effect of the decision in the 67 O. S. case, and that the convention further considered the act of 1900 and concluded to only use such portion thereof as related to public work in the amendment, and in doing so determined to leave out the matter of "work done for the state," which as is readily seen is a much broader statement and might include many men engaged in public work carried on by the state.

I am, therefore, led to conclude that it was not the intention of the framers of this amendment to make it as broad as the act of 1900, and, therefore, whatever of strength might be added by the last sentence of this statute, in construing the statute as if it stood alone, it is of no avail to vary or change the plain import of the language used in the amendment, and we are relegated to a determination of what is included in the language "workmen engaged on any public work carried on or aided by the state."

If this language could find neither lodgment nor application without applying it to universities, lighting companies and public utilities owned or operated by the state or some political subdivision, no question of the application or construction might arise; but such is not the case, as at one time the term "public works" had a definite and well understood meaning applied as a matter of fact almost exclusively to canals.

As the state and various political subdivisions thereof are engaged nearly and probably all of the time in erecting public buildings, bridges and roads, and the state is aiding the divisions in many respects in construction and maintaining roads and highways and maintaining and operating the same such language finds plain and easy application, and it is only necessary to give it its plain and every day meaning and apply it to workmen engaged on public work as distinguished from workmen for the public, and thereby confining it to constructive work, betterment, building and improvement carried on and aided by the state. This brings us to a consideration of the question whether:

(1) The Miami University is a public work carried on or aided by the state, and

(2) If it is, what classes of its employes are within the eight hour rule?

To my mind an educational institution, regardless of its public character, is not within the meaning of this language. It is not a public work in the sense of this amendment and it is immaterial whether it is or is not carried on or aided by the state.

As nearly in point as any case I have been able to find is that of Blank vs. Kearny, 44 New York appellate division 592, wherein the question was made as to whether the phrase "any public work or improvement" as used in the laws of the state of New York, included matters like public lighting. In the course of the opinion in this case will be found:

> "Separate lighting contracts are required to be made in each borough, 'or in such subdivisions of the city as may appear to the board of public improvements and the municipal assembly to be for the best interests of the city.' The contracts must be for the term of one year and be awarded to the lowest bidder.
>
> "These seem to be the principal statutory provisions bearing upon the plaintiff's cause of action, unless it is affected by the following clauses of section 413 of the character:
>
> "Except as herein otherwise provided, any public work or improvement within the cognizance or control of any one or more of the departments of the commissioners who constitute the board of public improvements, that may be subject of a contract, must first be duly authorized and approved by a resolution of the board of public improvements and an ordinance or resolution of the municipal assembly. * * * When a public work or improvement shall have been duly authorized as aforesaid, then but not until then, it shall be lawful for the proper department to proceed in the execution thereof in accordance with the provisions and subject to the limitations of this act.
>
> "If the phrase 'any public work or improvement' in this section was intended to comprehend service rendered and supplies furnished in carrying on the ordinary functions of a municipality whenever carried on through the agency of a contract, then the learned judge at special term was right in continuing the injunction. In our judgment, however, section 413 of the Greater New York charter relates rather to *public works* in the nature of *betterments* and does not refer at all to such a matter as public lighting, which must constantly be provided for from day to day and month to month in the administration of the affairs of the city."
>
> Blank vs. Kearny, 44 N. Y., App. 595.

* * * * *

The question of the application of the employers' liability act rests solely upon a construction of the same.

Section 13, (103 O. L. 77,) reads as follows:

> "The following shall constitute employers subject to the provisions of this act:
>
> "1. The state and each county, city, township, incorporated village and school district therein.

"2. Every person, firm, and private corporation including any public service corporation that has in service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written."

Section 14 on the same page defines "employe" "workman" and "operatives," and reads as follows:

"The term 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:

"1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.

"2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer."

The following sections of the act provide means whereby the state and political subdivisions thereof named in this act may obtain funds for contribution to the state insurance fund; how they are to be paid and the like.

Inasmuch as the legislature has provided that certain taxing districts of the state and certain political subdivisions thereof shall participate in this state insurance and has provided the means whereby the premium therefore may be met, and has neither named colleges, institutions of learning, or by other designation included institutions like the Miami University, I am of the opnion that they are not included within the terms of the employers' liability act, have no power to contribute to the state insurance fund, and cannot be compelled to do so.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

796.

CITY ENGINEER—ASSISTANT TO THE CITY ENGINEER—SALARIES—RESOLUTION—PER DIEM—PUBLIC POLICY—COMPENSATION.

1st. Where a city council passes a resolution directing that all bills of an assistant engineer, which remain unpaid, shall be paid, and the engineer would be entitled to the compensation stated in the bills before council when said resolution was passed. He would be entitled to pay according to the terms of the resolution.

2nd. The city engineer would not be entitled to draw compensation from the city at one price for the assistant and pay a less amount to the assistant; the city engineer would not be entitled to any part of the assistant engineer's compensation. It would be against public policy to permit a city engineer to draw a per diem from the county and an hourly compensation from the city for services rendered on the same day.

COLUMBUS, OHIO, July 16, 1913.

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

GENTLEMEN:—Your favor of April 7, 1913, is received in which you inquire:

"We submit herewith certain legislation and facts concerning payments made for services of a city engineer, rendered to the city of Tiffin, Ohio, and would respectfully request your written opinion upon the following questions, growing out of said employment:

"First. In view of the above, was said assistant engineer entitled to compensation at the rate of 60 cents per hour prior to resolution of August 15, 1910?

"Second. Could the city engineer legally draw the compensation of the assistant engineer employed by him and pay said assistant engineer less than the amount drawn?

"Third. Could said engineer legally draw a per diem from the county and an hourly compensation from the city for services rendered on the same day?"

The facts are submitted as follows:

"On April 1, 1906, the board of public service of Tiffin, Ohio, entered into a contract with a civil engineer to act as city engineer at the following compensation: 60 cents per hour for services while engaged in engineering work for said city and 20 cents per hour for assistants necessary in such work. The last clause of said contract reads as follows: 'Section 3. This contract shall take effect on April 1, 1906, and be in force and effect for one year from that date.'

"The above contract was entered into pursuant to an ordinance of the city council creating the office of city engineer, prescribing his duties and directing the board of public service to make a contract at the rate of compensation said board decided upon.

"There was no further legislation on the part of the city council in respect to the office of city engineer until August 15, 1910, on which date the following resolution was passed: 'Fixing the compensation of the city engineer as follows: 60 cents per hour for engineer for time actually spent in the services of the city of Tiffin and 60 cents per hour for assistant engineer, doing the same work as done by the city engineer, etc.'

"The director of public service on June 1, 1910, without any authority than that in effect April 1, 1906, entered into a contract with a civil engineer to act as city engineer for an indefinite period, at the following compensation: 'For the time spent in the service of said first party (city of Tiffin, Ohio), either by said second party (the city engineer) or by some competent person employed by him as assistant, performing the same work which said second party would perform, 60 cents per hour.'

"On August 21, 1911, council passed a resolution declaring it the sense of the council that the compensation fixed theretofore (resolution of August 15, 1910) for the city engineer be as follows: '60 cents per hour for his own services and 60 cents per hour for assistants doing the same work as the city enginer, the compensation of assistants to be paid by the city engineer.'

"The said engineer served the city as city engineer during the years 1909-10-11 and rendered itemized bills for engineer and assistant engineer at 60 cents per hour for engineer and 60 cents per hour for assistant engineer.

"Payment of said bills was refused by the city auditor on the ground that the original contract (April 1, 1906) applied until June 1, 1910, and that the engineer could not draw the compensation of assistant engineer, etc.

"The city council on June 5, 1911, passed a resolution directing the city auditor to pay all engineering bills, he had previously refused to pay, upon proper approval of the director of public service.

"On August 21, 1911, the city auditor in accordance with the resolution of council (June 5, 1911) paid all bills rendered by the engineer during 1909-10-11, said bills being properly approved by the director of public service.

"Until the first Monday in September, 1909, the same individual employed by the city of Tiffin, Ohio, as city engineer served the county of Seneca as surveyor at a per diem compensation of $5.00 and from March 1, 1909, to the first Monday in September, 1909, it was found that said engineer received compensation from the county for the same days for which he was paid an hourly compensation by the city of Tiffin. As an illustration said engineer drew $125.00 for 25 days' service rendered Seneca county during the month of May, 1909, and $66.00 for 110 hours' service rendered the city of Tiffin during the same month; the details of bills paid by the city show that ten hours was the greatest number of hours for which compensation was claimed in any one day. The number of working days in May, 1909, was 26. The said engineer drew compensation from the county for 25 days and at 10 hours per day, 11 days from the city of Tiffin."

Your first inquiry requires a consideration of the statutes as they existed prior to, and also after, the passage of the Payne law.

Section 145 Municipal Code (section 1536-681 Rev. Stat.) as set forth in 96 Ohio Laws, page 68, provided:

"The directors of public service may employ such superintendents, inspectors, engineers, harbor masters, clerks, laborers, and other persons, as may be necessary for the execution of the powers and duties of this department, and may establish such subdepartments for the administration of affairs under said directors as may be deemed proper. *The compensa-*

tion and bonds of all persons appointed or employed by the department of public service shall be fixed by said directors, and no person shall be removed except for cause satisfactory to said directors, or a majority of them."

Section 227, Municipal Code (section 1536-1005, Rev. Stat.) as set forth in 96 Ohio Laws, page 95, provided:

"*Except in the department of public service,* council shall by ordinance or resolution, except as otherwise provided in this act, determine the number of officers, clerks and employes in any department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation and the amount of bond to be given for each officer, clerk or employe in any department of the city government, if any be required, and said bonds shall be made by such officer, clerk or employe with surety subject to the approval of the mayor of said city."

By virtue of these sections the directors of public service were authorized to fix the compensation of employes in the department of public service. These sections continued in force until August 1, 1909, when the amendment by act of 99 Ohio Laws, 562, known as the Payne law, became effective.

Section 145, Municipal Code, was therein amended to read as follows:

"The director of public service may establish such subdepartments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

Section 227, Municipal Code, was also amended to read:

"Council shall by ordinance or resolution, except as otherwise provided in this act, determine the number of officers, clerks and employes in any department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation and the amount of bond to be given for each officer, clerk or employe in any department of the city government, if any be required, and said bonds shall be made by such officer, clerk or employe with surety subject to the approval of the mayor of said city."

Section 145, Municipal Code, is now known as section 4327, General Code, and section 227, Municipal Code as section 4214, General Code. In carrying these sections into the General Code the language was slightly changed but the provisions thereof are substantially the same.

Since the amendatory act of 99 Ohio Laws 562 became effective on August 1, 1909, council has the right to fix the compensation of the employes in question. It appears that council did not fix any compensation for city engineer or assistant engineer until August 15, 1910.

From January 1, 1909, to August 1, 1909, it was the duty of the board of public service to fix the compensation, and after August 1, 1909, council was authorized to fix the compensation.

It appears that the auditor refused to make payment of the claims of the

engineer, and that on June 5, 1911, council passed a resolution authorizing the auditor to pay said claims when approved by the director of public service, and the same was thereafter paid.

Your first question is as to the right of the assistant engineer to receive sixty cents per hour prior to the passage of the resolution of August 15, 1910.

The time in question runs from January 1, 1909, to August 15, 1910. It is seen above that for a part of this time the board of public service had the right to fix the compensation and for the other part council had such right.

First as to the time during which council had such right.

Council did not fix the compensation until August 15, 1910, and no compensation was fixed for the period from August 1, 1909, to August 15, 1910.

The work had been performed by the assistant engineer and the city had received the benefit thereof. There was no legal obligation upon the city to pay said assistant as council had not fixed the compensation to be paid.

Council did on June 5, 1911, pass a resolution authorizing the auditor to pay for the services of the assistant engineer. From the facts given it does not appear that council formally fixed a compensation to be paid the assistant engineer. Council did authorize, by resolution, the auditor to pay the bills upon the approval of the director of public service.

Council could not delegate its power to fix compensation to the director of public service. But the bills apparently were before council, or were at least known to the members thereof, when the resolution was passed and if council knew the compensation stated therein, the resolution authorizing payment thereof would in effect be a fixing of the compensation.

The question arises could council authorize the payment of a moral obligation of this nature.

In case of Emmert vs. City of Elyria, 74 Ohio St., 185, Summers, J., says at page 194:

> "But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not ultra vires. If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

Equity and fair dealing would require an individual to pay the assistant engineer for the services performed by him.

Council in passing the resolution of June 5, 1911, recognized the moral obligation of the city and authorized payment. While the fixing of the compensation after employment is not regular and should not be encouraged, the purpose of the law in this case was not defeated as council itself fixed the compensation.

The amount of compensation stated in the bills before council at the time the resolution of June 5, 1911, was passed would be the amount to which such assistant engineer would be entitled to receive for services rendered from August 1, 1909, to August 15, 1910.

Council had no right to fix the compensation for the period from January 1, 1909, to August 1, 1910. The compensation for this period was to have been fixed

by the board of public service. The board employed the assistant engineer and the presumption would be that it also fixed the compensation to be paid.

The acts of the board of public service as to the contract of April 1, 1906, are not given. The contract itself is limited to one year. This does not show that the compensation fixed was limited to one year or to that particular contract. If the compensation was fixed by the board of public service in April, 1906, that compensation would continue until changed by the board, or its power to fix compensation was taken away.

Council could not by resolution passed June 5, 1911, authorize payment of a compensation for that period greater than that fixed by the board of public service.

If an assistant engineer was employed under the original contract of April 1, 1906, at twenty cents per hour and continued to work from year to year he would be presumed to be working for the same compensation unless other provision had been made. The presumption is that the board of public service fixed the compensation of the assistant engineer and that amount would continue as the compensation to be paid until changed.

Payment had not been made for these services and council could in June, 1911, if they acted in good faith and did not abuse their power of discretion, pass a resolution authorizing the auditor to pay for such services at the rate fixed by the board of public service. This would be a recognition of a moral obligation as in the case where council had a right to fix the compensation in the first instance.

In answer to your first question:

The assistant engineer would be entitled to receive, under the resolution of June 5, 1911, the compensation as fixed by the board of public service for services prior to August 1, 1909, and he would be entitled to the compensation stated in the bills before council when said resolution was passed, for services performed from August 1, 1909, to the time when the resolution of August 15, 1910, became effective.

In answer to your first question:

The city engineer would not be authorized to draw compensation for the city at one price for an assistant and pay a less amount to the assistant. The city engineer is not entitled to any part of the compensation to be paid to the assistant.

Your third inquiry involves the right of an engineer to draw pay from the county and city for services on the same day.

No employe can draw pay from two public corporations for the same services unless the work is a joint obligation of two corporations and each is to pay a part thereof. An employe may work a full day for the county and on the same day, but at different hours, perform services for a city. In such case he would be entitled to pay from the county for the time spent in its work and from the city for the time employed in its behalf.

It would be against public policy to permit an engineer who is employed by the day, or hour, to draw pay from the county and city for the same time. In order to draw pay from both the work should be separate and distinct and the work for the city should be performed at a time when he was not under duty to work for the county, or vice versa.

If the engineer, by working overtime, did actually get in the time for which he charged, he is entitled to pay therefor. If he did not get in that time then the bills would be excessive and he would not be entitled to the excessive amount.

This inquiry resolves itself into a question of fact as to whether or not the engineer actually performed the services for which he received pay.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

797.

WORKMEN'S COMPENSATION ACT—HOSPITALS, COUNTRY CLUBS, ETC., COME WITHIN THE PURVIEW OF THIS ACT.

Corporations not for profit such as hospitals, country clubs, etc., regularly employing more than five workmen come within the workmen's compensation act and are to be considered employers within the meaning of the compulsory compensation law of 1913.

COLUMBUS, OHIO, February 26, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of December 17, 1913, wherein you request my opinion as to whether corporations not for profit, such as hospitals, country clubs, etc., having in their employ more than five employes, are to be considered employers within the meaning of paragraph 2, section 13 of the compulsory compensation act of 1913.

Paragraph 2 of section 13 of the act in question reads thus, in defining who shall constitute employers:

> "Every person, firm and private corporation, including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, expressed or implied, orally or written."

Paragraph 2 of section 14, defining employe, workman and operative, uses the following language:

> "Every person, in the service of any firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, orally or written including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual or not in the usual course of trade, business, profession or occupation of his employer."

The second paragraph of section 14 includes within its purview, as employes, every person, firm and private corporation having in its service five or more workmen or operatives regularly *either* in the same business, *or* in or about the same establishment. It will be noted that the disjunctive "or" is used in this connection rather than the conjunctive "and;" hence, it must follow that if five or more workmen are regularly employed in the same business, or in or about the same establishment, the employer comes within the provision of section 13. It may be very plausibly argued that the word "business' carries with it the implication of an enterprise conducted for the purpose of profit, but this does not seem to me to be an entirely accurate characterization of the word.

Lindley, L. J., in Rose vs. Miller, 27 Ch. D., 88, says: "The word means almost anything which is an occupation as distinguished from a pleasure—anything which is an occupation or duty which requires attention as a business." If this definition be accepted, it would seem that the conducting of an enterprise for profit is not

essential in order to render the conduct of such enterprise a business. In other words, a business may be something in which no financial gain is made or intended to be made. Even if this word should be given a narrower meaning than I think should be given it, nevertheless, there would be no escape from the alternative expression "in or about the same *establishment*." An establishment has been defined to be the body of persons composing a business organization, household, or any public or private institution, together with the building or buildings they occupy. (Funk & Wagnalls New Standard Dictionary.) An institution whether public or private (Century Dictionary).

Now it would seem to me that a club, as well as a hospital would come within the foregoing definition of establishment, and being an establishment, if five or more workmen are employed therein, such institution is within the scope of section 13 of the act in question.

The next question is whether or not paragraph 2 of section 14 must be so read as to limit the scope of the second paragraph of section 13. The paragraph to which we are now referring excludes from its operation, in defining employe, workman and operative, any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer.

Now the word "trade" is usually considered in connection with the barter of goods for money or for other goods, "business," we have already discussed, and the word "profession" does not apply to a hospital or country club. I think, however, that the word "occupation" is broad enough to cover the carrying on of a club or hospital, and I am really inclined to the belief that the word "business" also covers the same situation. This fact, considered with the fact that the remaining language of the two sections quoted, seems clearly to indicate that employers of five or more workmen who are regularly employed in or about the same establishment, should be included within the scope of the workmen's compensation act, inclines me to the belief that it was not the legislative intent to exclude from the operation of this law hospitals and clubs employing five or more workmen.

Directly answering your question, I desire to say that, in my judgment, corporations not for profit regularly employing more than five workmen in connection with such said hospital or club, are to be considered employers within the meaning of the compulsory compensation act of 1913.

Very truly yours
TIMOTHY S. HOGAN,
Attorney General.

798.

LIABILITY BOARD OF AWARDS—LIABILITY INSURANCE—ON WHOM LIABILITY INSURANCE SHOULD BE PAID—LABORERS EMPLOYED IN FOREIGN STATES.

In the collection of premiums from employers in the state insurance fund no portion should be paid where the employers pay to employes employed or hired in a foreign state, but that part of the pay roll which constitutes payment made to employers of Ohio employes who are hired in Ohio and sent out of the state in the course of their employment should be included.

COLUMBUS, OHIO, February 25, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of December 17, 1913, you wrote us as follows:

> "It has been the practice of our commission and its predecessors, the state liability board of awards, in the collection of premiums from employers for the state insurance fund, to include in the pay roll of such employers such employes as may have been employed in the state of Ohio and sent out of the state into some foreign state or country to perform services contemplated by the contract or employment. We have not, however, included any portion of the pay roll of such employers paid to employes employed or hired in such foreign state or country.
>
> "It has also been our practice to pay compensation to employes of Ohio employers who are employed in Ohio and sent out of the state and injured in the course of their employment.
>
> "A number of employers have questioned the correctness of our construction of the law in this respect, and as the question arises so frequently now that compulsory compensation act is about to become effective, I should appreciate an opinion from your department on the question."

Accompanying your communication is a letter from an employer in which he suggests that if an accident occurs out of the state of Ohio the employe could bring an action if he so desired, and the employer, who had insured in the Ohio fund, would have no protection.

I have embodied this last suggestion in this communication for the reason that my opinion will deal with that phase of the case.

Preliminary to a discussion of the questions involved, I should like to call your attention to the decision of the supreme judicial court of Massachusetts in re Liability Company, 102 N. E., 693, wherein the facts show that the injured person made a contract with his employer in Massachusetts and took advantage of the compensation act of that state. In the course of his employment the employe was injured in New York, where he incidentally worked. The insurance company had been paid by the employer for insuring his employes in the course of their employment *whether within or without the state.* The last italicized language was treated by the court as being immaterial because the insurance policy did not add anything to the language of the statute, but merely provided for the performance of the requirements and payment of compensation *designated in the act.* If the law covered injuries received outside of the state the insurer contracted therefor, otherwise not. While conceding for the purpose of the judgment in that case *it was within the*

power of the legislature to give extra territorial force to the act, the court held that this had not been done, hence the employe had no claim against the insurer.

The cardinal point developed in this case, it will be seen, was the fact that by its terms the law applied only to injuries received within the state. There can be no question that statutes ordinarily fix the rights of parties within the state, and to give them wider operation, apt and unequivocal language must be used, which was not true of the Massachusetts act.

The English decisions support the Massachusetts rule to the effect that unless it is clearly otherwise provided the English workmen's compensation act has no effect beyond the territorial limits of the United Kingdom.

Tomalin vs. Pearson, 2 K. B., 61.
Hicks vs. Maxton, 124 L. T. J., 135.

and also a decision announced in 1912, and reported in volume 2, K. B. reports for that year.

Mr. Bradbury on page 44 of his "Workmen's compensation law" says:

> "Naturally, the compensation laws, like other state statutes, have no extra territorial effect. That is, should the employer and employe both reside in New Jersey, for example, and the employe should be sent into the state of Pennsylvania on the employer's business, and there injured, (there being no compensation law in Pennsylvania), such employe could not recover compensation in New Jersey. The same rule has been established in Great Britian."

From the foregoing it is apparent that we must examine the Ohio act in order to ascertain whether it was the legislative intendment that this act should be given force beyond the state of Ohio. While there are some expressions in the law that might indicate that no such desire was entertained by the general assembly, the law in some respects bearing an analogy to the Massachusetts act, nevertheless a careful inspection of the law will, I think, clearly evince legislative intent to have the act apply to those employes who are employed within the state of Ohio and as an incident to their employment are sent beyond the borders of this state and are there injured.

The second paragraph of section 13, defining what employers shall be subject to the provisions of the act, expressly states that *every* person, firm and private corporation, including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business are constituted employers.

In the second paragraph of section 14, employe, workman and operative are defined as *every* person in the service of any person, firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business, etc.

Section 22 provides that, except as otherwise provided, *every* employer mentioned in subdivision 2 of section 13 shall pay into the state insurance fund the amount of premium fixed by the state board of awards.

Section 23 exempts employers complying with the provisions of the last named section from liability to respond in damages for injury or death of any employe, *"wherever occurring,"* during the period covered by such premiums so paid into the state insurance fund, or during the time in which the employer is permitted to pay compensation direct to his injured or the dependents of his killed employe.

Section 24, authorizing any employer of less than five workmen to insure in

the state fund, expressly states that when he is so insured he shall not be liable in damages, save as provided in the act, for injuries or death of any such employes, *"wherever occurring,"* during the period covered by such premiums.

Section 25, providing for the disbursement of the state insurance fund, requires payment to employes of employers who are insured in said fund, and who have been injured in the course of their employment *"wheresoever such injuries have occurred."*

Section 27 authorizes any employe, whose employer has failed to comply with the provisions of section 22, and who is injured in the course of his employment, *"wheresoever such injury has occurred,"* and which was not purposely self-inflicted, or his dependents in case of death, in lieu of civil action, to file his application with the said board of awards for compensation.

The language which has been emphasized and italicized in the foregoing, makes manifest the fact that it was the object and scope of this act to include within its purview those employes who are hired in this state and who are injured in the course of their employment outside of Ohio.

With these considerations in mind, and taking the view that I do of the law, the next question will be what force and effect will be given by the courts of other states to this act, in case the employe brings an action against his employer who has contributed to the state insurance fund of this state.

That the act in question is a constitutional and valid enactment is unquestionable in view of the decision of the supreme court in this state in the case of State ex rel. vs. Creamer, 85 O. S., 349. Therefore, it must be assumed that it is in accord with the constitution and the recent amendment thereto, as well as with sound public policy, for the state to provide that an employe may be deprived of his right in action in tort by an enactment as the one herein under discussion. The same theory has been maintained in other states where the constitutionality of similar acts has been under discussion. Under the law of this state, as it now stands, whenever an employer hires a workman or operative, the Ohio law must be read into that contract, the employer saying in substance to the employe: "I shall employ you to perform these services for me at the compensation we have agreed upon, and when you accept such employment, you do so subject to being deprived of certain rights of action against me in case you are injured in the course of your employment, provided I contribute to the state insurance fund the premium required of me by the state board of awards.

The employe, in turn, says in effect to the employer by entering the service: "I accept such employment according to these conditions and I waive any right of action I have against you insofar as the Ohio law deprives me of such rights of action, and I agree to accept compensation out of the state insurance fund, whenever such law requires me so to do."

It is thus apparent that the relationship of employer and employe in this particular is contractual. I wish to emphasize this for the reason that it obviates a discussion of the doctrine of comity, or what may be called international courtesy, with reference to the application and enforcement of wrongful death and personal injury statutes, as such doctrine is enunciated in those decisions arising where an employe has been injured in one state and brings an action in another. I have reference to such cases arising under conflict of such statutes which often exists when the statute of the place of injury is invoked in the courts where the action is instituted.

It is a fundamental principle that, as a general rule, the *lex loci* governs in actions of contracts, subject to the doctrine that neither by comity nor by the will of the contracting parties, can the public policy of a country be set at naught. In other words, the law of the country where the contract is made will obtain unless

the contract is made in one country to be wholly performed in another, or unless the intention of the contracting parties is clearly otherwise, except where such contract is contrary to the public policy of the state wherein it is sought to be enforced. An analogous principle is that announced with reference to insurance to the effect that the law defining the insurer's engagements is that of the place where the company issuing the policy has its seat and where the loss is to be paid. The insurer is liable on the policy when it is good by the law of the state where the insurance has its seat, even though it be bad by the law of the state wherein the insured is situated. (Wharton on the conflict of laws, 3rd edition, section 465.)

It has even been held that a court will not deny the effect of a stipulation to subject to contract to a law of a designated state, so far as it confers rights, or imposes obligations, that are not opposed to the distinctive policy of the foreign. ib. p. 1022.

Mr. Wharton on pages 1062 and 1063 of the foregoing work states that the courts have adopted the rule that the nature, application and interpretation of a contract made in one state or country for the transportation of persons or property from a point in that state or country to a point in another was covered by the laws of the state or country in which the contract is made, and the transportation commences. He also says on page 1077 that it is established by the weight of authority that the validity of a stipulation limiting the amount of the carrier's liability is to be determined by the law of the place where the contract is made and the transportation commences, without reference to the law of destination or that of the place where the loss or injury occurs. This rule is also applicable to the contract of a telegraph company made in one state for the transmission of a telegram to a point in another state. Such contracts are governed by the law of the state in which the contract is made rather than by the law of the state in which it is received. ib. 1082.

In discussing the governing law of torts, Mr. Wharton very succinctly and admirably express the true rule in the following language:

> "So, undoubtedly, any defense based upon the express terms of the contract is governed by the *lex loci contractus* even though the action be *ex delicto*."

With these principles in mind it would seem to be clear that when the contract of employment is made in this state and in the course of his employment the employe is sent beyond the borders of Ohio, and while without the state, attending to his employer's business, the employe is injured, he is entitled to receive compensation out of the state insurance fund, and in case he sues his employer, he will be bound by the terms of his employment, and will be deprived of his defenses if he would have been deprived of them had the injury occurred in this state. That is to say, wheresoever he may be injured he must be governed by the Ohio law. I think it may safely be assumed that the other states and territories of the United States will, by virtue of the principles of comity, uphold the Ohio law, unless, of course, it be in direct conflict with the public policy of the state where the action is brought. The rules laid down in Massachusetts and in England do not deny this doctrine, but merely hold that the laws there under consideration did not apply to injuries that occurred without the borders of the country enacting the law relied upon. Taking the view that I do of the Ohio law, viz.: that it does cover injuries received without the state, this, of course, renders those decisions inapplicable to the matter under discussion.

An interesting decision upon this question arose in New York. One Anton V. Schweitzer sought to recover damages from his employer, Hamburg American Line, for personal injuries alleged to have been sustained by reason of a defective

windlass furnished by the master for his use. Defendant denied the averments of the petition, alleged contributory negligence and set up, in substance, that in the month of August, 1906, plaintiff was employed by defendant as a member of the crew on defendant's steamship, Pretoria, which sailed, under the German flag, from Hamburg, Germany, to New York, and was a German ship; that both plaintiff and defendant were German subjects at the time of the making of the contract of employment, which provided for a voyage to New York and return, and was entered into according to the laws of Germany. During such voyage plaintiff sustained the injuries he complained of. It was also alleged that at the time the contract was made and while plaintiff was on the vessel and when he sustained the injury,

> "it was and now is the law of the empire of Germany that persons who are employed on board of a German seagoing vessel sailing under the German flag, as members of the crew, or in any capacity whatever, and who, while on board such vessel in pursuance of such employment, or in consequence thereof, sustain personal injuries by reason of any cause whatsoever, shall have no right to claim, receive, sue for or recover any compensation from the owner of such vessel, or from any person connected with or responsible for the management or operation of such vessel, for the injuries so sustained, or for the damage arising therefrom, unless it shall have been determined by the judgment of a court of competent criminal jurisdiction that the injuries were wilfully or intentionally caused by the person against whom such claim is made or suit brought; that plaintiff's injuries were not wilfully or intentionally caused by the defendant or by any person for whose acts or omissions the defendant is responsible, and it has not been determined by any court or authority that the injuries were caused wilfully or intentionally * * *; that it is and was the law of the empire of Germany that a person who is employed on board a German seagoing vessel * * * and who sustains personal injuries through the carelessness * * * or any neglect of duty owed by the owner * * * or person responsible for the management or operation of the vessel, shall have the right to claim * * * compensation * * * exclusively from the society organized and existing under and in pursuance of the sea accident insurance law of the empire of Germany."

To this answer the defendant, under the New York practice, moved for an order directing plaintiff to serve a reply. The lower court denied this and defendant appealed to the appellate division of the supreme court. The court there decided that if the facts stated are only capable of denial a reply was unnecessary as they were deemed to be controverted, but when new matter set forth in a plea in bar *is such as will constitute a complete defense* it will simplify matters if a reply is required. Hence the question in this case was whether the facts, stated in the answer might, if true, constitute a defense.

What a foreign law is, is a question of fact and therefore the *answer contained a statement of issuable facts.* The court says, with reference to the legal question here involved:

> "The relation between the parties was contractual, and the answer alleges that the performance of the contract was to commence at Hamburg, but that said contract was not to be completed until the return of the vessel to that port. There is authority for holding, under such circumstances, that the *lex loci contractus* will control."

The holding of the court was that plaintiff be required to reply to part of the answer.

Schweitzer vs. Hamburg, etc., 149 App. Div. 900.

The case was subsequently tried and a verdict rendered for plaintiff. A motion to set aside verdict and for new trial was filed and sustained.

Schweitzer vs. Hamburg Co., 138 N. Y. Supp., 944.

In this decision Judge Kapper took the view that the foregoing decision seemed to hold in effect that the German law, if proved, constituted a complete defense, and it had been established more completely than the statement of it in answer quoted in the decision by the appellate division. It must be noted, however, that under the German law the insurance fund is created by mutual contributions of employer and employe and that it is only under the terms of the law that the employe is taken into the service. "If it is ever," says the court, "to be held in a master and servant negligence action that the *lex loci contractus* which is foreign to the forum is to prevail, notwithstanding the action is *ex delicto,* and is brought in the forum where the cause of action arose, this seems to me to be that case."

It was also held that the German law was not contrary to the public policy and laws of New York, and, therefore, it was a bar to the maintenance of the action.

In Pensahene vs. Anddore Co. 138 N. Y., Supp. 947, the court had before it a demurrer to a complaint based upon the elective compensation of New Jersey. Decedent was a resident of New York and was employed by defendant in New Jersey. While in such employ he was injured and as a result of such injuries, died. The New Jersey act is set out in the complaint, which averred that the sum of $2,400 was due by reason of the implied contract entered into in New Jersey at the time of decedent's employment in New Jersey. The court held that: (a) the *lex loci contractus* controlled the rights of the parties and the action being transitory it existed in every place where the proper parties for its enforcement could be found; (b) the law of New Jersey was not contrary to the public policy of New York. From this it, of course, followed that the demurrer was overruled.

Albanese vs. Stewart, 138 N. Y., Supp. 942, decided at about the same time, held that the New Jersey act governed an injury received in New Jersey. This decision is quoted in Pendar vs. Machine Co. 87, Atl. 1, 3 (R. I.).

The case of Pensahone vs. Auditore Co., *supra,* was carried to the appellate division where the decision of the lower court was reversed and leave granted plaintiff to file an amended complaint. The decision of four of the five justices before whom the case was heard was based upon the theory that the New Jersey law only applied *where the contract of hiring was made in New Jersey, and the complaint failed to show this.* These justices refused to concur with justice Woodward who wrote a separate opinion, as they held that his statement was obiter insofar as it went further than a mere discussion of the complaint.

The opinion of Justice Woodward is to the effect that the inference was that the contract was made in New York, and therefore, the New Jersey law could not be read into it; and that the New Jersey act was contrary to the public policy of New York.

Categorically answering your question, I desire to say that, in my judgment, your practice has unquestionably been correct in not including any portion of the payroll of employers paid to employes employed or hired in a foreign state or country, and in including that part of the payroll which constitutes payments made to employes of Ohio employers who are hired in Ohio, and sent out of the state in the course of their employment. You have been correct in paying the latter class of employes compensation when they are injured in the course of their employment, even though such injury occurs beyond the boundaries of the state of Ohio.

I am also of the opinion that when the injury occurs without the state the employer, who contributes to the state insurance fund of Ohio, may rely upon the Ohio act to the same extent as he could if the action were brought in Ohio and the employe there injured, provided, of course, that the contract of employment was made in this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

803.

LIABILITY INSURANCE—INTERSTATE AND INTRASTATE COMMERCE —EMPLOYERS ENGAGED IN TRANSPORTING CARGOES ON THE GREAT LAKES ARE WITHIN THE PURVIEW OF THE OHIO WORKMEN'S COMPENSATION ACT.

Ohio employers hiring five or more employes regularly in the business of transporting intrastate or interstate commerce by water are within the purview of the Ohio workmen's compensation act and are liable to contribute to the insurance funds, and such employer will have in the admiralty courts the same defense as any other Ohio employer contributing to the state insurance fund who is sued in the state court.

COLUMBUS, OHIO, March 3, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of November 28, 1913, you enclose a copy of a letter from Messrs. Goulder, Day, White & Garry, and state that this letter and your answer suggests a legal question upon which your commission desires my opinion.

The facts, as gleaned from these letters, are that a great number of vessel companies operating upon the Great Lakes and tributary waters are Ohio corporations, whose employes consist, to a large extent, of men employed on their boats which are engaged in interstate commerce and are divided into several classes, among which may be mentioned the bulk freighter class, which takes cargoes of coal, ore, grain, lumber, etc., for transportation between ports upon the Great Lakes, and which vessels are operated a large part of the time in waters outside of the jurisdiction of the state of Ohio and sometimes in Canadian waters; passenger lines plying between different states; package freighters, acting as common carriers between points in different states.

The question arising upon this state of facts is whether those companies come within the purview of the workmen's compensation act of this state, and whether the corporations contributing to such fund will be protected in case of accidents happening to members of the crews while the boats are in waters outside of the jurisdiction of the state of Ohio.

In a recent opinion to your commission I have fully discussed the question of the enforcement of the workmen's compensation act of this state, by the courts of other states, when accidents occur in such other states to an employe who has been hired by an Ohio employer in this state, and whose work requires him at times to go beyond the borders of Ohio. The conclusion at which I there arrived was that the workmen's compensation act of this state was intended to cover such injuries as occurred outside of Ohio, when the contract of employment took place in this state and the employe was injured in the due course of his employer's business. In view of the full expression of my position upon this matter, I shall not here further discuss that phase of the question.

The preliminary question having been disposed of in the opinion to which I have just referred, the next question for discussion is whether the workmen's compensation act of this state applies to the class of carriers referred to in the foregoing statement of facts.

Employers, as defined in section 13 of the act in question, (103 O. L., 77), comprise every person, firm and private corporation, including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. As defined in section 14, the terms "employe," "workman" and "operative," as used in the act, are to be construed to mean every person in the service of any person, firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, not, however, including any person whose employment is but casual or not in the usual course of trade, business, profession or occupation of the employer. These sections both literally and in spirit clearly indicate that such employers as those hereinbefore spoken of, are within the purview of the workmen's compensation act of this state, unless there is some federal inhibition which precludes the possibility of such construction.

Section 2 of article III of the constitution of the United States provided that:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction"

while the federal judicial code provides that the district courts shall have jurisdiction

> "of all civil cases of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

The following provision of the judiciary act has also been carried into the said code:

> "The jurisdiction vested in the courts of the United States in cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states * * *; of all civil cases of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

It has also been contended that the Ohio act would be an interference with interstate commerce if construed to apply to interstate carriers by water, and consequently would be invalid in violation of that provision of the federal constitution vesting in congress the power

> "To regulate commerce with foreign nations and among the several states and with Indian tribes."

It is fundamental that the state has, through its power of police regulation, the right indirectly to affect interstate commerce in certain particulars, in the absence of legislation by congress upon the same subject. The regulation of the relationship of master and servant is one of the instances wherein the state may legislate until such time as congress has enacted a law regarding the same subject-matter. Congress has not yet legislated upon the liability of an interstate water carrier

to his employe while both are engaging in interstate commerce, and consequently it is not a valid objection to state legislation of this character to assert that it indirectly affects interstate commerce. This matter has been decided in a discussion of the Washington act to be found in Stoll vs. Pacific Coast S. S. Co., 205 Federal, 169.

Recurring to the question arising by virtue of the jurisdiction of admiralty and maritime cases being vested exclusively in the federal courts, we think it may be safely assumed that the common law remedy is saved to suitors where the common law is competent to afford such remedy. The right to proceed at common law is the continuance in plaintiff of the right to proceed *in personam*, and therfore, when an action is brought directly against the ship owner for damages the action may be brought either in admiralty or at common law, the jurisdiction being concurrent. Of course, if the suit is brought in the state court, the state statute would unquestionably obtain, but it is contended that if the action was brought in admiralty, the enforcement of the act in that court would result in the curtailment of admiralty jurisdiction by abolishing a cause of action of which admiralty court had jurisdiction. This situation would arise when the employer had contributed to the state insurance fund and the employe was not injured by the wilful act of his employer or failure of the latter to comply with statutes enacted for the benefit of the employe.

Preliminary to a discussion of this question, it is necessary that we ascertain the position of the federal courts upon the question of the effect given state statutes in admiralty courts, as well as what state statute is applicable and where a conflict may arise between the statutes of different states.

In the case of Steamship Co. vs. Gilmore, 207 U. S., 398, the facts arose out of a collision of two vessels belonging to a Delaware corporation. The accident occurred on high seas. The Delaware statutes authorized the personal representatives of a decedent to maintain an action and recover damages for wrongful death of such decedent. The court held that the Delaware statute applied, although the proceedings were brought in admiralty. Had it not been for such statute no action could have been maintained because, according to maritime law, the cause of action abates with the death of the decedent. In other words, there is no survivorship. This case is also authority for the holding that a statute of the character of that of Delaware is not repugnant to the commerce or admiralty clauses of the federal constitution where congress has not legislated on the subject. The substance of the holding in the foregoing case is that where the law of a state to which a vessel belongs gives a right of action for wrongful death, the right of action given by the law of the domicile or flag will be enforced in an admiralty court of the United States. See also Deslione vs. Campagnic Generale Transat lantique, 210 U. S., 95.

In Monongahela, etc., vs. Shinnerer, 196 federal, 375, it was held that a state statute might be enforced in admiralty by proceedings *in personam*. In So. Pacific Co. vs. Da Costa, 190 federal, 689, an alien was killed by the bursting of a steam valve, while employed as coal passer on a steamship. The defendant was a corporation resident of Kentucky. It was held that the law of that state governed although the accident happened on high seas. "A statute of a state may be applied to a suit in admiralty to recover for a death on the high seas arising purely from tort, when the vessel belonged to the state in question." Fisher vs. Transportation Co., 162 federal 974.

A leading case is that of McDonald vs. Malloy, 77 N. Y., 546, wherein an action was brought to recover damages for wrongful death arising out of the destruction, by fire, of a steamer at high seas. The owners of the boat were residents of New York and the vessel was there registered. It was held that: (a) A state to which a vessel belongs may be regarded as the sovereignty whose laws will follow her

until she comes within the jurisdiction of some other government; (b) Civil rights of action for matters occurring at sea on board a vessel belonging to one of the states must depend upon the laws of that state unless they arose out of some matter over which jurisdiction had been vested in and recognized by the United States government.

In Cavanaugh vs. Navigation Co., 13 N. Y. Supp., 540, a passenger was killed in a collision on high seas. The defendant was a British corporation owning and navigating the colliding vessels. The English wrongful death statutes were hold to govern, and the limitation there fixed, obtained.

A leading and interesting case is that of Thompson Towing & Wrecking Co. vs. McGregor et al. 207 Fed., 209. There a proceeding in admiralty was brought by the Towing Co. for limitation of liability respecting a boiler explosion which resulted in the death of the decedent of one party to the action, and the injury of another party interested in the case. The appellee brought civil suit in the county courts of Michigan and appellant then proceeded in the federal court for limitation of liability. Among the objections urged against one of the claimants, was that the accident occurred in Canadian waters, and hence the right of action of the decedent was governed by the law of that country under which suit was barred. The court held that the accident had happended in Canadian waters and the right of action as established by the Michigan statute was in force. This was held to be true because the boat which was blown up was registered and owned in Michigan and was there domiciled. Hence it was to be treated as part of Michigan territory. Until congress has acted, the state might, as respects its interests, enact proper statutes concerning matter within the federal power. This decision also maintains the doctrine that such construction does not require the giving of extra territorial effect to statutes, because the vessel under such circumstances is constructively a part of the territory of the nation to which the owner belongs. In Murray vs. Pacific Coast S. S. Co., 207 Fed., 688, the very question here involved was before the district court of the western district of Washington, southern division, but was not decided. An action had been brought against the Steamship Co. for damages for an injury received by plaintiff while in the employ of defendant. In his complaint the plaintiff alleged that the defendant had not contributed to the Washington workmen's compensation act. Defendant answered alleging that the act was unconstitutional. A demurrer to this answer was sustained. The court held that the suit was one to enforce a common law remedy and was not a proceeding against any *res,* and was therefore not within the exclusive jurisdiction of admiralty. As the plaintiff charged that the defendant was in default under the workmen's compensation act, such act was inapplicable, and therefore defendant's contention that the law was unconstitutional would not be determined, since it was no bar to plaintiff's right to enforce his common law suit in either event.

The foregoing cases undoubtedly established the proposition that if a vessel is owned in Ohio, she constructively constitutes a part of the territory of that state, and in the absence of congressional legislation, the Ohio law, at least insofar as it pertains to the actions for wrongful death, is applicable, even though the accident occasioning death should have happened on the high seas or within the territorial jurisdiction of another country. It is urged, however, that the Ohio workmen s compensation act abolishes a cause of action of which the admiralty court has jurisdiction, in case the employer contributes to the state insurance fund, and in so doing it divests the admiralty court of certain jurisdiction, thereby rendering the act inapplicable or invalid insofar as cases in admiralty are concerned.

Section 23 of the act in question (103 O. L., 81) provides that employers who comply with the provisions of the act shall not be liable in damages at common law or by statute for injury or death to any employe during the period by the premium

paid into the state insurance fund. I cannot bring myself to the belief that the foregoing provision of the Ohio law, in any way, limits or is intended to limit the jurisdiction of admiralty courts. The state law grants to the employe a certain right to participate in the state insurance fund, and requires the employer to pay the premium upon which the employe's right is based. The employer, in turn, is granted the privilege of exemption from liability at common law or by suit. These rights do not affect the jurisdiction of the admiralty courts, but, on the contrary, may be enforced in the proper federal tribunal. The jurisdiction of the tribunal exists and may be invoked to give effect to the statutory rights. The case is tried in the admiralty court just as it would be in the state courts. The federal court has complete and full jurisdiction to administer the law of the state between persons who come within its jurisdiction. If an action that would have been barred under maritime law, continues to exist and will be enforced in admiralty courts because the state statute provides for the suvival of such causes of action, then it would seem that state statutes applicable to injuries occurring to a servant by reason of the negligence of his master, on high seas and navigable waters, should and will be enforced in admiralty proceedings. In other words, the statute must be applied in admiralty just as if the suit had been brought in the state courts; and any elements of the cause of action or of the defense, which are open to the parties under the state statutes, may be relied upon in admiralty. The following cases throw some light upon this question:

Ex parte McNiel, 13 Wallace, 236.
Bigelow vs. Nickerson, 70 Fed. 113, 30 L. R. A., 336, 340.
Quintette vs. Bisso, 136 Fed. 825, 5 L. R. A., N. S., 303, 314.
City of Norwalk, 55 Fed., 98.

For the foregoing reasons it is my opinion that Ohio employers, hiring five or more employes regularly, in the business of transporting intrastate or interstate commerce by water, are within the purview of the Ohio workmen's compensation act, and are required to contribute to the state insurance fund. When they have contributed, and an employe is injured, the employer will have, in the admiralty courts, the same defense as would have any other Ohio employer contributing to the state insurance fund, who has been sued in the state court.

It has been suggested that if the accident should happen in the territory of jurisdiction of some other state or country, the courts of such other state or country would not enforce the provisions of the Ohio law. In my judgment, by virtue of the doctrine of comity, the Ohio law will be held by the courts of other states to govern actions brought under the circumstances suggested.

I have fully developed my views concerning this phase of the question in the other opinion, to which I referred at the outset of this communication, and I do not think it is necessary for me here to reiterate the views there expressed. Several of the decisions there cited, and especially that of Schweitzer vs. Hamburg, etc., Co., 138 N. Y. Supp., 944, is very pertinent to the matter in hand.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

799.

CAPITAL STOCK—INCREASE OF CAPITAL STOCK—PREFERRED STOCK—ARTICLES OF INCORPORATION.

A full subscription of the common stock already issued is not a condition precedent to the increase of capital stock of a corporation by issuance and disposition of preferred stock as provided in section 8699, General Code.

COLUMBUS, OHIO, March 10, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—With your assent and at the request of Messrs. Johnson & Jones, attorneys at law of Ironton, Ohio, I have reconsidered my opinion to you under date of April 18, 1911. In that opinion I held that sections 8698 and 8699, General Code, must be read in connection with each other, and that the condition precedent to the exercise of the general power provided for by the first of these sections must be understood as applicable to the second of them; so that a corporation may not increase its capital stock by issuing and disposing of preferred stock unless the capital stock as already authorized is fully subscribed and an installment of 10% paid on each share thereof.

The opinion as originally expressed states propositions to which I still adhere but the conclusion which I reached therein is no longer satisfactory to me because of other circumstances to which my attention has been called. Therefore, I have carefully reconsidered the entire question, and upon such reconsideration have come to a conclusion opposite to that already stated.

My present opinion is, then, that the full subscription of the capital stock already authorized is not a condition precedent to the increase of capital stock of a corporation by issuance and disposition of preferred stock as provided in section 8699, General Code.

In the first place, I no longer hold the view that the joint rendition of the two sections leads to the conclusion expressed in the former opinion. That is to say, while I am still satisfied that the two statutes must be read together, relating as they do to the same subject-matter, i. e., increase of capital stock, yet the effect of thus reading them together is not that described in the first opinion.

When the two statutes are placed side by side as they happen to be in the present General Code, and considered with respect to their joint effect one upon the other, it appears that while both relate to the increase of capital stock, and while by a liberal interpretation both might be said to relate to such an increase in the same sense, i. e., as an increase in the amount of the authorized capital stock, yet section 8698 is general in its terms, applying to all increases in authorized capital stock, while section 8699 is particular in its terms and relates only to a certain kind of increase in capital stock, i. e., increase by issuance of preferred stock only. This being the case occasion is afforded for the application of the somewhat familiar rule that in the absence of a clear expression of a contrary intent, a statute covering an exceptional or special case is to be regarded as an exception to the rule of another statute prescribing the proceedings to be followed generally. This is especially true where both statutes are complete in themselves.

Now section 8699 is complete in itself despite its reference to the filing of the certificate as provided for in the preceding section. This reference to the preceding section clearly relates to the certificate only and cannot be construed as an adoption of all the conditions precedent referred to in section 8698 so as to make them apply as well to the action to which section 8699 applies. For if section 8699 is,

by reason of the reference therein, to section 8698 to be regarded as qualified by what is found in section 8698, then it seems to me it must necessarily follow that all the conditions of section 8698 must be attached to the performance of the act described in section 8699. That is to say, if any of the conditions precedent, referred to in section 8698 are to govern in cases provided for in section 8699, then all of them must govern including the meeting of stockholders, which is as much of a condition precedent to the general increase of capital stock authorized by section 8698 as is a subscription of the stock already authorized. Clearly, it cannot be held that such a meeting is necessary in order to do what is contemplated by section 8699. Therefore, is must be held, I think, that section 8699 is complete in itself when read in connection with section 8698, and that the only conditions of the lawful increase of capital stock by issuance and disposition of preferred stock are those found in that section.

This course of reasoning really eliminates certain collateral considerations which, however, point in the same direction. Thus it is pointed out that original section 8698 could have referred only to common stock when it spoke of "capital stock," because prior to the enactment of what is now section 8667, General Code, in its present form (as section 3235a R. S.) the original authorized capital stock of a corporation could consist of common stock only; so that the only way in which the first part of section 8698 could have been used at that time was for the purpose of increasing the common stock; and the meaning of the whole section would be governed by the necessary application of its first provision. From this it would follow that section 8699 when it was Revised Statutes section 3263, and prior to the enactment of section 3235a, R. S., did not provide for an increase of capital stock such as was contemplated by what was then section 3262, R. S., which is now section 8698, General Code, but for a special kind of increase of capital stock entirely separate and apart therefrom.

In fact the only complication encountered when all the related statutes are examined is that now, by reason of section 8667, General Code, the original authorized capital stock of a corporation may consist of both common and preferred stock. However, the consideration which I have given to the leglislative history of the two sections confirms the view that section 8699 is a provision for a special case, whereas section 8698 is a provision general in its nature, so that the rule of interpretation above referred to applies.

I have given full consideration to the objection that the conclusion at which I have now arrived will make it possible for a corporation to increase its common stock without the necessity of a full subscription of its existing common stock and in an indirect way. That is, if the corporation may increase its capital stock by issuing and disposing of preferred stock without having its existing common stock fully subscribed for, it may, when authority to have preferred stock is obtained, by amendment, change such preferred stock again into common stock; the result of which action would be, of course, that the common stock would stand as increased without the original common stock having been subscribed for in full as required by section 8698, General Code.

Even if this objection were well taken I should not deem it material as reflecting upon the meaning of the statutes as I find them. I do not, however, think that the objection is well taken, being of the opinion, although I do not desire to express a final view upon the matter, that authority to issue and dispose of preferred stock cannot be converted into authority to have common stock by amendment. The only thing which may be accomplished by amendment other than those specifically referred to in section 8719, General Code, is to "add to them (the articles of incorporation) anything omitted from it which lawfully might have been provided for originally in such articles."

It will not be contended, of course, that it would be proper originally to provide in the articles anything with respect to that kind of preferred stock, if I may so put it, authority to have which might subsequently be acquired by complying with section 8699, General Code. That is to say, section 8699, General Code, authorizes an issue of preferred stock not provided for in the original articles of incorporation. Therefore anything with respect to a change in the matter of the stock issued under authority of section 8699 is manifestly not a thing which might have been provided for in the original articles of incorporation. Therefore, when special authority to have increased preferred stock is acquired under section 8699, General Code, that authority can never be converted into authority to have common stock. In fact I am of the opinion that no subsequent action of any kind can be predicated upon the special authority, the exercise of which is provided for in section 8699, General Code.

Other questions have been considered and the legislative history of the related statutes has been carefully examined; but I do not deem it necessary to burden this opinion with a lengthy statement of all the considerations which I have weighed in reaching my conclusion.

I am of the opinion, principally for the reasons stated, that the subscription for all the shares of stock authorized at the time such action is taken is not a condition precedent to the exercise of the right to increase the capital stock by the issuance and disposition of preferred stock specially provided for in section 8699, General Code.

I hand you herewith the certificate of increase of capital stock of the Marting Iron & Steel Company. The conclusions already expressed warrant me in advising you to receive and file this certificate upon the payment of the proper fee therefor.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

800.

MAYOR—VILLAGE COUNCIL—MAYOR MAY VOTE IN CASE OF A TIE.

Section 4255, General Code, makes the mayor of a village a member of council to the extent that he has the right to vote in case of a tie, consequently, when the council consists of an even number of members, and these are evenly divided, the mayor may cast a deciding vote; an ordinance so voted on is legally passed.

COLUMBUS, OHIO, February 14, 1914.

HON. NELSON J. BREWER, *Village Solicitor, Euclid, Ohio.*

DEAR SIR:—I have your letter of February 11, 1914, as follows:

FACTS:

"E. is a village. The council thereof consists of six members, all elected at large. An ordinance is 'fully and distinctly read on three different days,' as provided by law. On motion to adopt, the vote stood three for and three against. The mayor thereupon voted for the adoption of the ordinance and declared the same carried.

QUESTION:

"Is the ordinance legally passed?"

Section 4255 of the General Code, provides:

"The mayor shall be elected for a term of two years, commencing on the first day of January, next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. He shall be the chief conservator of the peace within the corporation, and shall have the powers hereinafter conferred, perform the duties hereinafter imposed, and such other powers and duties as are provided by law. He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie."

Section 4224 of the General Code, provides in part as follows:

"No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

In volume 28 of Cyc., at page 337, I find the following:

"It has been held that where the mayor is only entitled to vote in case of a tie, and a majority of all the 'members elect' of the council is required to pass a measure, the mayor cannot vote, when the members are equally divided, so as to give such majority, and is not to be counted in determining whether the measure has been passed."

In support of this proposition, the case of State vs. Gray, 23 Neb., 265, is cited and in the 1913 supplement of Cyc., the case of Merriam vs. Railroad is cited on the same proposition.

In both of these cases the presiding officer of council is held not to be a member of council within the provision laid down by the statute, that

"No ordinance shall be passed by council without the concurrence of a majority of all the members elected thereto."

It is said in Dillon on municipal corporation, vol. 2, page 836 (note to section 513):

"The language of the decisions which declares that a mayor who is only a presiding officer with a casting vote in case of a tie is not a member of the council, must not be taken in its absolute and literal sense. He is a member for the purpose of presiding with a vote in the contingency specified. It is anomalous that he should take any part in the proceedings of the council and not be regarded as a member. Carrollton vs. Clark, 21 Ill. App. 74. When the statute confers upon the mayor the *right to preside* and to give *a casting vote* in case of a tie, he is so far a member of the council that the aldermen or councilmen cannot deprive him of these rights. State vs. Yates, 19 Mont., 239; McCourt vs. Beam, 42 Oreg. 41."

To my mind, the doctrine laid down by Judge Dillon in his work on municipal corporations, above quoted, is the correct one and I am of the opinion that section 4255 of the General Code, in giving the mayor the right to vote in the case of a tie, makes him a member of council to that extent and for that purpose and that therefore, when the council is composed of an even number of members and these are evenly divided, the mayor may cast the deciding vote.

I am, therefore, of the opinion that the ordinance you refer to was legally passed.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

801.

ENGINEER — REFEREE — PUBLIC WATER SUPPLY — CONTINGENT FUND.

When the state board of health employs an engineer as a referee on public water supply matter, such engineer may be paid for his services from the contingent fund of said department.

COLUMBUS, OHIO, March 6, 1914.

DR. E. F. MCCAMPBELL, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have your two letters of late date, and in reply to your inquiry as to what funds may be used to pay referee engineer in the Greenville matter, desire to say section 1257, General Code, reads:

> "If an order of the state board of health, when approved by the governor and attorney general, and made in pursuance of the provisions of this chapter relating to public water supply, is not acceptable to any city, village, corporation or owner shall have the right to appeal, as follows: The necessity and reasonableness of such order may be submitted to two reputable and experienced sanitary engineers, one to be chosen by such city, village, corporation or owner, and the other by the board, who shall not be a regular employe. Such examiners shall act as referees. If the engineers so chosen are unable to agree, they shall choose a third engineer of like standing, and the vote of the majority shall be final."

Section 1258, General Code, reads:

> "Such referee engineers may affirm, modify, or reject the order of the state board of health submitted to them, and their decision, as reported in writing to the governor and attorney general, which shall be rendered within a reasonable time, shall be accepted by the state board of health, and shall be enforced by the board in the manner provided for in this chapter. The fees and expenses of the referee engineers shall be equally divided between the city, village, corporation or owner requesting such reference and the state board of health."

These two sections when construed together provide for a reference of the reasonableness of any order of your board to arbitration of a board of engineers, one to be selected by the municipality, one by your board, and in the event of their failure to agree, a third to be selected by the two; the fees and expenses of the same to be equally divided.

The question of your power to enter upon the reference and make the expense is not at issue, it only being desired to know from what fund, if any, the same may be paid in the absence of a specific appropriation for the purpose.

You state that you have an appropriation for "contingencies under the general head of contract and open order service."

That this reference is a contingency which is liable to arise cannot be doubted, that it may or may not present itself is clear but when it does it cannot be avoided nor evaded by your board under the sections above quoted. It is your duty upon demand, therefore by a municipality, or of any one not satisfied with an order

of your board, and being advised of the selection of a referee engineer to meet the demand by a like appointment, and an arrangement by which the arbitration might be had at the earliest period of time and the expense so incurred is unavoidable and must be met.

I am of the opinion that you have full authority to pay the same from your contingent fund, and therefore advise you to that effect.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

802.

CENSUS—CENSUS BUREAU ESTIMATE—NUMBER OF SALOON LICENSES GRANTED IN A TOWNSHIP.

Township officials have no authority to take a census to determine the number of saloons that may be permitted. The liquor license board shall be governed by the last estimate of the United States census bureau in order to determine the number of saloon licenses to be granted in a township.

COLUMBUS, OHIO, March 16, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Under date of January 27th, we received from Hon. Charles M. Milroy, prosecuting attorney of Lucas county, Ohio, the following inquiry:

> "Inquiry has been made at this office relative to authority of the board of trustees of Washington township, this county, in the matter of having a census taken of the population of said township for the purpose of determining the maximum number of licenses that may be granted for trafficking in intoxicating liquors.
>
> "It appears that the population of said township at the last federal census, taken in 1910, was 5,297. Upon this basis, ten licenses have been granted. It is contended that the present population is considerably in excess of the number shown by the last federal census, and hence that the maximum number of licenses which may be granted in Washington township is in excess of the number already granted."

We are addressing the opinion to you and sending a copy of the same to Mr. Milroy.

Section 44 of the Greenlund license act provides as follows:

> "In determining the maximum number of licenses which shall be granted in any municipal corporation or township of the state, the license commissioners shall be governed in determining the population of said political subdivision by any official census which shall have been taken therein within the year next preceding that for which licenses shall be granted. If no such official census of the population has been taken, the board shall be governed by the latest estimates of the United States census bureau. * * *"

As far as I am able to discover, there is no provision for the taking of an official census by the authorities of a township. Hence, it is my opinion that in

such political subdivisions there cannot be an official census taken by the township authorities. As the section provides that if no such official census of the population has been taken the board shall be governed by the latest estimates of the United States census bureau, in order to determine the number of saloon licenses to be granted in the township, it would be necessary for some person having the authority to secure from the United States census bureau the proper estimates.

The last United States census, 1910, gives the population of Washington township, Lucas county, Ohio, as 4,789. The state liquor licensing board obtained from the United States census bureau the estimates made by that bureau for Washington township for the month of November, 1913. The estimate of the United States bureau, based on the 1910 census, fixed the population of said township, in November, 1913, at 5,297. It was upon this basis that ten licenses were apportioned to Washington township.

As section 44 provides that the commissioners shall be governed, in determining the population of political subdivisions, by the official census which has been taken therein within the year next preceding that for which licenses shall be granted, I take it that when the basis is to be fixed by the estimates of the United States census bureau, made for the years intervening between the decennials, these estimates will also be for a time immediately preceding the year for which the licenses are to be granted; hence, there can be no other estimate obtained for the purpose of determining the number of licenses for said township until immediately preceding the next license year.

You are correct in your view that there is a distinction drawn between the official census and estimates of the United States census bureau. The official census is taken for the decennial period; the estimates are based upon the population as shown by the census, with such addition as the estimated increase will make. But, as stated above, since the state board, in fixing the number of licenses at ten, based that upon the estimate that they had received from the United States census bureau for that township, in November, 1913, this number cannot be increased unless the estimate obtained immediately preceding the next license year would justify a greater number for the next succeeding year.

Trusting that this fully answers your inquiry, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

804.

UNION CEMETERY—LAND TITLE—DIRECTOR OF PUBLIC SERVICE.

The city cemetery at Greenville, Ohio, is a union cemetery, and therefore, not under the control of the director of public service of that city.

COLUMBUS, OHIO, March 6, 1914.

HON. H. F. DERSHEM, *City Solicitor, Greenville, Ohio.*

DEAR SIR:—I have your letter of late date in which you inquire, after stating facts as to title:

> "I desire your opinion as to whether or not, under the state of facts above given, this is a union cemetery to be managed and controlled under the sections above set out, or a city cemetery to be controlled exclusively by the director of public service, under such rules and regulations as the council may prescribe."

The cemetery in question was acquired in four parcels:

1. In 1853, by a conveyance to the Greenville cemetery association, its successors, etc. This association conveyed the same in August 1877 to the incorporated village of Greenville for its use and that of Greenville township in common.

2. August 18, 1877, 2.09 acres conveyed to the incorporated village of Greenville without any stipulation as to user.

3. December 28, 1882, ____ acres adjoining above to the village of Greenville, without any stipulation as to user.

4. 4.27 acres conveyed to the city of Greenville for the use of its inhabitants and the inhabitants of Greenville township, Darke county in common for cemetery purposes.

Tracts 1 and 4, assuming that the city of Greenville is successor to the village of the same name, are held for the common use of the city and township; the other tracts were apparently conveyed to the village of Greenville as additions to the cemetery, the title to which was held by it in common for the use of itself and Greenville township.

Section 4160, General Code, reads:

> "The title to, and right of possession of, public graveyards, and burial grounds, located within a city, and set apart and dedicated as public graveyards or burial grounds, and grounds used as such by the public but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the corporation where such graveyard or burial ground is located."

Section 4174, General Code, reads:

> "The title to, and right of possession of public graveyards and burial grounds, located within a village and set apart and dedicated as public graveyards or burial grounds, grounds used as such by the public, but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the corporation where such graveyard or burial ground is located."

Section 4183, General Code, reads:

> "The councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township, when conveniently located for that purpose, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided."

You further state that for some years past this cemetery has been managed and controlled under the laws in regard to union cemeteries.

If this is held to be a city cemetery it is under the control of the director of public service of the city.

Insofar as your information goes, the only action of the city, other than what may be assumed from the fact that it has succeeded to all the rights, title and the like formerly held by the village of Greenville, is found in the fact that the

deed for the fourth tract, 4.27 acres, was to the city for the common use of its inhabitants and those of the township of Greenville, and its participation in controlling the same as a union cemetery.

The above deed being in full harmony with the conveyance of the first tract and not in conflict with the title to the second and third, must be given full consideration in fixing the status of the cemetery, and when considered in the light of the action of the city as above stated, to my mind makes it a union cemetery, and therefore, not under the control of the director of public service of the city of Greenville.

Many inquiries have been made concerning the effect of the act of April 18, 1913, 103 O. L. 272, wherein sections 4184 and 4185 of the General Code are repealed, and said matter has been considered by this department, and a copy of my opinion on that subject to the bureau of inspection and supervision of public offices has been sent Mr. Meeker.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

805.

COMMON PLEAS COURT—JURISDICTION—RIGHT TO ENTERTAIN APPLICATIONS FOR CLERK HIRE.

If the county commissioners have refused to make an allowance, the court of common pleas has jurisdiction to entertain application made by county officers for clerk hire and make such allowance to said several officers as the necessities of their respective offices in the judgment of the court might require.

COLUMBUS, OHIO, March 6, 1914.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of January 16, 1914, asking opinion of me, from which it appears that in November, 1913, several of the county officers of Pike county made application to the board of county commissioners pursuant to the provisions of section 2980, General Code, for allowance to said respective officers for clerk hire, etc., during the year 1914, and that all of the applications were rejected on the ground taken by the county commissioners that no one of the officers involved required the attention of any person other than the officers elected thereto.

You further say that some of said county officers are now contemplating the making of applications to the common pleas court, or a judge thereof, for allowances for such purposes under favor of the provisions of section 2980-1, General Code.

The questions presented are:

> "First. Whether under the facts above stated the common pleas court, or judge thereof, has jurisdiction to entertain the contemplated applications and grant the allowances asked for.
>
> "Second. Whether in the event of such jurisdiction the authority of the court to make the allowances is dependent on a showing that the business of the several offices has increased over that done by the offices at the time the applications, before noted, were made to the board of county commissioners."

The statutory provisions pertinent to a consideration of the question here presented are those contained in sections 2980, 2980-1 and 2981, General Code, which read as follows:

"Section 2980. On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal.

"Section 2980-1. The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers requires additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application, and if, upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and therupon the board of county commissioners, shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

"When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year.

"Section 2981. Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Sometime ago the question was presented to this department whether, as to a particular office, under section 2980-1, the authority of the common pleas court to make an additional allowance for clerk hire, etc., therein provided for, was limited to the condition that the county commissioners had made an allowance for such office up to the maximum amount which the county commissioners might allow for such office, under said section of the General Code. After careful consideration of that question I arrived at the conclusion that the authority of the court to act was not limited to the condition that the county commissioners had made the maximum allowance, and with respect to the question there presented it was my view that the words "additional allowance," as used in section 2980-1, are referable to the allowance actually made and fixed in any case by the commissioners, rather than to the maximum prescribed, and that the additional allowance therein provided for is additional to that made by them, whether it be equal to or less than the maximum.

With respect to the question here presented, however, it appears that no allowances were made by the commissioners, but that the applications of the several officers therefor were wholly rejected, and the question is whether the authority of the common pleas court or judge to entertain the contemplated applications and grant allowances thereon, is limited to the condition that the county commissioners have first made an allowance.

Section 2980-1 provides, in part, as follows:

> "If at any time any one of such officers requires additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas of the county wherein such officer was elected; and thereupon such judge shall hear said application, and if upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required."

In ordinary signification the phrase "additional allowance" presupposes an allowance already made, and the term "additional" embraces the idea of joining or uniting one thing to another so as thereby to form an aggregate.

With respect to the question at hand, however, in an obvious and practical sense it may be said that any allowance made by the common pleas court will be in addition to what the officers received on their applications to the board of county commissioners; for on those applications the officers got nothing. Though the legislative intent in the enactment of Section 2980-1 is to be extracted in the first instance from the language of the section itself, yet I do not think that such intent and purpose can be safely arrived at by a mere play on the meaning and significance of particular words. Section 2980-1 was enacted for the purpose of affording a remedy for a number of defects which were more or less manifest in the practical operation of the law with reference to allowances for clerk hire, before the enactment of section 2980-1. In the first place, there was no check on the amount that the county commissioners might fix as an allowance for clerk hire for any office, other than the requirement that such amount should be reasonable and proper, which obviously was a matter wholly within the sound judgment and discretion of the county commissioners; again, under the law as it then stood it was legally possible for an incumbent of an office to exhaust the aggregate amount fixed as clerk hire for the year, and thus leave his successor in office during the year without money for clerk hire during the remainder of the calendar year for which the aggregate amount was fixed; finally, and more pertinent to the question at hand, there was

no provision in the law, as it then stood, for the contingency that the business of such office might necessarily require an amount in excess of that allowed by the commissioners, whether such allowance was nothing or more.

With respect to applications by county officers to the board of county commissions for allowances for clerk hire, the court in the case of Theobald vs. State, 10 O. C. C., N. S., 175, 180 (decided in 1907) says:

> "The legislature has conferred upon the board of county commissioners in each county the power to judicially determine these questions. The selection of the tribunal must be left to its wisdom. If under the law, an officer should make application to the board for assistants in the prescribed way, and be refused, then should he be physically unable himself to perform all the duties of the office because of their magnitude, the default would not be his, but that of the board. It must act with legal, not arbitrary, discretion, in the bestowal or refusal of the fund. The public has a right to expect and demand reasonable and proper regard, both by the officer and the board, for the amount of labor necessary to be performed in its office."

In a case reported as "In re clerk hire in county offices, 7 N. P., N. S., page 8, it was held:

> "The right of appeal from the action of the board of county commissioners in rejecting a claim against the county is limited to matters in which the commissioners are vested with a judicial function, and does not include those matters in which the commissioners act with discretionary power or in an administrative or governmental capacity.
>
> "No appeal lies from action by county commissioners in fixing the allowance for clerk hire for county offices."

In other words, as the law stood before the enactment of section 2980-1, when the county commissioners once acted on an application for clerk hire, their action, at least in the absence of a showing of fraud, gross abuse of discretion or arbitrary action, was in all respects final, whether the allowance made by them on such application was nothing or a fixed sum of money.

Looking at the provisions of section 2980-1, last above quoted, we must assume that the legislature in the enactment of these provisions had in view a purpose to afford a remedy for the condition of affairs theretofore existing. These provisions do not attempt to give to the officer whose application has been acted upon by the county commissioners a right of appeal to the common pleas court from the action of the county commissioners, nor do they give to the court any right to review the action of the county commissioners. On the contrary, though the jurisdiction of the court or a judge thereof is unquestionably dependent upon the fact that an application for clerk hire shall first have been made to the county commissioners, yet the application itself, as made to the common pleas court or judge thereof, and the hearing on such application, are wholly independent of the proceedings before said county commissioners.

Upon these considerations, I am of the opinion that when an application for clerk hire, etc., has been made to the county commissioners pursuant to the provisions of section 2980, General Code, and the commissioners have acted thereon, that the officer making such application may apply to the common pleas court for an allowance in addition to that made by the county commissioners, whether the amount which they granted was nothing or some fixed substantial some of money. In such case the hearing on the application filed with the common pleas court, or a

judge thereof, will properly proceed on a consideration of the necessities of the office at the time the application before the court or judge was filed, and that the court or judge thereof in considering the question whether the necessities of the office require an allowance for clerk hire, etc., in addition to that made by the county commissioners, will not properly review the action of the county commissioners to determine whether they were right or wrong in the action taken by them on the facts presented on the application to them for an allowance in the first instance.

With respect to the inquiries presented by you, I am of the opinion that the common pleas court, or a judge thereof, would have jurisdiction to entertain applications made by county officers for clerk hire and make such allowance to said several officers as the necessities of their respective offices might, in the judgment of said court or judge thereof, require, and that the granting of such allowance would not be dependent upon a showing that the business of the several offices had increased since an action by the county commissioners on the application made to them. The finding of the county commissioners on the facts presented to them was independent and final. The inquiry and finding by the court of common pleas or judge would likewise be independent on the facts existing and conditions presented at the time of the filing of the applications before said court or judge.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

806.

PAROCHIAL SCHOOL—RIGHT OF COUNCIL TO FURNISH WATER TO SUCH SCHOOL FREE.

Under the provisions of section 3963, General Code, the city council is without power in any way to furnish water for parochial schools without making a charge therefor.

COLUMBUS, OHIO, March 6, 1914.

HON. GEO. C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Under favor of February 17, 1914, you submit the following question:

"Section 3963 of the General Code is as follows:

"No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm or destitute persons, or orphan or delinquent children, *or for the use of of public school buildings;* but, in any case, where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building, or buildings, are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

"QUERY. Is a school building owned and maintained by the Catholic church a public school building within the meaning of section 3963, so that the council of the city may furnish water to such parochial school building without making any charge therefor?"

Whether or not a parochial school building may be exempted from the payment of water rents by force of the statute above quoted, depends upon the comprehension of the term "public school buildings," as the same is employed in the above statute.

In the case of Myers vs. Akins, 8 O. C. C., 228, an Ursuline convent was held to be a public college within the meaning of section 2732 R. S., exempting all public institutions from taxation. In the case of Little vs. Seminary 72 O. S., 417, the United Presbyterian Theological Seminary of Xenia, Ohio, which institution was devoted to the training of young men for the Gospel, free and open to all on the same conditions, was held to be an institution of purely public charity within the comprehension of section 2732, R. S., exempting such institutions from taxation.

On page 427 of that case the court said:

"It is settled in Gerke et al. vs. Purcell, 25 O. S., 229, and in cases following it, that an institution such as the petition alleges the seminary to be, is an institution of purely public charity within the meaning of this section of the constitution. (Article XII, section 2.)"

The case of Gerke vs. Purcell, above referred to, is interesting in its interpretation of the term "public school houses" as used in connection with the constitution of Ohio, article XII, section 2, and of the same term as employed in section 5349 of the General Code.

The constitutional provision, as it was construed in that case, is as follows:

"Article XII, section 2 * * * burying grounds, *public school houses,* houses used exclusively for public workship, institutions of purely public charity, public property used exclusively for any public purpose * * * may, by general laws, be exempted from taxation."

In interpreting this provision on page 242, the court says:

"The other classes of property that may be exempted from taxation are described as 'public school houses,' and 'public property used exclusively for any public purpose.'

"It appears to us that the word 'public' as applied to school houses, is used in the same sense in which it is used in the second instance, as applied to property; and that the school houses intended are such as belong to the public, such as are designed for the schools established and conducted under the authority of the public. In the classification, public school houses, from the nature of their use, are named as a distinct species of public property that may be exempted; and we see nothing inconsistent or unreasonable in such specific designation, arising from the fact that the subsequent provision authorizes the exemption of public property generally where it is used exclusively for some public purpose.

"If all school houses in which schools are kept, that are open to such of the public as choose to patronize them, were to be regarded as public

school houses, such property might be exempted, *although owned by private parties and used by them solely with the view to profit in prosecuting their business.*"

In considering the term "public school house" as employed in section 5349 of the General Code (then S. & S. 761) the court says:

> "The property exempted by the first subdivision of the section is described as follows:
>
> "All public school houses and houses used exclusively for public worship, the books and furniture therein, and the ground attached to such building necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise *used with a view to profit;* all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, *not used with the view to profit.* * * *
>
> "A consideration of this provision of the statute shows that the word 'public,' as here applied to school houses, colleges and institutions of learning, is not used in the sense of ownership, but as descriptive of the uses to which the property is devoted. The schools and instruction which the property is used to support, must be for the benefit of the public. The word 'public' as applied to 'school houses,' is obviously used in the same sense as when applied to colleges, academies, and other institutions of learning. The statute must be construed in the light of the state of things upon which it was intended to operate. * * *
>
> "Besides, the condition prescribing that the property, in order to be exempt, must not be used with a view to profit, does not seem appropriate if intended to apply only to institutions established by the public. Such institutions are never established and carried on by the public with a view to profit. But the condition has marked significance when applied to private property, which is often used for the purposes of education, like property in ordinary business, as a means of profit. But when private property is appropriated to the support of education for the benefit of the public without any view to profit, it constitutes a charity which is purely public. When the charity is public, the exclusion of all idea of private gain or profit is equivalent, in effect, to the force of 'purely' as applied to public charity in the constitution."

The case held that a parochial school was a "public school house," as the term was used in the statute, but not as such term was used in the constitution.

It is clear from the above quoted language of the court that in distinguishing between the term "public school house" as applied in the constitution, and as applied in this statute, the court laid particular stress upon the fact that the statute qualifies the term "public school house" with the clause "not used with a view to profit." The use of such clause in the mind of the court prevented the application of the term to school houses owned by the public and restricted its application to such school houses as were used for charitable purposes by private individuals or organizations.

In this case the court justified the exemption from taxation of such privately owned school houses under the constitution, not by authorization of the term "school house," as employed in the article of the constitution above quoted, but by authorization of the term "institutions of purely public charity."

In the case of Myers vs. Akins, above quoted, an Ursuline convent was permitted to be exempted from taxation as a public college solely under the authoriza-

tion of the constitution referring to institutions of public charity. I am of the opinion that the language of the court in the case of Gerke vs. Purcell, in construing the term "public school house," as employed in the constitution, has a direct application to section 3963, General Code, quoted by you. In this statute the term "public school building" is not in any way restricted to public school buildings "not used with a view to profit." If the term "public schools," as used in this statute, therefore, is construed to apply to public schools other than those owned by the public, it is clear that public schools not operated for a profit would be exempted as well as those operated as a charity. Such a construction was manifestly not intended.

I therefore conclude that under section 3963, General Code, a director of public service in cities is not expressly prohibited from making a charge of supplying water to a parochial school building.

This conclusion is furthermore supported by the language of the statute, which provides that where *said school buildings* are situated within a district which is partly within and partly without the city or village, they shall be obliged to pay for water furnished. Inasmuch as the term "school district" is a term having a peculiar application in the statutes dealing with schools owned by the state or its subdivisions, it is quite clear that the legislature intended reference to such schools alone.

Inasmuch as the effect of this statute is solely to prohibit the director of public service from making a charge upon the class of institutions therein included, the question remains whether or not council is permitted of its own volition, through its general legislative power, to exempt a parochial school building from payment for water furnished the same. This question brings into view section 6, article VIII of the constitution, which provides as follows:

> "No law shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company, corporation or association."

The common pleas court in the case of Crossland vs. Zanesville, unreported, affirmed in 56 O. S. 735, said in its opinion:

> "It is for the public interest that the municipality retains control and management of the sick and disabled poor. One of the chief purposes of the local government is to preserve the health and safety of its inhabitants.
>
> "If the municipality may escape its obligations and duties to the sick and disabled by farming out the same to the charitable associations or corporations, the public interests may suffer in that respect."

Elliott, in his work on "municipal corporations," in speaking of alms-houses and hospitals, page 61:

> "The power of taxation cannot be employed to support such institutions when they are under the control of private persons who are not accountable to the government."

Under this rule, I am of the opinion that council is not permitted to burden taxpayers with the upkeep of a waterworks system and confer upon a private organization the privilege of receiving the benefit of the same without charge. It is well settled that municipal corporations have only such powers as are expressly

or impliedly conferred by statute. Being unable to find anywhere in the statutes any provision authorizing a municipal corporation to extend the privilege of free water to such an organization, I am of the opinion that council is without power, under the law as it stands, to exempt a parochial school building from payment of water rents.

There exists ample authority for the holding that where council is empowered or required to maintain charitable institutions, it may, within the limitations of the authorizations of law, contract with private organizations for the conduct of such charitable enterprises. There can be no doubt, under the holdings, that a parochial school is to be deemed a building of public charity; but, since under the plan provided by the statutes the duty of providing education in no way devolves upon municipal corporations, but rests, on the conntrary, with independent subdivisions of the government, to wit: boards of education, it is clear that council has no power whatever to contract for the education of its citizens. It would seem clear, therefore, that council is also without power to make the furnishing of free water a consideration for a contract with parochial school authorities, for whatever benefits such organization may afford the general public through the operation of parochial schools.

My opinion, therefore, is that a council of a city is without power in any way to furnish water for a parochial school without making a charge therefor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

807.

COLLATERAL INHERITANCE TAX—APPLICATION TO BE MADE UNDER 5333, GENERAL CODE.

Where a property by will is bequeathed in trust to B. with full power to sell, transfer, manage, invest, reinvest, or dispose of any part thereof, B. to pay the income of the estate to the mother of A. during her life, and after her death to distribute the residue among certain collateral relatives, the provisions of section 5333, General Code, are to be applied to the estate as a subject of the collateral inheritance tax at its present value.

COLUMBUS, OHIO, March 14, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of January 20th, you request my opinion upon the following question:

> "By the will of A. the residuum of his personal estate, after paying specific legacies, is bequeathed to B. in trust, with full power in B. to sell, transfer, manage, invest and reinvest or dispose of the same or any part thereof, B. to pay the income of the estate to the mother of A. during her life, and after her death to distribute the residuum among certain collateral relatives, all of whom are subject to the collateral inheritance tax."

You inquire whether the estates of the collateral relatives are taxable now or whether, on the principles laid down in my recent opinion to you, in the matter of the estate of Theresa Braunstein, these estates do not become taxable until the death of decedent's mother.

The principles referred to are, that where estates of inheritance do not vest

at the death of the testator, and where the amount or share of a given inheritor cannot be then ascertained, the tax cannot be then assessed but must be assessed and collected, if at all, at such subsequent time as it may vest, or the amount of it may become certain.

This general principle results from the very necessities of the case. It is not found in the collateral inheritance tax law as a statutory enactment; hence, in my judgment, it is to be applied only when no other course is possible.

Section 5333 of the General Code, as amended, 103 O. L. 463, provides as follows:

> "When a person *bequeaths* * * * property * * * for the use of father, mother * * * etc., during life * * * and the remainder to a collateral heir * * * the value of the prior estate shall be appraised within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

The reference in this section to "the manner hereinafter provided" is to section 5343 of the General Code, which provides in part that:

> "In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent. compound interest."

It is true, of course, that, technically, there is no such thing as a "life estate" or "remainder" in personal property; also, that a direction to trustees to distribute a trust estate among certain persons upon the happening of a certain event does not make the distributive shares "remainders" in a technical sense. However, technicalities must be ignored in the interpretation of amended section 5333, General Code. The section uses the word "bequeaths," clearly evincing an intent to make its provisions applicable to personal property inheritances. It uses the words "for the use of," clearly evincing an intention to make it apply to trust estates. Therefore, in my opinion, a bequest to a trustee for the use of a certain person during the life of the latter, and on his death for distribution among certain other designated parties, creates a "remainder" and a "prior estate" within the meaning of section 5333, and a "life estate" within the meaning of section 5343, General Code.

This leaves but one question in the case submitted by you, viz.: as to whether or not the trustee's powers of disposition are such as to make it impossible to apply section 5333, General Code.

In my opinion this question may be answered in the negative. I see no distinction between the trustee's powers, as described by the language quoted by you, and the powers of any trustee who is given the management of a fund for the benefit of another, with discretion as to investment and reinvestment. The presumption is that, despite the investments, sales and reinvestments of the fund, i. e., despite the conversion of one form of personal property into other forms of personal property in the management of the trust, the value of the corpus of the estate will remain the same. This may be a very violent presumption, but it is no more violent than the presumption which is evidently contemplated by section 5333, in its narrowest interpretation that specific real or personal property will be of the same value at the end of a given life as it is at the date of the testator's death, or sixty days thereafter. Suppose, for example, there was no power of sale and reinvestment, and that the bequest, instead of being a residuary one, consisted of

certain specified corporate stocks of the present market value of one hundred dollars a share: is there not the possibility that these shares may deteriorate in value until they are worth but fifty dollars each, before the death of the party for whose benefit they are held? And yet, does not section 5333 require, at the very least, that, where specific property is bequeathed for the use of a direct heir during his life, and the remainder to collateral heirs at his death, without any power of sale or reinvestment, the tax shall be assessed immediately? In other words, the section presumes that the value of the property will not be changed during the existence of the prior estate in it; and this presumption is not rebutted.

Now, the will in question creates a trust for the benefit of the mother, who is to have merely the income therefrom. The power of sale, management and reinvestment is to be exercised, in accordance with the clear intention of the testator, with the purpose of preserving the corpus of the estate or enhancing its value, if possible. If the trustee discharges his duty with reasonable prudence he will maintain the value of the estate as a whole. It is my belief, then, that section 5333, General Code, shows a legislative intention to make the presumption above referred to applicable to a state of facts of this sort; that is to say, the indisputable presumption is that the trustee will discharge his trust and will maintain the corpus of the estate unimpaired.

For the reasons stated, I am of the opinion that the case is a different one from those discussed in the other opinion, which you have, and that the provisions of section 5333 are to be applied to the estate, as a subject of the collateral inheritance tax, at its present value.

I deem it proper, however, to state that I have assumed that the question in your mind has arisen because of the powers of sale, management and reinvestment possessed by the trustee; and not because of the quality of the estates possessed or to be possessed by the ultimate takers, who are subject to the tax. That is to say, I do not intend to pass upon the question as to whether or not the interests of those ultimate takers are vested, assuming that to be the case. Should it appear, under the exact language of the will, which you do not quote, that the case is otherwise, then, the rule formulated in the other opinion would apply.

Without citing the decisions, it may be sufficient to state that if the takers of the subsequent estates, as vested interests, can be now ascertained, so that at the death of the mother the distributive shares will be disposed of to them, or their personal representatives, the principles of this opinion will apply; but if the intention of the testator, as disclosed by the language of the will, is that the distribution at the death of the mother shall be among the survivors of those named as the ultimate takers, then, the interests of the latter cannot vest until that event takes place, and the principles of the other opinions are brought into play.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

808.

MANDAMUS—LICENSE—CHATTEL LOAN BUSINESS.

Mandamus will lie to compel the secretary of state to issue a license granting permission to engage in the business of making loans upon chattels or personal property, where the person seeking a license has done all things that the statutes make it his duty to do.

COLUMBUS, OHIO, March 13, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 2nd, wherein you state:

"I am enclosing you herewith the original applications and bonds of M. Blumberg & W. R. Teel, and M. Blumberg, for license to engage in the business of making loans upon chattels or personal property.

"I am also enclosing herewith a communication from J. Guy O'Donnell, prosecuting attorney of Miami county, Ohio, protesting against the issuing of any such license to M. Blumberg, for the reasons stated in said protest.

"Kindly advise what course I should pursue in the matter."

Sections 6346-1 and 6346-2 of the General Code of Ohio provide as follows:

"Section 6346-1. No person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever or of purchasing or making loans upon salaries or wage earnings without first having obtained a license so to do from the secretary of state.

"Each application shall be accompanied by a bond to the state of Ohio in the penal sum of two thousand dollars ($2,000.00) to the approval of the secretary of state. If any person shall be aggrieved by the misconduct of any such licensed person, firm or corporation or by his, their or its violation of any law relating to such business, and shall recover a judgment therefor, such person may, after return unsatisfied either in whole or in part of any execution issued upon such judgment, maintain an action in his own name upon such bond herein required in any court having jurisdiction of the amount claimed. The secretary of state shall furnish to any one applying therefor a certified copy of such bond filed with him, upon the payment of a fee of one dollar ($1.00) and such certified copy shall be prima facie evidence in any court that such bond was duly executed and delivered by the parties whose names appear thereon. Said bond shall be renewed and refiled at the time of making application for license, but said bond until renewed and refiled as aforesaid shall be and remain in full force and effect.

"Section 6346-2. Application for license to conduct such business must be made in writing to the secretary of state and shall contain the full names and addresses of applicants, if natural person, and in case of firms or incorporated companies, the full names and addresses of the officers and directors thereof and under what law or laws incorporated. the kind of business which is to be conducted, whether chattel mortgage or salary loan; the place where such business is to be conducted and such other informa-

tion as the secretary of state may require. The fee to be charged for said license shall be ten dollars ($10.00) per annum and such amount must accompany the application. Each license granted shall date from the first of the month in which it is issued and shall be granted for the period of one year, subject to revocation, as provided in this act, and such license shall be kept conspicuously displayed in the place of business of the licensee."

Sections 6346-3, 6346-4 and 6346-5 provide for certain things to be done by the licensee, and for the manner of the conduct of his business, with limitation on the amount of interest that may be charged as also the amount that may be charged for investigation, examination, collection and other purposes.

Section 6346-6 provides a penalty for violating the foregoing provisions, and that upon a second conviction it shall become the duty of the secretary of state to revoke a license issued to a person so convicted.

I have examined the various protests filed against the issuing of license to M. Blumberg, and, without passing upon either their sufficiency or their merits, but looking only to what may be the duty of the secretary of state under the present chattel loan law, I am of the opinion that the issuing of such a license by the secretary of state is purely a ministerial act, and that he is without power to judicially determine the fitness or nonfitness of the applicant.

You will recall the decision of the supreme court in the case of State ex rel. Brower vs. Graves, and the action of the court upon the answer filed in that case. In view of the court's attitude in that matter, and the well known principles of law with regard to officers whose duties are merely ministerial, I am of the opinion that mandamus would lie against you in the event that you refused to issue a license to a person who has done all things that the statute makes it his duty to do; and that in the case presented you have no option but to issue the license.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

810.

YOUNG MEN'S CHRISTIAN ASSOCIATION—YOUNG WOMEN'S CHRISTIAN ASSOCIATION—TEACHERS' AGENCY—EMPLOYMENT AGENCY—CHARITABLE INSTITUTIONS.

The young men's christian association, and the young women's christian association are charitable institutions within the meaning of the law, and therefore, exempt from the payment of a license fee under section 893, General Code. The same rule will apply to teachers' agencies and also ministerial associations, providing they are engaged in work of a charitable nature.

COLUMBUS, OHIO, March 5, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

(Attention Mr. Hammond.)

GENTLEMEN:—Under favor of February 13th, you request my opinion upon the following questions:

"1. Does a young men's christian association or a young women's association come within the meaning of the law respecting employment agency licenses?

"2. Are teachers' agencies subject to the law?

"3. Is a ministerial association a charitable association?"

Under date of January 16, 1914, I rendered you an opinion wherein I held that under sections 886 and 893, General Code, charitable organizations were not required to have a license for the operation of an employment agency wherein a charge for the service was made. These sections are as follows:

> "Section 886. No person, firm or corporation shall open, operate or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining a license from the commission of labor statistics, and paying to him a fee according to the population of the municipality as shown by the last federal census, viz.:
>
> | | |
> |---|---|
> | "In cities of 50,000, and upward | $100 00 |
> | "In cities of 16,000 to 50,000 | 75 00 |
> | "In cities of less than 16,000 | 50 00 |
> | "In villages | 25 00 |
>
> "The commissioners may refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies, or is not of good moral character.
>
> "Section 893. Except an employment agency of a charitable organization, a person, firm or corporation furnishing or agreeing to furnish employment or help, or displaying a sign or bulletin, or offering to furnish employment or help through the medium of a circular, card or pamphlet, shall be deemed a private employment agency, and subject to the laws governing such agencies."

The answer to each of your questions hinges upon the definition of a charitable organization. The word "charity" may be used in many senses and is employed in different connections and with different applications in many fields of the law. Thus the technical legal term "charity" is used with reference to a gift or a trust to be applied "consistently with existing rules of law for the benefit of an indefinite number of persons either by bringing hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life or by erecting or maintaining public buildings or works or by otherwise lessening the burdens of *government.*"

> Words and Phrases page 1074.
> 5 Am. & Eng. Encyc. of Law, p. 894.

In this connection the word "charity embraces of necessity a substantial element of publicity; that is, a gift or trust to come within the rules of law applicable to such technical term "charity" must tend in a way to benefit the public and to relieve the government of some of its burdens.

Thus it is well settled that a bequest for the benefit of defined persons is not a charity but a trust only, and as such is subject to the rules controlling *ordinary* trusts.

> 5 Am. & Eng. Encyc. of Law, 896.

So the word "charity" as employed in this sense can have no application to beneficial or charitable associations organized for the benefit solely of their own membership.

Swift vs. Eastern Beneficial Society 73 Pa. St. 362.
59 Maine 326.
Vol. 3 Am. & Eng. Encyc. of Law, 1044.
Vol. 5 Am. & Eng. Encyc. of Law, 894, et seq.
Words and Phrases, Title "Charity," p. 1077.

"Charity" in its broadest sense, however, is defined as follows:

> " 'Charity' in its widest sense, denotes all the good affections which men ought to bear towards one another, and in that sense embraces what is generally understood by benevolence, philanthropy, and good will. In its more restricted sense it means merely relief or alms to the poor."

Words & Phrases Vol. 2, p. 1074.
5 Am. & Eng. Encyc. of Law 894 and cases cited.

There is nothing in the statutes quoted above which serve of themselves to indicate the precise sense in which the term "charitable" is employed.

A review of the decisions dealing with exemption from taxation as the same pertains to charitable organizations however, sheds some light in this connection. The language of the constitution, article XII, section 2, the construction of which is involved in the cases of this state, exempts institutions of *purely public charity.* In the statute involved in your questions, however, it is a *charitable organization* which is exempted from the payment of a license fee. It is well settled that a license is in no sense a tax, and, therefore, the constitutional provision has no bearing upon this statute. It is very material, however, to note in considering the views of the courts with reference to the constitutional provision, that great stress is laid upon the necessity that the charity be essentially public in its nature. In the present statute reference is not made to the public nor is the term "charitable," as employed in section 893 of the General Code in any way limited by the term "public" or any similar adjective.

The following cases in Ohio under the constitutional provision referred to require the charity to be essentially public in order to allow the organization to take advantage of the exemption clause:

Library Assn. vs. Pelton, 36 O. S. 253.
Humphrey vs. Little Sisters of the Poor, 29 O. S. 201.
Davis, Auditor vs. Camp Meeting Assn. 57 O. S. 257.
Little vs. Seminary, 32 O. S. 417.
Myers vs. Aiken, 8 C. C. 232.
Gerke vs. Purcell, 25 O. S. 242.
Watterson vs. Halliday, 77 O. S. 150.

The case of Morning Star Lodge vs. Hayslip, 23 O. S. 145 is of especial importance in this connection. It was therein held that a charitable or beneficial association which extends relief only to sick and needy members and to the widows and orphans of its deceased members, is not an institution of *purely public charity.*

In other states, however, constitutional provisions exist which exempt "charitable institutions." The language employed being substantially the same as that of the statute in question, there being no qualifying adjective expressly restricting the charity to one of a public or general nature. Cases construing such provisions quite generally hold that charitable organizations which are not essentially public in their nature or such as are confined to the benefit of a limited and specified

number or even to the bent of their own members, come within the constitutional exemption from taxation. These decisions would seem to support a similar holding with reference to section 893 of the General Code. The following are examples of such holdings:

Fitterer vs. Crawford 157 Mo. 51.
Philadelphia vs. Masonic Home, 160 Pa. 572-577.
Hibernian Society vs. Kelley, 28 Oregon 173.
City of Petersburg vs. Petersburg Benevolent Assn., 78 Va. 431.
Union Pacific Ry. Co. vs. Artist, 60 Fed. 365.

Without quoting from these decisions at length in considering the difference in language between the constitution, as applied to exemption from taxation and the language of our statute and according due credence to the general rule running through the above quoted decisions, I am of the opinion that under the statutes under consideration an organization need not necessarily afford its advantages to the public or even to an indefinite and unascertained portion of the public to come within the exemption therein provided for.

The answer to each of your questions, therefore, depends on whether the organizations involved are charitable in their nature, regardless of whether or not the charity comprehended by the organization is a *public* charity or otherwise.

I am of the opinion that the term "charitable," therefore, must not be given its broadest comprehension. The following cases support the statement that, "the test which determines whether the enterprise is charitable or not is its purpose. If its purpose is to make profit it is not a charitable enterprise."

Long vs. Rosedale Cemetery, 84 Fed. Rep. 135.
Union Pac. Ry Co. vs. Artist 60 Fed. 365, 3rd syllabus, page 368.

An organization is certainly not a charitable organization if it is run for profit. In view of the above authorities, therefore, I may say that an organization is entitled to the xemption provided by section 893 of the General Code when the same is operated not for profit, and has for its purpose a charitable one, to wit, benevolence, philanthropy, good will, alms giving or some kindred good.

Under the rule established by the Ohio cases above cited, I am of the opinion that there can be no question but that a Young Men's Christian Association or a Young Women's Christian Association are " charitable organizations" and that they come within the meaning of the exemption provided by this statute. Indeed, in the case of Y. W. C. A. vs. Spencer, 9 C. C. n. s., 351, the court expressly recognized the Young Women's Christian Association as an institution of "purely public charity."

In the case of People ex rel. Brooklyn Y. M. C. A. vs. Willis, 52 N. Y. Supp. 739, the court said:

> "There can be no question that the Young Men's Christian Association is an association incorporated for charitable work as charity is understood and defined in the law. Not only is its work charitable but it is benevolent, and undoubtedly in the highest degree commendable and beneficial."

I have in mind the case of the Trustees of the Y. M. C. A. vs. City of Patterson, N. J. 61 N. J. L. 421, wherein the court held that the buildings of the Young Men's Christian Association were not used for exclusively charitable purposes, which the court considered to have application only to such charitable purposes as were deemed eleemosynary, to wit, purposes connected with the distribution of charity,

id est, of aid to the needy. Also the case of Chapman vs. Holyoke Y. M. C. A., 165 Mass. 280, wherein the court held that a Young Men's Christian Association was not a public charitable corporation whose purposes were not only charitable but also social, and whose benefits were confined to its members, and therefore, not entitled to exemption as a public charitable corporation.

I am of the opinion, however, that neither one of these cases can be reconciled to the Ohio rule. They are subject to distinction on several grounds. In the New Jersey case the court was required to restrict the exemption to buildings used *exclusively* for charitable purposes, and there is no such limitation in the statute upon which your questions hinge. The Massachusetts case involved exemption from liability for tort rather than exemption from a tax or license. At any rate, whatever force may be given to these decisions, it is clear that under the authorities, especially in Ohio, which authorities must be allowed to control, as laid down in the cases of Library Association vs. Pelton, Morning Star Lodge vs. Hayslip, Gerke vs. Purcell and the other decisions above referred to, an association such as the Young Men's Christian Association or the Young Women's Christian Association, whose benefits are open to all members of the public, subject to the same conditions, and which is operated without a view to profit, must be considered a charitable institution, and, therefore, exempt from the payment of a license under section 893 of the General Code.

In regard to your inquiries with reference to teachers' agencies and ministerial associations, I can only say that the information at hand by no means permits of the exercise of any judgment as to the real nature of these organizations. My advice as to the same, therefore, must be restricted to a reiteration of the rules above set out. In brief, if these organizations are of themselves primarily of a charitable nature, and if they are operated without a view to profit they may undoubtedly conduct an employment agency without having to procure a license so to do. If, however, these organizations are primarily engaged in some other activity, having in view in one way or another a pecuniary gain, and the employment agency even though such agency itself be not a paying proposition or even though it is not operated with the intention of deriving a gain therefrom, nevertheless if such agency is a mere incident to the primary object of an organization operating for gain, I am of the opinion that it would be necessary to procure a license. The question, therefore, is one of fact upon which I am unable to venture definite advice without further information.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

811.

FREE TURNPIKE ROAD COMMISSIONERS—CUSTODY OF FUNDS—COUNTY COMMISSIONERS—COUNTY AUDITOR—ROAD IMPROVEMENT.

Funds arising from the sale of bonds from the construction of a free turnpike under section 7232, et seq., General Code, should be deposited with the treasurer of the county and paid out by him upon the warrant of the county auditor. The road commissioners have no right to the custody of such funds.

COLUMBUS, OHIO, March 10, 1914.

HON. WM. C. BROWN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Under date of January 20th you submitted for an opinion, the following:

> "Would you kindly give an opinion as to the right of free turnpike road commissioners to the custody of funds arising from the sale of bonds, sold for the purpose of creating a fund to construct a free turnpike road? That is, should such funds by law be deposited in the county treasury and the payments made by approval of the county commissioners upon warrant of the county auditor on the treasurer, or have the road commissioners the right to such custody of the funds that they may deposit the same in a bank and receive interest on daily balances therefrom, accruing to the benefit of the district taxed for such road improvement."

The identical question presented by your inquiry was decided in the case of State ex rel. Sapp, et als. vs. John L. Means, Auditor, Common Pleas Court of Jefferson county. Judge Worley in the opinion says:

> "Now we come to the question in case bonds are sold and funds are raised by the sale thereof, how should such funds be paid out? An immediate answer to that question is that the funds so raised should be paid out exactly the same way as the statute provided they must be paid out where the funds are raised solely by taxation, which is by the treasurer on the warrant of the auditor, he being first directed in writing to so do by the road commissioners.
>
> "And, as reasons for the answer which I give I say first that the statute is entirely silent on the subject so far as any direct and express provision is concerned. But by analogy it should follow the same rule as is prescribed for money raised by taxes. Why should it not be so? And if it should be paid out by the treasurer on the warrant of the auditor, then as a matter of course it must be first placed in the county treasury.
>
> "A second reason is that there is no statutory authority whatever for the road commissioners receiving the money on the sale of the bonds and depositing the same where they please and paying it out as they see fit. Such a method of handling the public funds is unusual and I may say unreasonable, and to so handle public funds cannot be presumed by a mere failure to give express direction as to how the same may be handled, deposited and paid out.
>
> "As a third reason I say that nowhere in the statutes is there any warrant for the handling of public moneys according to the method that

is claimed on behalf of the road commissioners in this case. And that being true, this is a very good reason in my judgment, why such authority as is now claimed on behalf of the road commissioners, the relators in this case, cannot arise by implication. It is wholly contrary to the policy of the law with respect to the handling of public funds. As a fourth reason I call attention to the fact that as originally enacted, section 7283, which provides for the sale of the bonds, and section 7284, which provides for their payment, was one and the same section enacted at the same time and so related to each other that the provisions of section 7284 must necessarily be read with reference to the provisions of 7283, and when so read, I think warrant the conclusion which I have reached, that the funds raised by the sale of the bonds must be paid out in exactly the same manner as are funds raised by taxation either by the general tax or the extra tax. And, as a fifth reason for the answer which I have given, I call attention to the provisions of the section 7308, which among other provisions contains this language:

" 'Whenever any free turnpike road constructed in accordance with the provisions of this chapter, shall have been fully paid for, and the bonds and coupons, if bonds have been issued thereon, shall have been redeemed, and the pike commissioners of such road shall have ceased to exist, and any money remaining in the treasury of the county in which such road was or shall be constructed, and which was derived from taxation or the sale of bonds to construct such road, shall, upon the order of the county commissioners be paid over, upon the warrant of the county auditor in such amounts and at such intervals as they deem proper, to the pike superintendents as the case may be, to be by such superintendent or superintendents used, under the provisions of chapter eight, title four, part two, in making repairs of such road for the construction of which such remaining money was raised. And this provision shall apply in all cases where there is now a balance remaining in the county treasury, as well as to all such cases as may arise in the future.'

"It will be noticed that this provision refers to the money arising from the sale of bonds being in the county treasury. But it is claimed upon the part of these relators that it does not necessarily go into the county treasury, but that they may place it where they see fit to place it.

"But I say that the language of this statute clearly indicates that the proper place for it is in the county treasury and that if any of it remains after the improvement has been paid for, then it may be paid out by the county treasurer as the section provides.

"Now as a sixth reason for answering the question as I have, that this money arising from the sale of bonds should be paid into the county treasury, I call attention to sections 2294 and 2295 of the General Code.

"Section 2294 refers to the sale of bonds by county commissioners, by boards of education and by commissioners of free turnpikes, just such commissioners as are the relators in this action.

"Section 2295 provides as follows: 'None of such bonds shall be sold for less than the face thereof, with any interest that may have accrued thereon, and the privilege shall be reserved of rejection of any or all bids.

"If bids are rejected the bonds shall again be advertised.

"All money from both principal and premiums on the sale of such bonds, shall be credited to the fund on account of which the bonds are issued and sold.

"Notice the provision which says that the money arising from the sale of such bonds, which includes the kind of bonds attempted to be sold in this case, shall be credited to the fund on account of which the bonds are issued and sold.

"Now what does that mean? How could they be credited to this fund, if they are placed in some private bank? Who has charge of the fund on account of which these bonds are sold? Who is the custodian of that fund? Who keeps the account? Who does the crediting?

"It is wholly foreign to our ideas to keep public funds and the account thereof by anybody except the treasurer of the political division in question, which in this case is the county treasury. No political division has any connection with it other than the county; the township does not have any connection with it. There is no provision in the statute that these road commissioners shall have a treasury or a treasurer or shall be the custodian of funds except for the incidental purposes of paying the same out. So that it seems to me that the only reasonable construction that can be placed upon sections 2294 and 2295 is, that in case of the sale of bonds such as were attempted to be sold in this case, that the county treasurer shall have the custody of the proceeds of such sale, and that he shall keep a record of the funds pertaining to the improvement, and that he shall credit the proceeds of the sale of the bonds to such funds. He does that by virtue of his office, and by virtue of the general powers conferred upon him by law, but no other body or officer is in any way authorized to keep a record of such fund.

"So for all of these reasons I am constrained to believe that the money arising from the sale of bonds as in this case, must necessarily, under the law, be paid into the county treasury.

"In reaching this conclusion, and with reference to the provisions of the law in section 7284, as to the method of paying out the funds arising from the extra taxes, I have not overlooked the provisions of section 7260, which among other things contains the following statement, to wit.

" 'So much of the taxes mentioned in section 7257, levied and collected on taxable property within the bounds of a road located under the provisions of this chapter, which is not discharged in labor, and which is paid into the county treasury, shall be paid by the treasurer, upon the warrant of the county auditor, to the road commissioners of such road to be expended by them in constructing it, and to the payment of the principal and interest of bonds, if any have been issued therefor, this section shall apply to such taxes as have been levied theretofore and have not been paid to township trustees.'

"Now it is true that that section does provide that these general taxes referred to therein shall be paid by the treasurer upon the warrant of the county auditor to the road commissioners of such road to be expended by them in the construction of it. But I take it that that section even though the language of it is different from section 7284, nevertheless means precisely the same thing, which is that the funds therein referred to, shall be paid upon the warrant of the county auditor by the treasurer at the direction of the road commissioners. From these authorities and the construction which I have placed upon these various sections of the statute, I am fully convinced that this money arising from the sale of bonds should be paid into the county treasury, and for that reason that the contract which the road commissioners entered into, requiring them to deposit the money elsewhere is illegal and void."

The reasoning of Judge Worley seems to me to be sound, and the holding in this case, in my judgment, is correct.

I am, therefore, of the opinion that the funds arising from the sale of bonds for the construction of free turnpikes, under sections 7232, et seq., should be deposited with the treasurer of the county and paid out by him upon the warrant of the county auditor. The road commissioners have no right to the custody of such funds.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

812.

CONSTRUCTION OF THE PHRASE "IN WHICH SAID TAX ORIGINATES."

The meaning of the phrase "in which said tax originates," as used in section 5332 as amended in 103 O. L., 463, is that the situs of the property passing by descent, devise, or deed or gift for general property taxation purposes in this state determines the place of the origination of the tax.

COLUMBUS, OHIO, March 14, 1914.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 26th, requesting my opinion as to the meaning of the phrase "in which said tax originates," as used in section 5332, as amended, 103 Ohio Laws, 463.

The language in question is simply a paraphrase of article XII, section 9, of the constitution, as recently amended. In fact, it was, evidently, in deference to the requirement of this provision that this particular change was made in section 5331, which in this respect reads as follows:

> "Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates."

However, I have found no clue in the debates of the constitutional convention of 1912 adequately disclosing the meaning of the phrase in question, as it is employed in the constitution.

I find no similar provision in any of the inheritance tax statutes of other states.

Accordingly, I have been obliged to arrive at the conclusion which I shall hereafter express by process of elimination.

The following meanings might be, conceivably, applied to the language in question:

1. The place where the testator died; inasmuch as it is his death which creates the estate of inheritance.
2. The place where the executor resides; because, as you state in your letter, he is obliged to pay the tax and it is to come out of funds in his hands.
3. The place where the will is probated; inasmuch as it is this act which gives final effect to the disposition made by the testator of his estate.
4. The domicile of the testator at his death.
5. The situs of the property passing, by will or otherwise, considered for purposes of property taxation.

I can think of no other possible meanings which might be given to the language in question.

The first of these meanings must be rejected, when section 5331, in its entirety, is considered. One of the essential provisions of the section is that all property and interests therein, subject to the jurisdiction of this state, which passes by one of the three modes mentioned to persons other than those in the direct line of ascent or descent of the testator or decedent, shall be subject to the tax. The effect of this is that, if real estate located in Ohio passes by descent, devise or deed of gift, to a person whose interest therein is taxable, the tax is to be charged and collected, and fifty per cent. of it must go to some taxing district in this state. So, if the owner of the property should die in another state, the use of the first meaning would lead to impossible consequences.

For similar reasons, the second above suggested meaning must be rejected, as it is possible that the executor of the estate might be a non-resident of this state.

The third possible meaning must be rejected for two reasons: 1st, because it is not necessary that the property pass by will, it being sufficient that it passes by descent or deed of gift; and, second, because such a meaning would give the taxes to the county seat in all cases, whereas the plain purport of the statute is to the contrary.

The fourth suggested meaning must be discarded, for reasons similar to those advanced by me in discussing the first and second meanings, respectively. That is to say, the decedent might have been domiciled in another state at the time of his decease; in which event the adoption of the meaning now under discussion would afford no rule for the distribution of the tax assessed, on account of the devolution of real property located in Ohio.

By process of elimination, then, I have arrived at the choice of the fifth suggested meaning, and I am of the opinion that the situs of the specific property passing, by descent, devise or deed of gift, for general property taxation purposes in this state, determines the place of the origination of the tax for the purposes of section 5331, General Code.

That situs, in my judgment, is to be determined with respect to the situation of the property as it existed at the death of the decedent; that is just prior to his death. In this sense effect is given to the principle that the testator's death creates the inheritance and gives rise to the liability for the tax; thus, in a way, "originating" the latter. So, if the property passing by inheritance be real estate, the taxing district in which the tax originates, as to that portion of the estate, is that district in which the real estate is located; if the property so passing be tangible personal property, the district in which the tax originates is that district in which it would have been listed for general property taxation by the testator, at the time of his death, under the statutes providing for the place of listing tangible personal property; if the property so passing consists of moneys, credits or investments, then (with certain possible exceptions, it not being my purpose to go into complete detail in this opinion) the tax originates in the district in which the decedent was domiciled at his death.

By adopting the rule which I have laid down, a place for the origination of the tax will be furnished as to all property "subject to the jurisdiction of the state" within the intendment of section 5331; whereas, the adoption of any other rule creates the possibility, at least, of failing to assign a "district of origination" to some inheritances of property subject to such jurisdiction.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

813.

SAVINGS AND LOAN—FOREIGN SAVINGS AND LOAN COMPANY—THE RIGHT TO ADVERTISE IN OHIO.

Where a foreign savings and loan company advertises in a newspaper in Ohio the payment of six per cent. on savings and paid up stock, the soliciting of business by such company in such manner does not come within the meaning of the phrase "doing business" as employed in section 678, General Code.

COLUMBUS, OHIO, February 26, 1914.

HON. JAMES A. DEVINE, *Inspector Building & Loan Associations, Columbus, Ohio.*

DEAR SIR:—Under date of January 16, 1914, you wrote asking an opinion of me, and in your communication you say:

> "The enclosed letter from Charles O. Britton, Esq., counsellor at law, Indianapolis, Ind., on behalf of the Union National Savings & Loan Association of that city, is referred to you with request that you advise us what, in your opinion, constitutes 'doing business' under sections 678, et seq., of the General Code of Ohio.
>
> "This question was raised through having referred to this department an advertisement in a Dayton, Ohio, newspaper wherein this association advertised the payment of '6% on savings and paidup stock,' whereupon we called their attention to the requirements of the Ohio Laws covering the transaction of business in this state by such foreign associations. The enclosed letter resulted therefrom."

Section 678, General Code, provides as follows:

> "Foreign building and loan associations doing business in this state shall conduct such business in accordance with the laws governing domestic associations. No foreign building and loan association shall do business in Ohio until it procures from the inspector of building and loan associations a certificate of authority to do business in this state after complying with the following provisions:
>
> "1. It shall deposit with the inspector one hundred thousand dollars, in cash or bonds of the United States or this state, or of a county or municipal corporation therein, satisfactory to the inspector.
>
> "2. It shall file with the inspector a certified copy of its charter, constitution and by-laws, and other rules and regulations showing its manner of conducting business together with a statement such as is required annually from all associations.
>
> "3. It shall also file with the inspector a written instrument, duly executed, agreeing that a summons may issue against it from any county in this state direct to the sheriff of the county in which the office of inspector is situated, commanding him to serve it by certified copy personally upon the inspector or by leaving a copy thereof at his office. The inspector shall mail a copy of any papers served on him to the home office of such association."

Statutes of similar import to the above, applying to foreign corporations of different kinds, have been enacted in practically all of the several states and the

provisions of these statutes in respect to what constitutes "doing business" within the meaning of these terms have been construed in many decisions of the courts. In these decisions, however, the courts for the most part have refrained from formulating any general rules for determining when a foreign corporation is "doing business" within the meaning of such statutes, but have contented themselves in determining whether, under the facts in particular cases, such corporations are within the statute. As might be expected, the question has arisen most frequently with reference to mercantile and commercial corporations. The decisions construing statutes of this kind, with respect to the class of corporations just noted, have been influenced in a large measure, by the fact that the commerce clause of the federal constitution limits to a considerable extent, the power of the states to enact measures restricting the business of foreign corporations of this kind.

Insofar as any general rule can be gathered from the decisions, the phrase "doing business" within any particular state as applied to foreign mercantile and commercial corporations, implies corporate continuity of conduct in respect to such business; such as might be evidenced by the investment of capital; the maintenance of an office for the transaction of business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on business.

Penn Colliers Co. vs. McKeever, 183 N. Y., 98.
Simmons-Burk Clothing Company vs. Linton, 90 Ark., 76.
Kilgore vs. Smith, 122 Pa., 48.
Caesar vs. Capell, 83 Fed. Rep., 403-422.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.
Toledo Commercial Co. vs. Glenn Mfg. Co., 55 O. S., 217, 222, 223;

With reference to such foreign corporations as insurance companies, investment companies and building and loan companies, I am not prepared to hold that the reason and purpose of statutes of this kind as applied to such corporations, require such evidence of intended business continuity in order to bring them within the meaning of the phrase in question. As to such companies, business done or transacted within the state through any agency, is "doing business" in such state.

Rose vs. Kimberly, 89 Wis., 545.
Swing vs. Munson, 191 Pa. St., 582.
Farrier vs. New England Mort. Security Co., 88 Ala., 275.
Hacheny vs. Leary, 12 Ore., 40.
Dundee vs. Mortgage Trust and Investment Co., 95 Ala., 318.
State vs. Bristol Savings Bank, 108 Ala., 3.
State ex rel. vs. Co-operative Homestead Co., 47 Wash., 239.
Maine Guarantee Co. vs. Cox, 146 Ind., 107.
Casualty Co. vs. Banking Co., 12 C. C. (n. s.) 200.
State vs. Insurance Co., 24 C. C., 387.

Doing business within the meaning of statutes of this kind means transacting some act of business of the character for which the foreign corporation was organized and it has therefore been held, as often as the question has arisen, that the act of the foreign corporation in selling and placing its corporate stock, does not offend statutes of this kind.

Payson vs. Withers, 5 (U. S.), 269.
Bartlett vs. Choteau Ins. Co., 18 Kans. 369.
Bank vs. Leeper, 121 Mo. App., 688.
Union Trust Co. vs. Sickles, 125 App. Div. (N. Y.), 105.

I take it, however, that the matters advertised by the company referred to in your communication, had no reference to the corporate stock of such company, but that the matter so advertised was something pertaining to the ordinary and usual business of the company. The act of the company, however, in advertising the payment by such company of "6% on savings and paid up stock" was not doing business in the sense that any business was thereby transacted, but at most this advertisement was but a solicitation of business and as to this it has been held as often as the question has been presented, that mere solicitation of business is not "doing business" within the meaning of statutes of this kind. It is true that the decisions in many of the cases touching this point, have been influenced by the commerce clause of the federal constitution, but in other cases where this constitutional provision did not apply and was not taken into consideration, the decisions have been to the same point. Thus in the case of Board vs. The Union & Am. Publishing Co., it was held that soliciting subscriptions for a newspaper published in another state, by a corporation, was not "doing business" within the state of Alabama, within the meaning of the constitution of that state, prohibiting foreign corporations from doing any business in the state without having at least one known place of business and an authorized agent or agents therein.

In the case of American Contractor Publishing Co. vs. Bagge, 91 N. Y. Supp., 73 it was held that where a foreign corporation was engaged in publishing a magazine in Illinois and employed an agent in New York who merely solicited orders for advertisement, which orders were required to be forwarded to Illinois for acceptance and if accepted, the advertisement appeared in the magazine, such transaction did not constitute doing business in New York within the meaning of the statutes of that state, requiring foreign corporations doing business in New York, to obtain a certificate from the secretary of state and pay a license tax. While a state has no power to prevent its citizens from making contracts in another state, it has the undoubted right to prohibit to an unauthorized foreign corporation, the right to solicit business within its jurisdiction, when such business is not protected by the commerce clause of the federal constitution. Nutting vs. Mass., 183 U. S., 553.

With respect to foreign building and loan companies, the statute has not prohibited them from soliciting business in the manner disclosed and called in question. By your communication, and on the considerations hereinbefore noted, I am of the opinion that the act of the company in question, in soliciting business in the manner indicated, does not come within the meaning of the phrase "doing business" as employed in section 678, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

814.

BOND ISSUE—ATTORNEY'S FEE—TRANSCRIPT.

The city of St. Marys is without authority to pay the sum of two hundred and sixty dollars for the service of attorneys to whom was submitted a transcript of proceedings in connection with the issue and sale of bonds; this fee was included as a part of the bid.

COLUMBUS, OHIO, March 19, 1914.

HON. L. C. BRODBECK, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—I have your letter of March 4, 1914, as follows:

"On December 7, 1913, Spitzer-Rorick & Company of Toledo presented a bid to J. F. Boos, city auditor of St. Marys, Ohio, for a series of bonds that were to be issued within a short time thereafter.

"On the 17th day of December, 1913, the council of the city of St. Marys, Ohio, by resolution, awarded the bonds in question to Spitzer-Rorick & Company.

"You will notice in the fourth paragraph of the bid, that Spitzer-Rorick & Company included as a part of their proposition that the sum of $260.00 be allowed them as attorney fees.

"The question bothering me at this time is as to whether or not such an allowance would be legal, that is, whether or not the city of St. Marys could pay the sum of $260.00 to Spitzer-Rorick & Company for the services rendered by the attorneys to whom they submitted the transcript of the proceedings."

Section 3924 of the General Code reads:

"Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder, after thirty days' notice in at least two newspapers of general circulation in the county where such municipal corporation is situated setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale. Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the direction of the mayor and the officers and agents of the corporation by whom such bonds have been, or shall be, prepared, advertised and offered at public sale."

Nowhere in the statute is the municipality given any authority to reimburse the bidders for fees paid to attorneys by them in passing upon the validity of the bonds, and this department has frequently held that this may not be done. Accordingly, it is my opinion that the city of St. Marys is without authority to pay the sum of two hundred and sixty dollars to Spitzer-Rorick & Company for the services rendered by the attorneys to whom they submitted transcript of the proceedings in connection with the issue and sale of the bonds.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

815.

BOARD OF HEALTH—REFUSE—PUT-IN-BAY.

The board of health of the village of Put-in-Bay, or the board of health of the township in which this village is located, as the case may be, has the right, within their respective jurisdictions, to abate a nuisance caused by the throwing of refuse from boats into the bay.

COLUMBUS, OHIO, March 4, 1914.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—I have your favor of February 2, 1914, asking an opinion of me, in which you say:

> "For several years we have had complaints from the health authorities of Put-in-Bay in regard to the practice of excursion boats throwing refuse such as papers, remains from lunches, sweepings, etc, into Put-in-Bay while the boats are at the docks. The local board of health is anxious to take some action to prevent this practice, if within its jurisdiction, and I should be glad if you will inform me if the local board of health or the state board of health has the authority to issue an order to companies or persons operating these boats to provide other means for disposing of their wastes.
>
> "You will realize the necessity of some action if you have taken occasion to observe the manner in which the beach at Put-in-Bay is littered with rubbish of all descriptions."

I take it that the local board of health referred to in your communication is the board of health of the village of Put-in-Bay.

Section 4404, General Code, provides that the council of each municipality shall establish a board of health, composed of five members, to be appointed by the mayor and confirmed by council, but shall serve without compensation and a majority of whom shall be a quorum, and that the mayor shall be president of such board by virtue of his office. It is further provided in said section, that in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. It is provided that such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be aproved by the state board of health.

Section 4413, General Code, provides as follows:

> "The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded, and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances."

By section 4420, General Code, it is provided that the local board of health shall abate and remove all nuisances within its jurisdiction. Section 4414 and 4415, General Code, provides as follows:

"Section 4414. Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense.

"Section 4415. If such violation, obstruction, interference or omission be by a corporation, it shall forfeit and pay to the proper municipality a sum not to exceed three hundred dollars, to be collected in a civil action brought in the name of the municipality. Any officer of such corporation having authority over the matter, and permitting such violation, shall be subject to fine or imprisonment, or both, as heretofore provided. The judgment herein authorized being in the nature of a penalty or exemplary damage, no proof of actual damages shall be required, but the court or jury, finding other facts to justify recovery, shall determine the amount by reference to all the facts, culpatory, exculpatory, or extenuating, adduced upon the trial."

The question presented is one as to the power of the local board of health of the village of Put-in-Bay to meet the situation indicated in your communication.

In the case of Edson vs. Crangle, 62 O. S., 49, it was held that the boundary line between the United States and Canada through Lake Erie is the northern boundary of this state, and its jurisdiction extends to that line. The village of Put-in-Bay is a municipal corporation and it may be a matter of some question whether its authority or that of any of its agencies would extend to the abatement of existing nuisances in the waters of Put-in-Bay and Lake Erie, outside the corporate limits of the municipality.

Savors vs State of Ohio, 8 N. P. (n. s.), 228.
State vs. Savors, 15 C. C. (n. s.), 65.

There is no question, however, as to the power of the local board of health to abate nuisances on the beach, which is within the corporate limits, nor as to its power by proper order to prohibit actions beyond the corporate limits, the natural and obvious effect of which is to create a nuisance on the beach within its jurisdiction.

"It is the place where the nuisance is caused and not the place where the act is done causing the nuisance, that determines the venue. McClain criminal law, section 1177."

Strawboard Company vs. State, 70 O. S., 140-147.

From the tenor of your communication, I take it that the beach affected by the nuisance in question is a part of the village, but if it should appear that any part of the beach affected by the nuisance is outside the limits of the municipality and in the township, you will note that section 3391, General Code, provides that in each township the trustees thereof shall constitute a board of health which shall be for the township outside the limits of any municipality.

Sections 3392 and 3394 of the General Code, provide:

"Section 3392. The township board of health may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of all nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of villages, (and the) record thereof shall be given in all courts of the state, the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by posting them in five conspicuous places within the township.

"Section 3394. Township boards of health shall have the same duties, powers and jurisdiction, within the township and outside of any municipality as by law are imposed upon or granted to boards of health in municipalities, and any violation of any order or regulation of such township board made pursuant to such authority, or obstruction or interference with the execution thereof, or wilful or illegal to obey such orders or regulation, shall be punished, and the prosecution thereof instituted and conducted in the same manner, and the fines and penalties and the disposition thereof, and the punishment shall be the same as is provided by law for the prosecution and punishment of the violation of any like order or regulation of boards of health in municipalities."

It follows that by force of the statutory provisions above noted, that the local board of health of the village of Put-in-Bay, or the board of health of the township, as the case may be, has ample power and jurisdiction to provide for the abatement of the nuisance in question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

816.

CITY ENGINEER—RIGHT TO ACT AS CONSULTING ENGINEER.

The city engineer of a city may be employed as consulting engineer in the installation of a water system and receive additional compensation for such work, providing he has sufficient time to properly discharge the duties of both positions.

COLUMBUS, OHIO, March 7, 1914.

HON. E. W. NEWKIRK, *City Solicitor, Wooster, Ohio.*

DEAR SIR:—I have your letter of January 23, 1914, as follows:

"The city of Wooster will soon take the necessary steps to enlarge and extend its water system so as to procure more and pure water. The city has been advised by the state board of health to employ a consulting engineer to supervise the testing of the new source of water supply, and I presume to supervise the installation of the new or extended waterworks system.

"Our regular city engineer claims that he is able to do this work and wants to be employed to do it. He is by ordinance paid a certain salary during the winter months, and a considerably larger salary during the

summer months. The question is, has the service director, or, if he has not, has the council by ordinance a right to employ the present city engineer to do the above additional work and agree to pay him a salary or fee in addition to his regular salary for said work."

Section 1240 provides in part:

"No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system, or purification works for a water supply or a sewage, of a municipal corporation or public institution, or make a change in the water supply, waterworks intake, water purification works of a municipal corporation or public institution, until the plans therefor have been submitted to and approved by the state board of health."

From this section it is clear that your city must submit its plans for the installation of the proposed new water system, to the state board of health for approval, but this does not give the board any voice in the selection of an engineer to direct the work. That is a matter for the consideration of your city authorities.

It will not be claimed by any one, I am sure, that it is the official duty of the city engineer to act as a consulting engineer in connection with the installation of a new water system. Such work is neither incident or germane to his duty as city engineer. The question then is, can the city engineer be employed to act as consulting engineer on such work and be paid additional compensation. Judge Dillon, in his work on municipal corporations, says on page 740, in a note to section 426:

"Payments of additional compensation to a city surveyor held valid for preparing plans and specifications for a general system of sewage disposal not contemplated when his salary was fixed and the work was outside his official duties."

Collock vs. Dodge, 105 Wis., 187.

The statutes in that case were very similar to our own. The charter of Madison provided for the election by the council of a city surveyor, who was required to be a practical surveyor or engineer and the council was authorized to prescribe his duties and fix the fee and compensation for his services. It also empowered the council to impose additional duties upon officers whose duties were therein prescribed, and to fix the compensation of all officers elected by it, *which should not be increased or diminished during the time such officer remained in office.* The charter nowhere prescribed the duties of the surveyor except that he should act upon the board of sewage assessors. The council although it had prescribed from time to time the duties of the surveyor as to street improvements, had never taken such action in regard to building sewers except to recognize that such services were not official duties. The council having adopted a general system of sewage disposal, employed "D.," who had theretofore been elected city surveyor, and his salary as such fixed before the beginning of his term of office, to prepare plans and specifications therefor and agreed to pay him for such plans and specifications, etc., compensation in addition to his salary as city surveyor. In an action by a taxpayer to restrain the payment of such additional compensation and to recover back what had already been paid, it was held that the legislature had delegated to the council the power to prescribe the duties of the city surveyor and to fix the fee and compensation for any services performed by him; that the council had determined that the services in question were not official services; and

that under the charter provisions this was not such an unwarranted exercise of power as to call for the intervention of the courts. It was said by the court in that case:

> "We concede the rule, in all its amplitude, that a person, accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary and that no very nice distinctions should be indulged as to what are and what are not official duties. But the rule, nevertheless, has its limit. It does not follow that public officer is bound to perform all manner of public services without compensation because his office has a salary attached to it, nor is he, in consequence of holding an office, rendered legally incompetent to discharge duties which are extra-official outside his official duties as prescribed."

Mechem, on Public Officers, Sec. 863.
State ex rel. Seattle vs. Carson, 6 Wash., 250.
U. S. vs. Brindle, 110 U. S., 688.
See Eagle River vs. Oneida Co., 86 Wis., 266.

In our own state it was held in Lewis, Auditor, vs. State ex rel., 11 O. C. D., p. 647:

> "The services performed on the decennial board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners, are without the scope of their official duties as such and are not so 'incident' or 'germane' to the regular duties of the office to which they have been respectively elected, as to make the provision for compensation contained in the Hendley law in contravention of the act of the legislature, 94 O. L., 396, or the constitution, article II, section 20."

In White vs. East Saginaw, 43 Michigan, 567, it was said:

> "The imposition of new duties not 'incident' or 'germane' to the regular duties of his office upon an officer, does not change his office, but invests him with a new office."

There is nothing in the statutory laws of the state preventing the same person from holding the position of city engineer and being employed as consulting engineer in connection with the installation of a new waterworks system for the city, neither does the common law rule of incompatibility forbid one person holding the two positions; nor is such person precluded from receiving the salaries or compensations attached to both employments.

Since it is a well established principle of law, that where one person may legally hold two different positions and does hold them, he may receive the salary of both, for these reasons and from a consideration of the authorities quoted, it is my opinion that your city engineer may be employed as consulting engineer in the installation of a new water system and receive additional compensation for such work, assuming of course, that he has sufficient time to properly discharge the duties of both positions.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

817.

FEES—INHERITANCE TAX—COLLECTION OF TAXES.

The fees allowed the county treasurer under the inheritance tax law are fixed by section 2685, General Code. The fees of the auditor, treasurer and probate judge are a part of the costs of collection and other necessary and legitimate expenses referred to in section 5346, General Code.

COLUMBUS, OHIO, March 3, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of February 19th, requesting my opinion upon the following questions:

> "What are the fees of the county treasurer under the inheritance tax law, upon moneys collected by him in connection therewith?
>
> "Are the fees of the auditor, treasurer and probate judge to be considered as a part of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes, as referred to in section 5346, G. C., to be deducted from the amount of such taxes as directed by said section?"

Section 2685, General Code, provides as follows:

> "On settlement semi-annually with the county auditor, the county treasurer shall be allowed as fees on all moneys collected by him on any tax duplicate other than the liquor and cigarette duplicates, the following percentages: On the first one hundred thousand dollars, one and one-half per cent.; on the next two million dollars, five-tenths of one per cent.; on the next two million dollars, four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portion of the revenue payable to the state as well as to the county, township, corporations and school district; and all moneys collected on liquor and cigarette duplicate, one per cent., on all moneys collected otherwise than on the said duplicates, except moneys received from the state treasurer or his predecessors in office, or his legal representatives or the sureties of such predecessors, and except moneys received from the proceeds of the bonds of the county or of any municipal corporation, five-tenths of one per cent. on the amount so received, to be paid upon the warrant of the county auditor out of the general fund of the county."

The form given above is that found in 102 O. L., 277, when the section was last amended.

In my recent opinion to the auditor of state, a copy of which you have, I held that the collateral inheritance tax is a "tax collected on a duplicate" within the meaning of sections like the above; therefore, I am of the opinion that the first sentence of the section applies to and governs the fees of the treasurer about which you inquire.

However, the second sentence relating to the apportionment of the compensation does not control because of the conflicting provisions of section 5346, General Code, discussed in the former opinion.

Answering your second question, I am of the opinion that the fees of the auditor, treasurer and probate judge are clearly to be considered a part of the cost of collection and other necessary and legitimate expenses referred to in section 5346, and are to be deducted from the amount of the taxes as directed in said section.

I must confess that the conclusion which I have reached respecting the fees of officers under the collateral inheritance tax are far from satisfactory to myself. There should be at an early date some legislation which will clear up the entire subject.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

818.

OFFICES COMPATIBLE—HUMANE SOCIETY AGENT—PROBATION OFFICER.

A humane society agent may also be appointed to act as probation officer of the juvenile court.

COLUMBUS, OHIO, March 6, 1914.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 21, 1914, as follows:

> "In the administration of the new juvenile code, we are urging all of the juvenile courts to appoint a regular probation officer at such salary as the work involved may warrant.
>
> "In consultation with certain judges, the question has arisen whether there is any legal restriction against the appointment, as probation officer of the juvenile courts, of a person now serving as a regularly appointed agent of the humane society. Most of these societies are more or less supported from the public funds and it is not clear at all to us whether such real employment would be incompatible."

Section 10070 of the General Code, authorizing the appointment of humane society agents, reads:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense and there forthwith make complaint on oath or affirmation of the offense."

Section 1662 of the General Code, as amended 103 O. L., p. 874, providing for the appointment of probation officers for the juvenile court, reads in part:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be women, to serve as probation officers, during the pleasure of the judge."

Section 1663 of the General Code, reads:

"When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect, or dependency, the parentage and surrounding of such minor, his exact age, habits, school record, and every fact that will tend to throw light upon his life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct. He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person so arrested pending the issuance of a warrant, and perform such other duties incident to their offices, as the judge directs."

The statutory law of the state does not prohibit one person from holding both of these positions nor does the common law rule of incompatibility show them to be incompatible. Neither is there anything to prevent one person from drawing the salaries of both positions. Since it is a familiar principle of law that where an officer by law may and does hold two offices, he may receive the salaries of both.

I am therefore of the opinion that a humane society agent may also be appointed and act as probation officer of the juvenile court.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

819.

UNION CEMETERY—VILLAGE CEMETERY—CEMETERY FUNDS—DEPOSITORY.

Where a union cemetery has been controlled jointly by a village council and a township, the withdrawal of the township leaves the cemetery for control as a village cemetery, and the funds for this cemetery are to be controlled under the laws in relation thereto; these funds might be deposited at interest under the provisions of section 4295, *General Code.*

COLUMBUS, OHIO, March 16, 1914.

HON. P. R. TAYLOR, *Solicitor Port Jefferson, Sidney, Ohio.*

DEAR SIR:—I have your letter of March 6, 1914, in which you inquire:

"There is a union cemetery used jointly by the village of Port Jefferson and Salem township. Our understanding is that a considerable time ago the trustees of Salem township withheld from the management and control of this cemetery, under the provisions of section 4196, G. C.

"In view of this, and of the repeal of sections 4184 and 4185, G. C., by the act of the legislature, 103 O. L., 272, who is now custodian of the cemetery fund? It appears to me that in all probability the village treasurer might be such custodian, though nothing is said in the statute about it.

"I further would ask your opinion as to whether this cemetery fund, which now amounts to $5,000.00, is to be considered a fund of the municipality and as such capable of being let by contract to a depository, so as to cause the fund to earn some interest."

Section 4196, General Code, reads:

"A municipal corporation or township united with another municipal corporation or township, or both, in the establishment or control of a union cemetery, may by a resolution of the council of the corporation or of the trustees of the township and with the consent of the council of the remaining corporation and trustees of the remaining township or townships, withdraw from the management and control of such cemetery, and relinquish the interest of such corporation or township therein, and thereupon the cemetery shall be under the management and control of the remaining corporation and township, or corporations and townships."

If, as I understand your letter, Salem township withdrew from the management and control of this cemetery under this section, then it would seem to me that the cemetery fund, as it existed when the withdrawal was completed would follow the cemetery and under the management and control of the remaining corporation, i. e., the village of Port Jefferson.

The only reason to my mind for the statute requiring the assent of those remaining to the withdrawal of those going out, is to be found in the character of the management and the condition of the cemetery fund and the withdrawal and relinquishment mentioned in section 4196, cannot be construed as limited to the cemetery itself and leave the funds for future disposition, joint control or subsequent bickering.

The repeal of sections 4184 and 4185, G. C., has been construed by this office as not calling for additional legislation, and as still leaving the control of union cemeteries in the township treasury and the council of villages under the provision of section 4193, G. C. A copy of this opinion will be furnished you on request, but inasmuch as it applies to continuing control of union cemeteries and your inquiry goes to control after a withdrawal under section 4196, I do not think the same of sufficient importance to enclose a copy at this time.

The withdrawal of Salem township leaves the cemetery for control as a village cemetery and the funds (cemetery) about which you inquire are to be controlled under the laws in relation thereto; and it would seem to me that this cemetery fund might be deposited at interest under the provisions of section 4295, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

820.

COUNTY COMMISSIONERS—AGRICULTURAL SOCIETIES—CONSTRUCTION OF HIGHWAYS.

1st. County commissioners may permit a voluntary agricultural society to use township road building machinery.

2nd. The county commissioners have no authority to contract for the repair of roads without advertisment and competitive bidding with the association mentioned. A contract may be made with this association provided it is the lowest competitive bidder answering the advertisement.

3rd. Before the roads of a county can be improved or repaired, under the terms of house bill No. 444, at least ten per cent. of the total cost must be contributed by private parties, and a commission appointed, as provided in section 1. Contracts under this act must be made by this commission.

COLUMBUS, OHIO, March 9, 1914.

HON. H. R. LOOMIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Under date of October 1, 1913, you inquired of me as follows:

> "There has been organized in the county of Portage a voluntary association consisting of about two thousand members, the purpose of which is to improve the agricultural conditions of the county and the public highways. The county commissioners have levied a tax for the improvement of the public roads during the year 1914. The commissioners and this association are desirous of entering into an arrangement whereby the association will do the actual construction work of improving the highways, the county commissioners to pay the actual costs of the work.
>
> "In trying to find a way to carry out this purpose several questions have arisen which the commissioners have requested me to submit to you for determination:
>
> "First. Have the county commissioners authority to buy road building machinery and permit the association to use such machinery in repair of the highways within the limits of the county, such work being done at actual cost and there being no profit to the association? (See sections 7432 of the General Code and 7481 of the General Code.)
>
> "Second. Can the county commissioners without advertising for competitive bids, contract with this association to repair and maintain the county highways when such repair consists of cutting down hills, filling depressions on the roadways, of opening existing ditches, constructing necessary drainage and repairing surfaces with gravel, slate or slag, even though the amount expended on a certain mile of road may exceed $1,000.00 (See section 7419, et seq.)
>
> "Third. Can the county commissioners contract with said association for the purposes mentioned in question two, where the association does not pay ten per cent. of the cost of improvement?
>
> "Fourth. Before the county commissioners can contract with this association for the improvement of the highways, is it necessary that a commission be appointed as provided by house bill No. 444, page 732, volume 103 of Ohio Laws, provided the association prefers not to have a commission appointed by the court of common pleas, but to contract directly with the county commissioners?"

Sections 7432, 7480 and 7481 of the General Code relate to the purchase and use by county commissioners of road machinery. They are as follows:

> "Section 7432. The county commissioners may procure, by purchase or otherwise, the necessary tools and machinery for the purpose of making the repairs heretofore provided for.
>
> "Section 7480. The county commissioners, if they deem it to the public interest to do so, may purchase machinery or tools adapted for use in the construction or repair of roads, employ the necessary labor to operate them and pay therefor out of funds on hand applicable to the construction or repair of roads in the county. Payment therefor shall be made from the county treasury upon a warrant issued by the county auditor upon the order of the county commissioners.
>
> "Section 7481. Such machinery and tools shall be available for use in the construction, improvement or repair of such county or township roads within the county as the county commissioners shall from time to time order and direct."

Section 7432 is incorporated in the chapter relating to road repairs, and sections 7480 and 7481 are incorporated in the miscellaneous chapter of the road statutes.

It will be observed that the county commissioners by virtue of section 7432 may purchase tools and machinery for use in making road repairs. Section 7480 gives them authority to purchase machinery or tools for the construction or repair of roads and pay for same out of any funds in the county treasury applicable to the construction or repair of roads, and directs how such payment shall be made. Section 7481 authorizes county commissioners to direct the use of such machinery and tools, and specifically states that the same shall be available for the construction or repair of such county or township roads as the commissioners may direct.

There is no doubt of the power of the county commissioners under these statutes to purchase such road machinery and pay the cost thereof, as well as the cost of the labor necessary to operate the same, out of the county treasury. As the use of such machinery is limited only to such township and county roads as the commissioners may direct, and since there is no provision in the statutes limiting the use thereof to any particular officer or person, so long as the same is used on county or township roads, I see no reason why the commissioners cannot allow the association provided for by section 12 of house bill No. 444 to use such machinery.

Your second question relates to the power of county commissioners to contract for the repair of roads without advertisement and competitive bidding, and involves consideration of the statutes embodied in the chapter on road repairs—sections 7407-7458. The other sections of the chapter either have no connection with the subject or provide for repairs in special cases.

Section 7422 makes it the duty of county commissioners to

> "cause all necessary repairs to be made for the proper maintenance of all improved roads in the county * * *."

Section 7427 requires the commissioners to

> "fix a day on which they will let to the lowest and best bidder the job of furnishing and delivering such materials, so estimated, in such amounts and at such places as is decided upon by them."

Section 7428 provides for the making of a contract with the successful bidder for the furnishing and delivery of material and section 7430 allows county commissioners to employ labor by the day for making such repairs, or they may, by virtue of section 7431,

> "divide the work into convenient sections and let to the lowest and best bidder or bidders, the job of making the repairs for one year, according to specifications to be submitted to the bidders. In such event the notices, contracts and bonds to be given, entered into, and furnished, shall be in accordance with the provisions of sections seventy-four hundred and twenty-seven, seventy-four hundred and twenty-eight and seventy-four hundred and twenty-nine."

When proceeding under sections 7422, et seq., it is mandatory upon the county commissioners to award contracts for *furnishing and delivering material* upon advertisement and competitive bidding. They have the discretionary power to employ labor by the day or they may advertise for bids for the furnishing thereof and award the contract to the lowest bidder. The association would not stand in any different relation toward the county commissioners in this respect than a private individual.

I am of the opinion that the commissioners may contract with the association for furnishing and delivering material, and doing the work of repair for a period of one year, providing bids have been advertised for and the association is the lowest bidder, but they cannot contract with the association to repair and maintain roads without advertising for competitive bids.

Sections 7443, 7445, 7446, 7447 and 7451 provide:

> "Section 7443. All macadamized or graveled free roads, whether constructed under the general or local laws by taxation or assessment or both, or converted by purchase or otherwise from a toll road into a free road under any law, and all turnpike roads, or parts thereof, unfinished or abandoned by a turnpike company, and appropriated or accepted by the commissioners of the county, shall be kept in repair as provided hereafter in this chapter.
>
> "Section 7445. In each county, the county commissioners are constituted a board of turnpike directors, in which the management and control of all such roads therein shall be exclusively vested.
>
> "Section 7446. The directors, at their first meeting, shall divide the county into three districts, as nearly equal in number of miles of turnpike, and conveniently located, as is practicable, and each director shall have the personal supervision of one of such districts, subject to all rules and regulations that may from time to time be agreed upon by the board. The directors shall hold a meeting as the board at least once in three months, at their office at the county seat, and be governed in all transactions by the rules governing county commissioners.
>
> "Section 7447. The directors may appoint suitable persons to superintend the work of repairs on the several roads, who shall give bond and security to the satisfaction of the directors for the faithful performance of their duties, and take and subscribe an oath, which shall be endorsed on the back of the bond, and filed in the auditor's office of the county.
>
> "Section 7451. The directors may contract for labor and material, either at public sale or private contract, as will best subserve the interests of the different roads, and shall certify to the county auditor, on or before

the first Monday in June each year, the amount of money necessary for the purpose of keeping such roads, including the bridges and culverts thereon, in good repair."

I am of the opinion that the turnpike directors, under these sections, cannot contract direct with the association for the repair and maintenance of roads. The commissioners may appoint superintendents and may contract for labor and material without competitive bidding, but must do the work of repair themselves through their agents, the superintendents to be appointed under section 7447.

Your third and fourth questions involve the construction of house bill No. 444 (103 O. L., 732).

Sections 1 and 12 of said act, provide:

"Section 1. When the county commissioners of any county have determined to improve one or more highways within such county and any person, persons, firm, partnership, corporation or association of persons desire to contribute a fund for the purpose of assisting in the improvement of such highway, such fund to be not less than ten per centum of the total cost of such improvement, the said person, persons, firm, partnership, corporation or association may apply to a judge of the court of common pleas of the county, who may appoint four suitable and competent freeholders of the county who shall, in connection with the county commissioners, constitute a commission for the purpose of the improvement of such road and serve until its completion.

"Section 12. Whenever, in any county in the state, there shall be a bona fide, voluntary association, either incorporated, or unincorporated, not for profit, of not less than one thousand citizens of any county, one of the purposes of which organization is the improvement, maintenance and repair of the public highways of said county, the commission as provided for in section one of this act, having the right to expend money in grading, draining, curbing and improving county and state highways by the use of gravel, macadam, stone, brick, slag or other material, or expending money for improving, maintaining and repairing said highways, from the public funds under their charge and control, applicable for the construction, maintenance or repair of public highways, may, without the necessity of petition being presented by property owners or of advertising for competitive bids, make contracts with said association, or its proper representatives, to do such work of grading, draining, repairing and improving county or state highways within said county, by the use of gravel, macadam, brick, slag or other material and for the betterment generally of the highways of said county and make payments thereof out of any road or bridge funds under the control of said respective boards of officials, in the treasury, or levied for the purpose of constructing, maintaining and improving the public highways in said county."

The intervening sections of the act deal with the compensation of the commission provided for by section 1, their bond, oath of office, payment of expenses, employment of engineers, etc., and as they are not pertinent to the questions raised, I refrain from quoting them.

Before the roads of a county can be improved or repaired under the terms of house bill No. 444, at least ten per cent. of the total cost thereof must be contributed by private parties and a commission appointed as provided in section 1. Contracts under this act must be made by the *commission* and not by the county commissioners in any event.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

821.

"BLUE SKY" LAW—WHAT CONSTITUTES SECURITIES UNDER THIS LAW.

A corporation organized under the laws of Ohio and engaged in the business of furnishing supplies to its members, consisting of drugs and automobile accessories, where membership certificates are sold at twenty-five dollars each, the purchasers of these certificates have no voice in the management of the supply company and do not participate in the profits of the company. No certificates of stock are issued in this company, and in fact a member is not a stockholder in the company. These membership certificates sold in this way and on the above stated terms do not constitute securities within the meaning of the Ohio "blue sky" law.

COLUMBUS, OHIO, March 14, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Under date of March 3, 1914, I received a communication from the securities department of your office asking my opinion on a question stated therein, as follows:

"A corporation organized under the laws of Ohio is engaged in the business of furnishing 'supplies' to its members—these supplies consisting of drugs and automobile accessories. The object is to secure a large membership and buy these supplies in wholesale quantity, selling to the members at a wholesale price, plus the actual overhead charges of the supply company. Memberships are sold for twenty-five dollars each and the holders of membership certificates have no voice in the management of the supply company, and by the express terms of the membership contract, have no right to participate in the profits of the company, and no future claim for the return of the twenty-five dollars paid for the membership certificate. The theory of the supply company being that the twenty-five dollars received for membership certificates has been expended in the campaign for membership at the time it is received from the members.

"Each holder of a membership certificate deposits a certain amount of cash with the supply company for the purpose of guarantee payment of his account. The member is then at liberty to buy of the company an amount not exceeding the amount of his cash deposit. That cash deposit is returned to the holder of the membership certificate at any time he sees fit to withdraw from the supply company, of course, deducting therefrom any unpaid amount due from him to the supply company at the time of such withdrawal. The cash deposits are placed in the hands of the treasurer, who is under bonds, and they never at any time pass into or become a part of the assets of the company, but remain always the property of the member.

"The twenty-five dollars originally paid for the membership, as above stated, becomes the property of the supply company. No certificate of stock is issued and in fact, the member is not a stockholder in the supply company.

"Are the membership certificates, sold in this way and on these terms, 'securities' within the meaning of the so-called 'Ohio blue sky law?'"

Section 1, 103 O. L., 743 (Section 6373-1, G. C.), provides as follows:

> "Except as otherwise provided in this act, no dealer shall, from and after the first day of August, A. D., 1913, within this state, dispose or offer to dispose of any stocks, bonds, mortgages or other instruments evidencing title to or interest in property or other securities of any kind or character (all hereinafter termed 'securities'), issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit, organized under the laws of this state) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so as to do as hereinafter provided."

Section 2 of this act specifically exempts from the meaning of the term "securities" certain instruments therein designated, and further excepting conditionally certain persons, both natural and artificial, from the meaning of the term "dealer," defines that term as follows:

> "The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose of any security, through agents, or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters, or any stock promotion scheme whatsoever."

It is further provided by this section of the act that the term "dispose of" shall be construed to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for."

I take it that the corporation in question is one organized for profit, otherwise under the provisions of section 1 of the act, the question presented could not arise. As a corporation for profit it must have a capital stock (section 8667, G. C.), and the only persons who in any proper sense can be said to be "members" of this corporation are its stockholders. The transaction between the company and its patrons, designated in your communication as "members," is that the company for a consideration of $25.00 sells to such persons the privilege of buying from it supplies at wholesale price plus an amount sufficient in the aggregate to meet the overhead expenses of the company; and as this privilege does not appear to be assignable it is to be considered personal and exclusive to the persons paying the consideration to the company.

I do not have before me one of the "certificates" issued by the company, but in its essence I apprehend that it but imports a receipt for the money paid and states or evidences the agreement between the company and the person to whom it is issued defining his privilege to purchase supplies from the company at the rates above specified. The question is whether these certificates so issued are "securities" within the meaning of this act. This act does not define the term "securities" either in general terms or by a statement of the specific instruments or things included within its meaning. Within the purview of the question presented the descriptive language of section 1 is as follows:

> "* * * any stock, bonds, mortgages, or other instruments evidencing title to or interest in property or other securities of any kind or character, (all hereinafter termed 'securities'), issued or executed by any private or quasi-public corporation, co-partnership, or association (except corporations not for profit), organized under the laws of this state)."

The certificates mentioned in your communication are not stocks, bonds or mortgages, nor are they in any sense instruments evidencing title to or interest in property; and if they are within the purview of this act at all, they must fall within the meaning of the words "or other securities of any kind or character."

The Century dictionary defines a "security" as "an evidence of debt or property, as a bond or certificate of stock." A similar definition of the term was noted in the case of Mace vs. Buchanan, 52 S. W., Rep. (Tenn. 507), and the court in this case, by way of suggestion rather than as an attempt at accurate definition, says that this term is generally understood to refer to live and negotiable commercial obligations, or state, county, government or municipal bonds.

Considering the current and accepted definitions of the term in the light of the provisions of section 1 of the act, it can be safely said that the word "security" means some instrument or thing importing or evidencing a debt or importing or evidencing some interest in or title to property.

In no view can the certificates issued by this corporation as described by you fall within the signification of the term "securities" above noted.

Again, I apprehend that insofar as the term "securities" may be ascribed to instruments executed and issued by corporations, it has, generally, reference to instruments executed and issued in the exercise of its corporate functions rather than to instruments evidencing contractual obligations made or executed in the transaction of its ordinary business.

Aside from the consideration last noted, however, I am of the opinion that the certificates issued by this corporation in the manner described in your communication, do not come within the purview of this act.

In conclusion, I note that a number of the sections of the act under consideration were amended at the recent special session of the legislature, said sections as amended to become effective as law within the time prescribed by the constitution. Within the purview of the question presented by you, the descriptive language of section 1 of the act as amended (section 6373-1, G. C.) is

> "* * * any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property issued or executed by any private or quasi-public corporation, co-partnership, or association (except corporations not for profit)."

Without particular discussion it may be noted as apparent that the certificates issued by this corporation do not come within the signification or meaning of any of the particular instruments included within the descriptive language of the section as amended, above quoted. On the considerations above noted, the question presented by you is answered in the negative.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

822.

TERM OF OFFICE—INCREASE IN SALARY—VILLAGE TREASURER.

If a village passed an ordinance December 29, 1913, increasing the salary of the village treasurer, such ordinance would apply to the salary of the incoming treasurer, who would take his office on January 1, 1914, and would permit him to draw the increased salary during his term of office, after the ordinance goes into effect.

COLUMBUS, OHIO, March 13, 1914.

HON. AUGUSTUS W. MITHOFF, *City Solicitor of Basil, Lancaster, Ohio.*

DEAR SIR:—I have your letter in which you inquire:

> "If the village council should pass an ordinance on December 29, 1913, increasing the salary of the village treasurer, would such ordinance apply to the salary of the incoming treasurer, who takes his office on January 1, 1914, so as to permit him to draw the increased salary during the term of his office."

This question was presented to my predecessor, Mr. Denman, in 1911, and in an opinion to Van A. Snider, city solicitor, Lancaster, Ohio, it was said:

> "Section 126 M. C., provides as to salaries fixed by council that they,
> "'Shall not be increased or diminished during the term for which he (the municipal officer) may have been elected or appointed.'
> "Under the provisions of this section it is clear that if the ordinance in question became effective on January 6, 1910, its changes will not be effective as to those officers who took office on January 3rd. This question, in turn, depends upon whether the ordinance is one of a general and permanent nature requiring publication as prescribed in section 1695, R. S."

Later the same question was presented again and in an opinion to Hon. H. M. Houston, city solicitor, Urbana, Ohio it was stated:

> "Therefore, an ordinance fixing salaries which either increases or diminishes such salaries passed by council prior to the officer or employe, whose salary is so fixed, entering upon his term, while it remains inoperative sixty days, yet insofar as the officer is concerned, is, as I view it, a valid ordinance fixing his salary as determined by such ordinance at the expiration of said sixty days. Such officer or employe would, therefore, be entitled to the salary under the old ordinance until the new ordinance would go into operation at which time he would be entitled to the salary as fixed by the new ordinance. In other words, it would seem to me that the ordinance having been passed prior to the officer or employe entering upon his duties and merely the operation of the same being postponed, it could not be considered that such change, due to the new ordinance going into operation after the officer or employe entered upon his duty, increases or diminishes his salary as the case may be, within the meaning of section 4213 of the General Code.
> "Therefore, it would seem to me that an ordinance passed before December 31st, midnight, not having received the action above indicated, could not be considered as a valid ordinance. If before that time such ordi-

nance has received the above indicated action it would be considered as an ordinance passed by the outgoing council, but such ordinance would, under the provisions of the initiative and referendum act, not become effective until sixty days after the passage thereof. If an ordinance increasing or diminishing the salary of a mayor who takes office January 1, 1912, does receive such action prior to December 31st, midnight, I am of the opinion that the mayor would be entitled to the salary fixed by the ordinance which the new ordinance supersedes up to the time such new ordinance becomes effective under the initiative and referendum act, and thereafter would be entitled to the salary under the new ordinance."

Outside of Ohio, where no case directly in point can be found, the only case I have been able to find holds:

"Although the ordinance did not, because of the necessity of publishing it, take effect until after the term began, it nevertheless fixed the salary for that term and having been passed before the term, the plaintiff took his office with the right to the benefit of its provisions, provided it should become a law. To give the ordinance such effect is not in contravention of but in accordance with the terms of the legislature. Stuhr vs. Hoboken, 47 N. J. L., 149."

The syllabus (2) of the above case reads:

"Where, after an ordinance is passed, fixing a salary for the ensuing term, an officer is elected, the ordinance will fix the salary for that term, although it did not, because of the necessity of publishing it, take effect until after the term began."

The opinion of my predecessor seems to have been overlooked when the Houston opinion was written, as it was not mentioned, but be that as it may, I adhere to the Houston opinion and now advise you that it furnishes the correct rule of law in the premises.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

823.

JUVENILE COURT—THE APPOINTMENT OF A JUVENILE COURT CONSTABLE—VALIDITY OF SUCH APPOINTMENT.

The appointment of John Weinig as special court constable in the juvenile court, Hamilton county, Ohio, as evidenced by the records of the entries filed and entered in the court of common pleas of Hamilton, county, Ohio, was in all respects valid, and all questions with reference to the particular services to be rendered by the appointee should be determined by the court itself.

COLUMBUS, OHIO, March 16, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of February 19, 1914, I received a communication from your office, advising that a question had been officially presented to your office with respect to the validity of the appointment of Mr. John Weinig, an attorney of your city, to act as special court constable in the juvenile court of Hamilton county. It appears that on February 9, 1914, Hon. Krank M. Gorman, one of the judges of the court of common pleas of that county, was designated by the judges of the court of common pleas, superior court of Cincinnati, and the insolvency and probate courts of Hamilton county, to act and preside as the judge of the juvenile court for a term of one year.

The appointment of Mr. Weinig, as special court constable, and the designation of his duties are evidenced by two separate entries filed and entered in the juvenile court and the court of common pleas of said county, respectively, as follows:

"JUVENILE COURT OF HAMILTON COUNTY, OHIO

"No.

"In the matter of the appointment of John W. Weinig, special court constable. } ENTRY.

"In the opinion of the court the business of the juvenile court of Hamilton county requires the appointment of a special court constable. It is therefore ordered by the court that John W. Weinig be and he hereby is appointed as a court constable to attend to the assignment of all cases in the juvenile court of Hamilton county; to aid and assist in the administration of justice therein, and to preserve order therein; to prepare all legal documents necessary to be used in said court, including subpoenas, warrants, citations, etc., to collect evidence for the prosecution of cases in said court, and to prosecute under the directions of the court, any and all persons who aid, abet, induce, cause, encourage, or contribute toward the delinquency of a minor under the age of eighteen years, and all persons who contribute to the dependency of said minors; and to perform all such other duties and services as the court may direct.

"The compensation of said John W. Weinig is hereby fixed at twelve hundred ($1,200.00) dollars per annum, payable in monthly installments as provided by law, upon the order of the juvenile court.

"John W. Weinig, having been appointed court constable, appeared in open court this day, accepted said appointment, was duly sworn according to law and assumed his duties as said appointee."

"COMMON PLEAS COURT OF HAMILTON COUNTY, OHIO.

"No.

"In the matter of the appointment of John W. Weinig, special court constable. } ENTRY.

"In the opinion of the court, the business of the court of common pleas and of the juvenile court of Hamilton county requires the appointment of a special court constable. It is therefore ordered by the court that John W. Weinig be and he hereby is appointed as a court constable to attend to the assignment of all cases in the juvenile court of Hamilton county; to aid and assist in the administration of justice therein and to preserve order therein; to prepare all legal documents necessary to be used in said court, including subpoenas, warrants, citations, etc.; to collect evidence for the prosecution of cases in said court and to prosecute under the directions of the court, any and all persons who aid, abet, induce, cause, encourage or contribute toward the delinquency of a minor under the age of eighteen years, and all persons who contribute to the dependency of said minors; and to perform all such other duties and services as the court may direct.

"The compensation of said John W. Weinig is hereby fixed at twelve hundred ($1,200.00) dollars per annum, payable in monthly installments as provided by law, upon the order of the juvenile court.

"John W. Weinig having been appointed court constable, appeared in open court this day, accepted said appointment, was duly sworn according to law and assumed his duties as said appointee."

Sections 1 and 10 of article 4 of the state constitution, provide as follows:

"Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

"Section 10. All judges, other than those provided for in this constitution shall be elected, by the electors of the judicial district for which they may be created, but not for a longer term of office than five years."

Section 15 of article 4 of the constitution provides:

"Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein."

Section 1639, General Code, as amended, 103 O. L., 417, 418, sections 1692 and 1693, General Code, as amended, 103 O. L., 417, 418, provide as follows:

"Section 1639. Courts of common pleas, probate courts, and insolvency courts and superior courts, where established, shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. The judge of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such juris-

diction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner. The words 'juvenile court' when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction.

"Section 1692. When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases. .

"Section 1693. Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year, in counties where more than one judge and not more than three judges hold court at the same time, not to exceed one thousand dollars per year, and in counties where only one judge holds court, two and one-half dollars each day, and shall be paid monthly from the county treasury on the order of the court. Such court constable or constables may, when placed by the court in charge of the assignment of cases, be allowed further compensation not to exceed one thousand five hundred dollars, as the court by its order entered on the journal, determines."

As I see it, the primary question here presented is whether the juvenile court so called, is in a broad and complete sense a court separate and distinct from the several courts mentioned in section 1639, General Code, the judges of which designate the judge of the juvenile court; for if the juvenile court in legal contemplation is a separate and distinct court, I am unable to see any statutory authority for the appointment made. There are no statutory provisions authorizing the appointment of court constables as such, in juvenile courts so called, and section 1692 authorizes the courts therein named to appoint constables for their own respective courts only.

In the case of Mendelson vs. Miller, 11 N. P. (n. s.), 586, 588, the court (Philip, J.) says:

"We are dealing with a court. And what is a court? Without attempting to be severely accurate, I will say that a court is a governmental body or tribunal, clothed, with a judicial function. To constitute a court, there must be a judge, or judges, and he or they must have a defined and delegated jurisdiction. But before we can have judges and jurisdiction, these must be provided for by the constitution or by law.

"For the legislature to enact that there shall be a court; for it to fix the number of judges, to define the jurisdiction, and to prescribe the precedure, etc., is to establish a court."

In the case of Ex-parte Bank, 1 O. S., 432, 434, the court, speaking with reference to sections 1 and 10 of article 4 of the state constitution, as they then stood, says:

> "Thus all the judicial power of the state is vested in the courts designated in the constitution, and in such courts as may be organized under the first section. But it is perfectly clear that, upon the creation of any additional court by the legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the legislature to clothe with judicial power any officer or person, not elected as a judge."

Measured by the principles above stated, it is apparent that the juvenile court, so called, of Hamilton county, is not in any complete or proper sense, a separate and distinct court, either as to organization or jurisdiction, but is only a forum for the transaction of certain distributed business, concurrent jurisdiction of which is vested in the courts first specifically named in section 1639. In recognition of this status of the juvenile court, in the case of Travis vs. State, 12 C. C. (n. s.) 374, it is said:

> "The judges of courts having like original jurisdiction, may arrange for a proper distribution of the business coming before said courts. * * * * * * * * * * * *
> The act in question (juvenile court act) authorizes the judges of the several courts of equal jurisdiction, to designate one who shall hear and dispose of the business in which each is given equal original authority. Jurisdiction consists of the power to hear and determine. The source of this power resides in the legislature. In this act it is conferred upon the several courts named by that authority, and the mere selection by the several judges of one to dispose of the business, is not conferring jurisdiction. For, without such designation, either of the courts named could entertain jurisdiction of the matter specified in the act; whilst if the authority was conferred upon the judges, neither of said courts should exercise the power to hear and determine unless authorized by the judges before hand. The court first acquiring jurisdiction would hold it until the action was finally disposed of."

It seems clear that the fact that a particular judge of the common pleas court is designated to sit in a juvenile court, does not in any way change the quality of that particular judge. He is still a common pleas judge and in transacting the business of the juvenile court, he is exercising the jurisdiction of the common pleas court. In the exercising of his judicial functions, he remains the common pleas court of the county as much so as any other of the judges of said court.

By force of the express provision of section 1692, General Code, the common pleas court as such, had power to appoint Mr. Weinig as special court constable, if, in the opinion of the court, its business required such appointment, and the fact, if such it be, that the appointment was made by one judge of that court rather than by the whole body of judges thereof, is immaterial, at least in the absence of a rule of court, requiring such appointments to be made by all of the judges of the court jointly.

Moreover, the entry in the common pleas court recites that the appointment of Mr. Weinig is made by order of the court; this imports verity and is conclusive in this respect with reference to the question presented.

My conclusion, therefore, with respect to this phase of the question presented, is that the attempted appointment evidenced by the entry filed and entered on the records of the juvenile court, was without authority and is therefore invalid, but, that the appointment of Mr. Weinig evidenced by the entry filed in the common pleas court was authorized by statutory provision and is therefore valid, as far as

his status as special court constable is concerned, with full right to enjoy the emoluments of the position. On considerations before noted, it seems clear to me that the fact that the duties to be performed by Mr. Weinig are to be performed with reference to the business of the juvenile court, in no wise effects the question as to the validity of his appointment as special court constable in the common pleas court.

It may be a question whether, under the provisions of section 1692, G. C., Mr. Weinig, as such special court constable, can be required to act as prosecutor in cases before the juvenile court. The statute provides that such court constable may be bound to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. Under a familiar rule of construction, it is possible that the general language of the section just noted should be restrained in its meaning and limited to duties of a like kind with those enumerated. However, this is a question between the court and its appointee and in no wise affects the question as to the validity of the appointment of Mr. Weinig as court constable. Under his appointment as court constable, he is unquestionably authorized to perform some of the duties delegated to him in the entry of his appointment in the common pleas court and the fact, if so it be, that he cannot be required and is not authorized to perform other of the duties therein delegated, does not obviously affect the validity of his appointment with the right and duty upon him to perform such services as are not quesetioned. If the right of the appointee to prosecute any particular case before the juvenile court is questioned, such right can be challenged by the party aggrieved and his competency to act can then be determined by the court.

Section 1664, General Code, provides as follows:

> "On the request of the judge exercising such jurisdiction, the prosecuting attorney of the county shall prosecute all persons charged with violating any of the provisions of this chapter."

This section does not confer upon the prosecuting attorney of the county any absolute duty with its correlative right, with reference to the prosecution of persons before the juvenile court, his duty and right in any case is conditional on the request of the judge that he should so act.

Section 1662 of the General Code, as amended, 103 O. L., p. 874, provides that the judge transacting the business of the juvenile court may appoint one or more persons to serve as probation officers and the number of the persons who may be so appointed is only limited by the provision that the entire compensation of all probation officers in a county shall not exceed the sum of $40.00 for each full thousand inhabitants of the county at the last preceding census.

Section 1663, General Code, provides generally with reference to the duties of such probation officers, and with reference to the question here presented it may be noted that many of the services contemplated in the appointment of Mr. Weinig, as special court constable, could have been secured by his appointment as probation officer. However, the only question here presented is with respect to the validity of the appointment of Mr. Weinig as court constable, and finding as I do that there was power in the common pleas court to make such appointment, it obviously does not affect the question that the same services might, in many respects, have been secured by his appointment as probation officer.

I am of the opinion that his appointment as such special court constable was in all respects valid and that all questions with reference to the particular services to be rendered by the appointee should be determined by the court itself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

824.

TRANSPORTATION OF HIGH SCHOOL PUPILS—LAWS REGULATING SUCH TRANSPORTATION.

When a pupil resides five miles from any high school and has a high school in its district not closer than five miles, and no high school in any district nearer than five miles, free transportation to such high school may be furnished by the board of education when the nearest high school is its own high school. The board of education cannot under any circumstances furnish transportation to such pupil to any high school except its own.

COLUMBUS, OHIO, March 3, 1914.

HON. R. W. CAHILL, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Under date of November 28, 1913, you submitted for an opinion the following request:

> "When a pupil lives five miles from any high school and has a high school in its district not closer than five miles, and no high school in any other school district nearer than five miles, would the pupil be entitled to transportation to the nearest high school under favor of section 7748, General Code of Ohio?"

In reply to your inquiry, section 7748 of the General Code provides as follows:

> "A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; *except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school.* Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate."

Said section contains the provision that a board of education maintaining a high school must pay the tuition of all successful applicants who have complied

with the further provisions thereof, and who reside more than four miles by the most direct route of public travel from the high school provided by such board, when such applicants attend a *nearer high school.* Or, in lieu of paying such tuition, such board of education so maintaining a high school, may pay for the transportation of pupils living more than four miles from the *said high school maintained by the said board of education, to said high school.* In accordance with the phraseology employed in said section, it is apparent when a pupil lives more than four miles by the most direct route of public travel, from the high school provided by such board, and attends a nearer high school, that such board of education must do one of the two things prescribed by said section, that is to say, such board must either pay the tuition of such pupil, if such pupil attends a nearer high school than the one provided by said board, or, in lieu of paying such tuition, such board of education is required to furnish transportation for such pupils living more than four miles from the said high school, by the most direct route of public travel, which is maintained by the said board of education. It seems to be the legislative intent that the provision for furnishing transportation shall be limited to furnishing transportation to the said high school maintained by the said board of education in its own district, and said provision is not so broad that such board is required to furnish transportation to such pupil or to entitle such pupil to transportation to a high school other than its own high school. As before stated, such board of education is limited to furnishing transportation to such pupils to its own high school in lieu of paying the tuition of such pupils to a nearer high school than the one provided by such board.

Construing said section in accordance with the terms therein contained, it follows that such board can only pay the tuition of such pupils living more than four miles from the high school maintained by said board, measured by the most direct route of public travel, when such pupils attend a nearer high school, but cannot furnish transportation to such nearer high school. Such board can only furnish transportation to such pupils to its own high school.

For the foregoing reasons, I am of the opinion that such pupil is not entitled to transportation to the nearest high school, under favor of said section, unless in line with the foregoing, such nearest high school happens to be its own high school, for the reason that such board cannot, under any circumstances, furnish transportation for said pupils to any high school except its own.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

825.

SELECTION OF A CITY HOSPITAL SITE—BOND ISSUE.

Where a city has voted bonds to procure the necessary real estate and build a hospital thereon, the city council makes its selection of the hospital site, and determines as to the erection, repair or rebuilding of such hospital.

COLUMBUS, OHIO, March 7, 1914.

HON. C. E. RUBLE, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I have your letters of January 7, and February 21, 1914, in which you inquire:

> "1st. A candidate is elected to a city office. The council passes an ordinance and it is signed by the mayor, a day or two before his term commences increasing his salary $200.00 per year. Can he benefit by it?
>
> "2nd. Our city has voted bonds to procure the necessary real estate and build a hospital thereon. Who selects the site for the hospital?"

In answer to your first question I hand you herewith copy of an opinion covering the question sent to Hon. A. W. Mithoff, village solicitor of Bazil, Ohio.

Answering your second question attention is called to section 4022, General Code, which reads:

> "Such council may agree with a corporation or association organized in the municipality for charitable purposes, for the erection and management of a hospital for the sick and disabled, and a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them. The council shall provide for the payment of the amount agreed upon for such interest, either in one payment or installments or so much each year as the parties may stipulate."

Section 4023, General Code, reads:

> "When the council of a municipality enters upon and takes possession of grounds purchased, appropriated, or otherwise obtained for hospital purposes, and, by resolution or ordinance, determines to erect thereon or rebuild a hospital, the erection and repair thereof, or any addition thereto, shall be vested in a board of five commissioners, called the 'board of hospital commissioners.'"

These sections seemingly answer your question to the effect that the council makes the selection of the site and determines as to the erection, repair or rebuilding of a hospital.

It will be seen by reference to section 4029, General Code, that the plans, specifications and drawings are to be prepared by the "board of hospital commissioners," and while the contract is to be made "in the name of the corporation" (section 4030) it would appear (inferentially at least) that the contract should be made by the board. (Section 4031, G. C.)

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

826.

CIVIL SERVICE—OFFICIAL HOLDING OVER—NON-COMPETITIVE EXAMINATION—HEALTH OFFICER.

Where a health officer was appointed for a term ending December 31, 1913, and the first meeting of the board of health was held January 7, 1914, the old officer holds over until his successor is appointed and qualified, unless he is otherwise removed by the board of health. This would make him an incumbent of January 1, 1914, and section 10 of the civil service act would then apply, and he would be required to take a non-competitive examination in order to hold his position.

COLUMBUS, OHIO, February 25, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of January 6, 1914, this department received the following inquiry from Hon. H. B. Emersch, city solicitor of Bellefontaine, Ohio:

> "The health officer was appointed for term ending December 31, 1913. First meeting of the board of health will be held January 7, 1914. Does old officer hold over and is the present officer subject only to non-competitive examination?"

In an opinion given to Hon. T. F. Thompson, city solicitor of Zanesville, Ohio, under date of September 22, 1913, this department has held that the health officer of a city was in the unclassified service under the old municipal civil service law, and that under the new civil service act, 103 Ohio Laws, 698, et seq., such officer would be in the classified service. A copy of that opinion is herewith enclosed.

Therefore, in accordance with opinions heretofore given, the incumbent of this position on January 1, 1914, would be subject to a non-competitive examination as a condition of his continuance in office.

Section 10 of the civil service act applies, which reads in part:

> "The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. * * *"

This provision applies to the health officer of a city.

It appears from the above inquiry that the health officer was appointed for a definite term which expired by limitation thereof on December 31, 1913. It appears, however, that no successor had been appointed up to January 6, 1914, the date of the above inquiry. I presume that the health office continued to perform the duties of the position after December 31, 1913, and on and after January 1, 1914.

By virtue of section 2 of the civil service act, January 1, 1914, is the date on and after which appointments and removal, etc., shall be made according to the new law.

Had the health officer the right to hold upon the failure of the board of health to appoint a successor?

The rule is stated at page 427 of volume 28 of Cyc.:

"Even in the absence of some constitutional or statutory provision that officers shall hold over until their successors are elected, or appointed and qualified, municipal officers hold over until election or appointment, and qualification, unless there is some constitutional or statutory restriction express or implied to the contrary, as is sometimes the case."

Section 8 of the General Code, provides:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

This section specifically refers to offices. But the rule as stated in 28th Cyc., supra, will apply with equal reason to officers and employes.

The health officer in question had a right to hold until his successor was appointed, or unless he was otherwise removed by the board of health. This made him an incumbent on January 1, 1914, and section 10 of the civil service act would then apply.

He is required to take a non-competitive examination as a condition of his continuance in office.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

827.

CIVIL SERVICE—HEADS OF PRINCIPAL DEPARTMENTS—DEPUTIES—ASSISTANT SECRETARY.

1st. "Heads of principal departments," as used in the civil service means the head of each, whether one person or a board, is responsible directly to the chief executive officer.

2nd. The phrase "all heads of principal departments" as well as the words "boards and commissions" is limited and modified by the words "appointed by the governor."

3rd. The word "deputy" has a distinct meaning in law as follows: One who is authorized to act generally for and in place of his principal by law and not merely by his principal, and second that he must hold a fiduciary relation to his principal.

4th. Subsection 8 of main section 8 and also subsection 7 of main section 7 are separate and distinct, and the same elective or principal executive officer could appoint both deputies and also have two secretaries or assistants or clerks, provided the department was of such size as to admit both.

5th. Laborers are in the classified service and the nature and detail of examinations for such laborers are left in a great measure to the civil service commission.

The director of public service and the director of public safety are held to come within the meaning of subdivision 7 of branch A of section 8.

COLUMBUS, OHIO, December 18, 1913.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of November 13, 1913, you submit the following inquiries:

"First. Who are to be construed as 'heads of principal departments' as designated in subdivision 2 of main section 8 of the civil service act?

"We desire your opinion to cover not only the question as to who are 'heads of principal departments' as applied to state positions but as also applied to the administration of the law by municipal civil service commissions.

"Second. Are the words 'all heads of principal departments,' found in subdivision 2 of main section 8, modified by the words following the words 'appointed by the governor?' i. e. does it mean that the unclassified heads of departments are only those 'appointed by the governor or by and with his consent' or are the words 'all heads of principal departments' to be construed independently of the balance of subsection 2?

"Does the qualification as to being appointed by the mayor or other similar chief appointing authority have the same qualifications as the power of appointment by the governor, and do these words modify that part of subsection 2 reading, 'all heads of principal departments?'

"Third. What persons may be classified as 'deputies' under the provisions of subsection 8 of main section 8, and how far may 'elective or principal executive officers' go in designating their employes as 'deputies?'

"Fourth. If an 'elective or principal executive officer' appoints deputies under the provisions of subsection 8 of main section 8 can the same 'elective or principal executive officer' still appoint 'two secretaries or assistants or clerks' under the provisions of subsection 7 of main section 8?

"Do the provisions of subsection 7 of main section 8 apply only to those 'elective and principal executive officers, boards or commissions' who are not authorized by law to appoint deputies?

"Can 'elective or principal executive officers' appoint deputies and also two secretaries, etc., and thus employ more persons in the unclassified service than a board or commission could employ?

"Fifth Is common labor under civil service, and if so, what latitude has the commission in creating an eligible list for common laborers?

"Must there be a competitive examination as far as practicable, or would common labor be in the non-competitive class?

"Sixth. Are city clerks and their assistants under civil service?

"Seventh. Are the assistant city solicitors under civil service?"

You also attach a letter in which you give your views upon these several questions, and cite a number of authorities which have been found to be of considerable value in answering the inquiries. This department is always ready to receive the views of the executive officers who are familiar with the practical working of the law.

In this opinion, two further inquiries, submitted by Hon. David G. Jenkins, city solicitor of Youngstown, Ohio, under date of November 8, 1913, will be considered.

He inquires as follows:

"First. Is the director of public service such an 'elective and principal executive' officer so as to be entitled to two secretaries or clerks in the unclassified service?

"Second. Is the solicitor such an officer?"

All of the foregoing inquiries call for an interpretation of section 8 of the civil service law, 103 Ohio Laws, 698, said section to be known as section 486-8, General Code. This section provides:

> "Service. Unclassified. The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.
>
> "(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in section 19 hereof:
>
> "1. All officers elected by popular vote.
>
> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or school district.
>
> "3. All officers elected by either or both branches of the general assembly.
>
> "4. All election officers.
>
> "5. All commissioned, non-commissioned officers and enlisted men in the military service of the state.
>
> "6. All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense.
>
> "7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.
>
> "8. The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals.
>
> "9. Bailiffs of courts of record.
>
> "10. Employes and clerks of boards of deputy state supervisors and inspectors of elections.
>
> "(b) The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class.
>
> "1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act."

In considering your first question you have given the provisions of the laws of various states and they will be quoted, as they may be of aid hereafter in construing the civil service law of Ohio.

You state:

> "I have not found any other state using the same language which Ohio uses in designating the unclassified service as it relates to heads of

departments. For the purpose of comparing subsection 2 of main section 8 with the laws of other states I will quote in short from other states.

"The New Jersey act corresponding to this section reads:

"'all heads of departments of the state government and members of commissions and boards thereof and all appointments of the mayor.'

"The New York statute reads:

"'the head or heads of any department of the government.'

"The Wisconsin law reads:

"'all officers elected by the people, all officers and employes appointed by the governor, whether subject to confirmation or not.'

"The law of the state of Illinois relating to the civil service of cities reads:

"'heads of any principal department.'"

In your first inquiry you desire to know who are to be considered as heads of principal departments?"

The part of section 8 to be considered is subdivision 2 of branch (a), which reads:

> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district."

Your second inquiry also involves a construction of the same subdivision.

All employes and officers of the state, county, city and city school districts might be said to be in one big department, which is designated in the civil service law by the term "civil service."

This term is defined in section 1 of said act as follows:

> "The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers, in the service of the state and the counties, cities and city school districts thereof."

For convenience and efficiency the civil service is divided into departments. Some are principal departments; others are subdepartments.

Subdivision 2 under consideration contemplates that the chief executive officer of the state, who is the governor; the chief executive officer of the city, who is the mayor; and the chief appointing authority of the city school district, shall be considered as the head of the civil service in and for their respective political division or subdivision.

The department of civil service is divided into departments which may be designated as "principal departments?" These principal departments are again subdivided into "subdepartments," and some officer or board is usually placed at the head of such subdepartment.

In the civil service of the state as well as that of the city, the term "principal department" applies to those departments whose heads are subordinate only to the chief executive officer of the state or city, or to the public directly.

A department whose head is subordinate to or responsible directly to the head of another department, other than the chief executive, would be considered as a subdepartment and not as a principal department.

Let us take a concrete example, the one referred to by you: The board of administration. The members of this board are appointed by the governor and the

board is subordinate to no other officer. The board of administration has charge of many institutions. These institutions are departments in the civil service of the state. The heads of these departments are accountable to the board of administration and through this board to the governor. Of course all officers and employes in the civil service are responsible to the general public.

The board of administration would be at the head of a "principal department" and the superintendents of the various institutions would be at the head of subdepartments and not of principal departments.

The same is true in the cities. Under the Municipal Code the mayor is the chief appointing authority and may be considered as being at the head of the civil service. Under the mayor there are at least two "principal departments," designated as the departments of public service and of public safety. The department of public service has various subdepartments, as for example, the department of waterworks, the department of engineering.

The departments of public service and of public safety would be principal departments, and the various departments under the director of public service or of public safety would be subdepartments and not principal departments.

The examples given are not exhaustive. There are other principal departments than those mentioned.

Therefore, a "principal department" under subdivision 2 of branch (a) of section 8 of the civil service law, is one of the main divisions of the civil service, the head of which, whether one person or a board, is responsible directly to the chief executive officer, or as the statute designates it "chief appointing authority."

In your second inquiry you ask if the words "all heads of principal departments" are modified by the words "appointed by the governor," or whether the words "all heads of principal departments" are to stand independently.

In order to hold that the words "all heads of principal departments" shall stand independent of what follows, it would be necessary to insert other words to make such intention clear. To have such construction this subdivision would read:

> "All heads of principal departments and all boards and commissions appointed by the governor."

The ambiguity in this subdivision, if any, is caused by the use of the words "boards and commissions" and the comma after the word departments. A head of a principal department may be an individual, it may be a board, it may be a commission. The words "boards and commissions," do not, in my opinion add anything to the phrase "all heads of principal departments." Neither does the use of these words have the effect of making the phrase "all heads of principal departments" independent of what follows, to wit, the words, "appointed by the governor."

I am of opinion therefore, that the phrase "all heads of principal departments" as well as the words "boards and commissions" is limited and modified by the words following, to wit: "appointed by the governor or by and with his consent."

The same phrase and words are also limited by the words "by the mayor or * * * other chief appointing authority."

This subdivision should be construed to read:

> "All heads of principal departments, boards and commissions appointed by the governor or by and with his consent, and all heads of principal departments, boards and commissions appointed by the mayor or * * * other similar chief appointing authority."

Your third inquiry is:

"What persons may be classified as "deputies" under the provisions of subsection 8 of main section 8, and how far may 'elective or principal executive officers' go in designating their employes as 'deputies?'"

Subdivision 8 of branch (a) of section 8, provides:

"The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

This subdivision makes two qualifications for a deputy:

First, he must be authorized by law to act generally for and in place of his principal.

Second, he must hold a fiduciary relation to his principal.

You have called attention to a number of authorities defining a "deputy."

In volume 5, page 623, Am. & Eng. Enc. of Law. 1st Ed., a deputy is defined:

"A deputy is one who by appointment exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself, must act in pursuance of law, performing official functions, and is required to take oath of office before acting."

A "deputy" is similarly defined at page 1043, volume 13 of Cyc. and in volume 9, page 368, Am. & Eng. Enc. of Law, 2nd Ed.

In case of in re Ostrander, 12 Misc. (N. Y.), 476, the law under consideration provided:

"But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of any official or department, or to any other person holding a strictly confidential position."

Herrick, J., says on page 477:

"Now, while I am inclined to think that this provision of the statute, so far as it refers to deputies, refers to officers as such created by statute, who are by law clothed with the power and authority of the principal officer in his absence or inability to act, and that it does not refer to an employe who may have been for convenience, but improperly, named deputy, who is not clothed with any official power or authority, and has no right under the statute to act for in the place of the principal officer; and while, therefore, the naming of the position in controversy here as that of deputy does not necessarily bring it within the positions excluded from the operation of the laws in relation to soldiers, still this reasoning does not effect that portion of the statute relating to confidential positions."

In People vs. Barker, 14 Misc. (N. Y.), 360, it is held:

"A deputy tax commissioner in the department of taxes and assessments in New York City does not hold a confidential relation to the commissioners of taxes and assessments, and is not a 'deputy' within the

meaning of section 1 of chapter 119 laws of 1888, as amended by chapter 577, laws of 1892 (the Veteran law) and hence, cannot be removed except for cause, after hearing had."

In this case the provisions of the act were similar to those under consideration in 12 Misc. 476, supra. The statute in this case prescribed the title "deputy tax commissioners," and it was contended that this was decisive.

Beekman, J., says as to this, on page 362:

"The court is not tied down to a literal interpretation, but has a right to inquire into the reason for the enactment and to consider the purpose which the legislature sought to accomplish, and when this is revealed the living principle of the law is discovered and an unerring guide is found for its correct application."

Also on page 363:

"We are, therefore, at liberty to consider whether a deputy tax commissioner, although a *deputy* so styled, is still a deputy within the meaning of the Veteran law, and, therefore, excepted from the benefits of the act under which the relator claims reinstatement. A deputy is defined by Webster to be 'one appointed as the substitute of another, and empowered to act for him in his name or on his behalf.' He also states: 'Deputy is used in composition with the names of various executive officers to denote an assistant empowered to act in their name, as deputy collector, deputy marshal, deputy sheriff.'"

Also on page 364, Beekman, J., further says:

"The function of a deputy, possessing the power, as he does under certain circumstances, to act as if he were himself the actual incumbent of his principal's office, implies a correlative duty and right on the part of the principal to exercise an unfettered personal selection in the appointment of such a subordinate, and also a corresponding freedom in exercising the power of removal whenever his confidence in the integrity, capacity, trustworthiness or adaptability of his subordinate is in the least shaken. He should not be called upon to specify the grounds of his dissatisfaction, still less to make proof of charges when his objection, though substantial, may rest, as is frequently the case, upon moral evidence only, or upon well grounded suspicion equally destructive of that confidence which is of the very essence of the relation."

The position of deputy coroner was under consideration in case of State ex rel. vs. Houck, 21 Cir. Dec., 15, and Marvin, J., says on pages 15 and 16:

"The word 'deputy' is defined in Anderson's Law Dict. as 'one who acts officially for another;' 'the substitute of an officer, usually a ministerial officer.'

"The definition in Bouvier's Law Dict. is 'one authorized by an officer to execute an office or right which the officer possesses, for and in place of the latter.'

"*The fact that the statute uses the word 'deputy' is not necessarily controlling,* but, as already said, the things which a deputy coroner may do,

under the statute, being only to be done as a substitute for the coroner, that is to say, there being only the things which it would be the coroner's duty to do, if he were present, clearly make him a deputy only, and that being so, he seems clearly to be included in the general provisions of law relating to deputies."

In case of Warwick vs. State, 25 Ohio St., 21, Welch, J., says on page 25:

"At common law the officers and his deputy filled but a single office. Anderson's Lessees vs. Brown, 9 Ohio, 151. The acts of the deputy are in law the acts of the principal, and he is responsible for them. The deputy is appointed by the principal, can be removed by no one else, and is removable at his pleasure."

It is seen in the foregoing authorities that a deputy is one who acts for and in place of his principal. The authorities further hold that the use of the word "deputy" by statute and applying it to the position, is not controlling. Much less would it be controlling where an executive officer designates his subordinates as deputies.

The purpose and intent of the legislature as expressed in subdivision 8, supra, is the controlling feature. The legislature was not content with designating the positions or employes as "deputies," it went farther, it limited deputies to such as are "authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

This is the controlling feature, and a deputy, in order to be placed in the unclassified service must have these qualifications:

First, he must be "authorized * * * to act generally for and in place of his principal" by law and not merely by the principal, and second, he must hold a fiduciary relation to his principal.

In your fourth inquiry you ask several questions in reference to subdivisions 7 and 8 of branch (a) of section 8.

For comparison and convenience these subdivisions will again be quoted.

"7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.

"8. The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

Your first question in connection with these two subdivisions is whether an officer who has deputies in the unclassified service under subdivision 8, may also have two secretaries or assistants or clerks in the unclassified service under subdivision 7. You ask two other questions, the answers to which depend upon the answer to your first question under your fourth inquiry.

Subdivision 7 applies to "each of the elective and principal executive officers, boards or commissions," coming within its terms, and subdivision 8 applies to "elective and principal executive officers." Subdivision 8 does not apply to boards and commissions.

In each of the subdivisions there is a specific provision that the officers coming within their terms must be authorized "by law" to appoint deputies or assistants or secretaries or clerks, before such deputies or clerks or assistants or secretaries can come within the unclassified service.

There is nothing in the language of these subdivisions to indicate that if an officer has deputies in the unclassified service under subdivision 8, that he cannot also have two clerks or assistants or secretaries in the unclassified service under subdivision 7.

In order to hold that these two subdivisions cannot apply to the same officer it would be necessary to add to the language of one or the other of these subdivisions an exception. Either subdivision 7 should contain a clause similar to the following: "each of the elective and principal executive officers" "except those coming within the terms of subdivision 7," or subdivision 8 should contain some similar provision. No such provision is found in either subdivision and the language used does not permit such construction.

We must look for the intent of the legislature in the language which it has used. There is no ambiguity in subdivisions 7 and 8 as to the question now under consideration, and there is no authority for adding to either of them an exception from their terms.

Therefore an elective or principal executive officer may come within the provisions of both subdivisions 7 and 8 and may have appointees in the unclassified service under both subdivisions.

Subdivision 7 may apply to officers authorized to appoint deputies under subdivision 8.

As subdivision 8 does not apply to boards and commissions, an executive officer may be authorized to appoint more persons in the unclassified service than a board or commission.

In your fifth inquiry you ask if common labor is under civil service. I will again quote the definition of "civil service" in section 1 of the civil service law:

> "1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and *laborers* in the service of the state and the counties, cities and city school districts thereof."

This section specifically includes "laborers" in the civil service.

Laborers are not placed in the unclassified service by section 8, and they must, therefore, be in the classified service.

You ask what latitude has the commission in creating an eligible list for common labor; and also, must there be a competitive examination as far as practicable?

Section 10 of the civil service law, section 486-10, General Code, provides in part:

> "All applicants for positions and places in the competitive classified service shall be subject to examination which shall be public, competitive and free for all, with specified limitations, determined by the commission as to citizenship, residence, age, sex, experience, health, habits and moral character. Such examinations shall be practical in character and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position for which appointment is sought, *and shall, when appropriate, include tests of physical qualifications, health and manual skill.*"

The nature and details of the examination are left in a great measure to the civil service commission. The general scope of such examination is given. It "shall be practical in character and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position, for which appointment is sought, and shall, when appropriate, include tests

of physical qualifications, health and manual skill." This is the guide to the commission. The last part of this clause seems particularly applicable to common laborers.

Section 12 of the civil service law, section 486-12, General Code, provides:

> "From the returns of the examinations the commission shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the commission, and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by examination without reference to priority of time of examination. In the event of more than one applicant receiving the same mark at an examination, priority in time of application shall determine the order in which their names shall be placed on the eligible list. The term of eligibility for each list shall be fixed by the commission at not less than one nor more than four years."

A competitive examination, as far as practicable, should be made of applicants for positions as common laborers. Those who pass the general average prescribed by the commission shall be placed upon the eligible list. This applies to common laborers as well as to applicants for other positions.

It will be observed that section 12 provides two methods of determining the priority of applicants on the eligible list. In one method relative excellence determines the priority and where this is equal, priority of time determines the rank. Where the tests are few and applicants are many, as is likely to be the case with common laborers, the last method of determining rank will probably predominate.

In your sixth inquiry you ask in reference to city clerks and the assistants. This is being considered in another opinion which is now under consideration and which will be addressed to you.

Your seventh inquiry as to city solicitor will be considered in connection with the inquiry of the city solicitor of Youngstown, who also asks in reference to the director of public service.

On November 22, 1913, Hon. Clyde S. Porter, city solicitor of Tiffin, Ohio, asks in reference to the director of public service and the director of public safety. You also submit a further inquiry as to assistant prosecuting attorneys.

The director of public service and director of public safety are not authorized to appoint deputies and they would come under the provisions of subdivision 7 of branch (a) of section 8, which will again be quoted:

> "7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions authorized by law to appoint such a secretary, assistant or chief clerk."

It will be necessary to construe the phrase "each of the elective and principal executive officers."

The director of public service is an "executive" officer. He is at the head of one of the principal departments of the city under the Municipal Code. But he is not an "elective" officer. The same is true of the director of public safety.

The part of section 8 under consideration specifically excepts civil service commissions from its operation. The civil service commission is not an "elective" commission. This exception would tend to show that this part of the section was intended to apply to appointive "executive officers, boards or commissions," as well as those which are elected. Otherwise the exception of the civil service commission would be mere surplusage.

This provision should therefore be construed to read, "each of the elective executive officers, boards or commissions, and each of the principal executive officers, boards or commissions.

The director of public service and director of public safety would therefore come within the terms of this part of section 8. If they are authorized by law to appoint a secretary, or assistant, or clerk, two of such secretaries, or assistants, or clerks would be in the unclassified service.

The positions of assistant prosecuting attorney and assistant city solicitor will be considered in separate opinions.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

828.

SUPERINTENDENT OF INFIRMARY—CIVIL SERVICE EXAMINATION—REMOVAL FROM OFFICE.

Where the superintendent of an infirmary is holding his position by virtue of a contract or appointment, he will be required to take a non-competitive examination as provided in section 10 of the civil service act, as a condition of his continuance in office. If he fails to pass an examination, this would constitute cause for his removal even though his original appointment was made for a definite term of two years.

COLUMBUS, OHIO, March 16, 1914.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of December 23, 1913, the Hon. William C. Hudson, prosecuting attorney of Vinton county, Ohio, submitted the following inquiry to this department:

> "On the 6th day of January, 1913, the then board of commissioners of Vinton county, foreseeing that the political complexion of the board would be changed when the new members elected the previous election would go into office, made a contract with the then superintendent of the infirmary to continue as superintendent there for the period of two years (i. e., to January 6, 1915). This action of the old commissioners is not satisfactory to the present board of commissioners.
>
> "Under the above facts, may the present board of commissioners remove this superintendent except for cause, or is he entitled to hold his position under the provisions of section 2523 until January 6, 1915? (2) If they have not power to remove the superintendent may he be required under section 10 of the civil service law (103 Ohio Laws, 703) to take a civil service examination to determine his fitness, in order to hold his position during the remainder of the two years?"

In an opinion rendered to the bureau of inspection and supervision of public offices, under date of January 7, 1913, this department has held that a superintendent of an infirmary may be appointed for a definite term extending beyond the term of the appointing power, if such appointment is made for a reasonable time and in good faith. A copy of that opinion is herewith enclosed.

Your letter suggests that the contract in question may not have been made in good faith. This must be determined from the facts of each particular case.

In any event the contract is not void but may be voidable. A further question would then arise as to whether the present commissioners have exercised due diligence in declaring the contract at an end, or whether by their failure to act in time, they have ratified the contract.

These questions cannot be determined from the facts submitted.

Section 2523, General Code, to which you refer provides:

> "The county commissioners shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. The superintendent shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations. He shall not be removed by them except for good and sufficient cause. The commissioners shall not appoint one of their own number superintendent, nor shall any commissioner be eligible to any other office in the infirmary or receive any compensation as physician or otherwise, directly or indirectly wherein the appointing power is vested in such board."

By virtue of this section the superintendent of the infirmary cannot be removed except for cause.

The superintendent of the infirmary does not come within any of the ten classes of positions placed in the unclassified service by section 8 of the civil service act. He is not an elective officer and he is not the head of a principal department. He is, therefore, in the classified service and comes within the terms of section 10, of the civil service act.

Said section 10, reads in part:

> "The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service."

If, therefore, the present superintendent is holding his position by virtue of a binding contract or appointment, he will be required to take a non-competitive examination, as provided in section 10, supra, as a condition of his continuance in office. If he fails to pass the required examination that would constitute cause for his removal, even though his original appointment was made for a definite term of two years.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

829.

REMOVAL OF MEMBERS OF STATE BOARD OF HEALTH UNDER CIVIL SERVICE—PROCEDURE TO BE FOLLOWED.

Where the mayor of a city desires to remove members of the board of health, this may be done under the provisions of section 4263, General Code, providing they are guilty of any of the things enumerated therein and the mayor files charges and proceeds as provided in sections 4263 and 4264, General Code.

COLUMBUS, OHIO, March 16, 1914.

HON. C. E. VAN DEUSEN, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—Under date of January 24, 1914, you inquire:

> "I am in receipt of a letter from the mayor of our city, in reference to the removal of the board of health. The communication reads as follows:
>
> "'We have a condition in the board of health whereby, in my opinion, I deem it wise to form a new board. I, therefore, have requested the resignations of the members. Up until this time I have received the resignations of three members, the other two, from paper reports, refuse to resign.
>
> "'Our board for some time past, has been considered of little consequence owing to their inability to work together harmoniously. I would like to have an opinion from you as to what means would be necessary for me to pursue to enable me to remove the two members who refuse to resign.'"

The members of the board of health are appointed by virtue of section 4404, General Code, which provides in part:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. * * *"

Their terms of office are fixed by section 4406, General Code, which reads:

> "The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year"

Section 4250, General Code, gives the mayor authority to appoint or remove certain officers. Said section reads:

> "The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

This section does not apply to the members of the board of health. Section 4263, General Code, provides:

> "The mayor shall have general supervision over each department and the officers provided for in this title. When the mayor has reason to believe that the head of a department or such officer has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council, except when the removal of such head of department or officer is otherwise provided for, written charges against such person, setting forth in detail a statement of such alleged guilt, and, at the same time, or as soon thereafter as possible, serve or cause to be served a true copy of such charges with the person against whom the charges are made. Such service may be in person or by leaving a copy of the charges at the office of such person, and due return thereof made to council, as is provided for the return of the service of summons in a civil action."

This section authorizes the mayor to file charges against delinquent officers. It specifies various grounds for charges, and the manner in which the mayor should proceed. The charges are to be filed with council, and a copy given to the offending officer.

By virtue of section 4264, General Code, the council is to hear the charges and may remove the officer against whom charges have been filed. Said section reads:

> "When so filed with council, such charges shall be for hearing at the next regular meeting thereof, unless council extends the time for such hearing, which shall be done only on the application of the accused. The accused may appear in person and by counsel, examine all witnesses, and answer all charges against him. The judgment or action of the council shall be final, but to remove such officer the votes of two-thirds of all members elected to the council shall be required."

These sections apply to the members of the board of health. If they have been guilty of any of the things and matters enumerated in section 4263, General Code, the mayor may, by filing charges as provided in these sections, secure the removals which he deems necessary.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

830.

CIVIL SERVICE—CHIEFS OF POLICE AND FIRE CHIEFS NOT REQUIRED TO TAKE CIVIL SERVICE EXAMINATION—CONTINUANCE IN OFFICE.

Persons legally occupying the position of chief of police and chief of fire department of a city on January 1, 1914, are not required to take an examination, either competitive or non-competitive, as a condition of their continuance in office.

COLUMBUS, OHIO, February 24 ,1914.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Hon. Harry D. Smith, city solicitor of Xenia, Ohio has submitted, under date of January 6, 1914, the following for opinion:

> "Has your department passed on the question as to whether or not it is necessary for chiefs of police and fire departments, serving under the old law and at the time the new civil service law went into effect, to take the civil service examination in order to continue in such positions?
>
> "If required to take such examinations are the same competitive or non-competitive?"

This question has not been determined by this department.

Under the old municipal service law the chief of police occupied a peculiar situation. He could be appointed outside the eligible list, but after his appointment and qualification he was protected by special provisions of the civil service law as to his removal. The same was true as to the chief of the fire department.

Section 4381, General Code, of the old law, provided:

> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

This section was specifically repealed by section 32 of the new civil service act, but the provisions thereof were re-enacted verbatim and are contained in the last paragraph of section 19 of said act.

Section 31 of the civil service act, section 486-31, General Code, provides in part:

> "All officers and employes in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall, when this act takes effect, be deemed appointees under the provisions of this act."

This section continues in the service, without examination, all officers and employes "in the classified service" "holding their positions under existing civil service laws."

Section 4484, General Code, of the old law, provided:

> "Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

Sections 4381 and 4484, General Code, must be considered as part of "existing civil service laws" as contemplated by section 31, supra.

The chief of police and chief of fire department may not have been appointed in accordance with civil service laws, buf once appointed and qualified, they continued to hold their positions under the civil service law.

Section 10 of the civil service act, requiring non-competitive examinations, specifically exempts incumbents "holding their positions under existing civil service laws."

Said section 10, provides in part:

> "The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service."

The chief of police and the chief of the fire department held their positions under the old municipal civil service law when once appointed and qualified. But section 31 refers to officers and employes in the "classified service" and section 10, exempts those in the competitive "classified service."

Section 4479, General Code, of the old law, placed the chief of police and the chief of the fire department in the unclassified service, when it provided:

> "The unclassified service shall include * * * persons who, as members of a board or otherwise, have charge of any principal department of the government of any city, * * * the chief of the police department, the chief of the fire department, * * *."

This provision was inserted in the statutes by what is known as the Paine Law, 99 Ohio Laws 562. This act amended and repealed some twenty sections of the Municipal Code.

In section 149 of the Municipal Code, 96 Ohio Laws 70, it was provided among other things:

> "The chief of police shall be appointed from the classified list of such department."

This section was not repealed or amended by the Paine law.

In adopting the General Code in 1910, section 149, Municipal Code, became sections 4374 and 4375, General Code, but the above quoted provision was omitted.

In State vs. Wyman, 71 Ohio St., 1-11, in construing section 149 of the Municipal Code, it was held that the chief of police must be appointed from the classified list of the civil service commission. The omission of the above provision in the General Code gave authority to appoint the chief of police without the classified list.

A similar provision was contained in section 150 of the Municipal Code, as to the chief of the fire department, and was likewise omitted in adopting the General Code.

The result of this legislation was that by section 4479, General Code, the chief of police and the chief of the fire department were placed in the "unclassified service."

The two positions in question are protected from removal by the re-enactment, by the new civil service act, of section 4381, General Code.

The requirement as to examinations must be determined by the provisions of section 10 of the civil service act. The part to be considered is the following:

> "The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, * * * be subject to non-competitive examinations as a condition of continuing in the service."

The words "in the competitive classified service" as used herein, refer to the classified service under the new law and not to the classified service under the old law.

The chief of police and the chief of the fire department are in the "competitive classified service" under the new law. And as they are "holding their positions under existing civil service laws," they are exempted from taking a non-competitive examination. No reference is made in section 10 to the classified service under the old law.

I am therefore of the opinion that the persons legally occupying the positions of chief of police and chief of the fire department of a city on January 1, 1914, are not required to take an examination, either competitive or non-competitive, as a condition of their continuance in office.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

831.

OFFICES INCOMPATIBLE—DEPUTY CITY AUDITOR AND SECRETARY TO THE MUNICIPAL CIVIL SERVICE COMMISSION.

Under the present civil service law a deputy city auditor cannot also hold the position of secretary of the municipal civil service commission. These offices are incompatible.

COLUMBUS, OHIO, February 25, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Hon. G. B. Findley, city solicitor of Elyria, Ohio, has submitted the following inquiry under date of December 30, 1913:

> "Under the present civil service law, is there any objection to the secretary of the municipal board of civil service acting, also, as deputy city auditor?"

This raises a question of the compatibility of the two positions.

The rule of incompatibility is stated by Dustin, J., in the case of State vs. Gebert, 12 Cir. Ct. N. S., 274, wherein he says on page 275:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

The question as to the physical possibility to perform the duties of both offices must be determined by the facts and circumstances of each case. No doubt in many cities it would be physically possible for the same person to perform the duties of both positions. In other cities this would not be possible.

The other test is whether the one position is subordinate to, or is in any way a check upon the other.

The two positions now in question are not subordinate one to the other.

In an opinion given to the bureau of inspection and supervision of public offices, under date of September 12, 1912, this department passed upon the right of the city auditor to hold certain other positions. The disability of a city auditor to hold certain positions would pass to his deputy, who has the right to act for and in place of his principal, as to his official duties.

In that opinion in passing upon the right of the city auditor to hold the position of clerk of the board of control, or clerk of the director of public service or safety, the rule was stated:

> "Unless the duties of the office of clerk of the board of control, or clerk of the safety or service department, require such officer to receive, pay out or to account for funds of the city, or to certify an indebtedness for payment to the city auditor, such positions are not incompatible with the position of city auditor, and the same person may fill said positions and that of city auditor at the same time and receive the compensation fixed for each office."

This rule will apply to the positions now in question.

The duties of the secretary of the municipal civil service commission are not prescribed by statute.

In section 19 of the civil service act, section 486-19 General Code, it is provided among other things:

> "* * *. The expense and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city."

The council fixes the compensation of the civil service commission and of its employes.

The municipal civil service commission does not handle the funds of the city. It may be required to certify as to their expenses to the city auditor for payment.

This duty of the civil service commission would not prevent the secretary from also holding the position of deputy city auditor.

Attention has been called to the provisions of section 21 of the civil service act. This section to be known as section 486-21, General Code, provides:

> "Pay rolls. After the expiration of twelve months from taking effect of this act, it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service unless an estimate, payroll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or in case of the service of a city the certificate of the municipal service commission of such city, that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended or laid off or are being employed in pursuance of this act, and the rules adopted thereunder.
>
> "Any sum paid contrary to the provisions of this section may be recovered from any officer or officers making such appointment in contravention of the provisions of law and of the rules made in pursuance of law; or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond in an action in the courts of the state, maintained by a citizen resident therein. All moneys recovered in any action brought under the provisions of this section must, when collected, be paid into the treasury of the state or appropriate civil division thereof, except that the plaintiff in any action shall be entitled to recover his own taxable costs of such action."

By virtue of this section the city auditor is prohibited from drawing his warrant for the salary or compensation of persons in the classified service, unless the municipal civil service commission certifies that the appointment, or promotion of such persons have been made in pursuance of the civil service act. This duty concerns the members of the civil service commission and also of the city auditor, and of his deputy.

While these duties may not be required of the secretary of the municipal service commission, yet he has charge of the general detail work of the commission. He is subordinate to the commission. If the deputy city auditor was also

secretary of the municipal service commission, we would have the situation of a subordinate employe in one capacity a check upon his superior officer in another capacity.

It would be in keeping with public policy if the auditor's office and the civil service commission are kept separate and distinct. I am therefore of the opinion that the deputy city auditor cannot also hold the position of secretary to the municipal civil service commission.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

803-A.

NEWSPAPER—CITY PRINTING—EX-MAYOR OF CITY MAY BE OWNER OF NEWSPAPER DOING SUCH PRINTING.

The fact that the term of an ex-mayor of a city, who is half-owner of a county newspaper of general circulation, expires on January 1, 1914, *will not prevent such newspaper from receiving compensation for printing of any kind done by it.*

COLUMBUS, OHIO, March 7, 1914.

HON. WILLIAM B. JAMES, *City Solicitor, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of January 15, 1914, as follows:

"The ex-mayor of our city, whose term expired January 1, 1914, is the one-half owner of the Wood County Democratic, the only Democratic newspaper of general circulation in the city and in which our ordinances requiring publication in two newspapers of opposite politics can be published.

"Would the ex-mayor be bound by section 12912, G. C., considering that he is only a partial owner of the paper and that printing is paid for at legal rate, also considering the fact that all ordinances of a general matter, etc., should be published in two papers of opposite politics? Can the Democratic paper legally draw compensation from the city for such publication, or any other printing it may do for the city officers or employes? Would there be any distinction as regards legislation or improvement initiated during the ex-mayor's term of office or any legislation or improvement started since his term expired?"

Section 12912, General Code, reads:

"Whoever, being an officer of a municipal corporation or member of of the council thereof, or the trustee of a township, is interested in the profits of a contract, job, work or service for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or twonship during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

Interpreting this section, the circuit court in the case of Findley vs. Parker, 9 Ohio C. D., p. 710, held:

> "An officer of a municipal corporation who has retired from the office to which he has been elected or appointed, may not be interested, either directly or indirectly in any work or service for said corporation until the expiration of one year after his retirement from office, as provided for in section 6976, R. S."
>
> (Now section 12912, General Code).

In the case of State ex rel. vs. Wichgar, 18 O. C. D., p. 743, the circuit court placed upon this section the same interpretation and held:

> "A member of the municipal board of health is an officer of the municipality and as such ineligible to the office of district physician during his term and for one year thereafter, and he cannot therefore recover for services rendered in such capacity."

It will be noticed from a reading of section 12912, that to give it the construction placed upon it by the circuit court in the above cases, it is necessary to make the phrase during "the term for which he was elected or appointed" or "for one year hereafter" modify "Whoever, being an officer * * * is interested in the profits of a contract, job, work or services for such corporation." Such construction is, I think, incorrect. Section 12912 was originally section 92 of the Municipal Code of 1869, 66 O. L., 164, and read as follows:

> "Sec. 92. No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work or services, (other than official services to be performed for the corporation) nor shall any member or officer act as commissioner, architect, superintendent or engineer, in any work undertaken or prescribed by the corporation during the term for which he was elected or appointed, or for one year thereafter."

This section was carried into the Revised Statutes by the codification of 1880 in practically the same form in which I find it now as section 12912 of the General Code. It is a familiar principle of statutory construction that a re-enactment of a statute for the purpose of codification and revision is presumed not to change its meaning and we therefore refer to section 92 of the Municipal Code of 1869, above quoted, to assist us in arriving at the meaning of section 12912.

Quoting from the opinions of the Attorney General of Ohio, 1910-11, page 1033:

> "It will be noted with respect to the original act that the subject 'no member of the council or any officer of the corporation' is repeated; in fact the entire structure of the original section indicates clearly that the portion thereof which follows the parenthesis is absolutely separate and distinct from that which precedes and that it would have been proper gramatically to have placed a period at the division point. This conclusion eliminates one of the possible meanings suggested and indicates clearly that the phrase 'during the term for which he was elected or appointed, or for one year thereafter' does not modify the verb 'is interested'."

My interpretation of section 12912 is in harmony with the view above expressed and I am, therefore of the opinion that the newspaper mentioned can legally receive compensation for city printing of any kind done by it, notwithstanding the fact that the ex-mayor whose term expired January 1, 1914, is the half owner of said newspaper.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

832.

CONSTRUCTION OF A SEWERAGE DISPOSAL PLANT ORDERED BY THE STATE BOARD OF HEALTH—PROPER PARTY IN THE CITY TO ENTER INTO A CONTRACT OF THIS KIND.

1st. Under the provisions of the General Code, the Director of Public Service is the proper party to enter into a contract for the construction of a sewerage disposal plant, ordered by the State Board of Health.

2nd. Since the enactment of the Municipal Code of 1902, *what is now section* 4468, *but which existed prior to the enactment of the Code, should by reason of section* 4211 *be considered as amended insofar as to simply provide for the authorization of council for the entering into contracts.*

3rd. Whether or not section 4468 *is to be considered as so amended by reason of the subsequent passage of what is not section* 4211, *section* 4468 *requires the recommendation of the Board of Health in a municipality, whereas the construction of a sewerage disposal plant under consideration is on order of the State Board of Health, consequently sections* 4468 *and* 4469 *should not be considered.*

COLUMBUS, OHIO, March 9, 1914.

HON. WALTER S. RUFF, *City Solicitor, Canton, Ohio.*

DEAR SIR:—As heretofore acknowledged, I have your favor of Jan. 27, 1914, enclosing opinion submitted by you to the council of your city with respect to the power and authority of the city council to let and enter into a contract for a proposed sewage disposal plant, and requesting my opinion with respect to this question.

You do not advise as to how the matter of the proposed construction of this plant has come up, but from other sources I learn that for some years the city of Canton has been considering the necessity of constructing a sewage disposal plant, but that nothing definite to this end was done until about the middle of last year when the trustees of Canton township filed, with the state board of health, a statement in writing, such as is provided for in section 1249 of the General Code; that subsequently, in accordance with the authority conferred on the state board of health by sections 1250 et seq., General Code, that body ordered the city of Canton to build a sewage disposal plant, which the city now proposes to construct. As I view the question here presented, however, I do not deem the facts above stated, leading up to the proposed construction of this plant, to be of vital importance.

Prior to the year 1902, when *Municipal Code* was enacted, the only authority conferred upon municipalities in this state, with reference to the construction of sewage disposal plants, was that given by section 2143, R. S., now sections 4468 and 4469, General Code, which read as follows:

"Sec. 4468. Upon the recommendation of the board of health of a municipality, or, of the powers of such board have been vested in any other officer or board, upon the recommendation of such officer or board, the council may cause plans and estimates to be prepared and acquire by condemnation or otherwise such land or lands within or without the corporate limits as are necessary to provide for the proper disposal in a sanitary manner of the sewage, garbage and waste matters, and either or any of them, of the municipality.

"Sec. 4469. Upon obtaining the approval of the state board of health, the council may contract for, erect and maintain a sanitary plant or plants on the lands so acquired with all necessary buildings, machinery, appliances and appurtenances for the treatment, purification and disposal in a sanitary and economic manner of the sewage or garbage, nightsoil, dead animals, offal, spoiled meats and fish or other putrid substances or any liquid or solid wastes or any substance injurious to the health of the municipality."

In the enactment of the Municipal Code and later in 1904, general power was granted to municipalities, with reference to the construction and maintenance of such plants, by provisions which have been carried into the General Code as sections 3647 and 3649, which are as follows:

"Sec. 3647. To open, construct and keep in repair sewage disposal works, sewers, drains and ditches, and to establish, repair and regulate water-closets and privies.

"Sec. 3649. To provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and to establish, maintain and regulate plants for the disposal thereof."

Likewise, by the Municipal Code, municipalities were given power to appropriate, enter upon and hold real estate for sewage disposal plants. (Sec. 3677, G. C., Sub. 10; Sec. 3678, G. C.)

In 1904, the provisions of what are now sections 1249, et seq., General Code, were enacted, giving the state board of health authority, on proper complaint, to direct municipalities to install works or other means for purifying or disposing of sewage and other waste matter.

In the enactment of the Municipal Code of 1902, the legislature, as a general plan or scheme in the organization of cities, divided and classified their powers as legislative, executive and judicial. Nothing with respect to the last named division of the powers of cities is here pertinent. The legislative power of cities was vested in a council to be elected as therein provided; (sec. 4206, General Code), and further, as to the powers of the city council, section 4211, General Code, which was enacted as section 123 of the Municipal Code, provides as follows:

"The powers of council shall be legislative only and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

As to the executive powers of cities, section 4246, General Code, provides as follows:

> "The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title."

Section 4323, General Code, provides that in each city there shall be a department of public service which shall be administered by a director of public service.

Section 4402, General Code, makes provision for a board of control consisting of the mayor, director of public service, and director of public safety, and section 4403 provides that no contract in the department of public service or the department of public safety, in excess of five hundred ($500.00) dollars, shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract.

With respect to the powers of the director of public service, as the administrative officer of the department of public service in the government of cities, which are pertinent to the question presented on your submission, sections 4324, 4325, 4326 and 4328 make provision as follows:

> "Sec. 4324. The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts.
>
> "Sec. 4325. The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title.
>
> "Sec. 4326. The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city parks, baths, play grounds, market houses, cemeteries, crematories sewage disposal plants and farms and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city.
>
> "Sec. 4328. The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for no less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Prior to the enactment of the Municipal Code it is clear that the only powers in municipalities, with reference to the preparation of plans for and contracts for sewage disposal plants, were those conferred on municipal councils by section 2143, R. S. (Sec. 4468 and 4469, General Code), under the limitations therein prescribed.

The next question is whether, independent of sections 4468 and 4469, General Code, by the provisions of the Municipal Code and subsequent enactments, authority and power have been given to any officer, board, or other city authority, with reference to the preparation of plans for and contracts for the construction of such plants, and if so, to whom? In the consideration of this question it is to be borne in mind that general power is now given to municipalities with reference to the construction and maintenance of sewage disposal plants.

Looking to the provisions of section 4211, General Code, other than those in terms prescribing limitations on the administrative power of council, I note that they provide that "all contracts, requiring the authority of council for their execution, shall be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contracts has been given, and the necessary appropriation made, council shall take no further action thereon."

By the provisions of section 4326, General Code, as well as section 4324, it is plain that the matter of sewage disposal plants is a matter under the charge of the director of public service. Contracts with reference to such plants, therefore, relate to a matter within the charge of the director of public service; and on the authority of section 4211, if such contract is one requiring the authority of council for its execution, it is to be entered into and conducted to performance by such officer.

The significance of the provisions of section 4211, just noted, with respect to the question at hand, does not lie so much in themselves as in their consonance with the manifest general purpose of the legislature to vest matters of this kind in and under the charge and supervision of the director of public service as an arm of the executive or administrative department of city government, and to require that administrative duties with reference to these matters be performed by him. By section 4325 he is required to supervise the construction of public works, other than those having reference to the department of public safety, or except as otherwise provided; and by section 4326 he is required to make and preserve surveys, maps, plans, drawings and estimates; by section 4328 he is authorized to make contracts within the supervision of these departments, such contracts, of course, if they involve an expenditure of more than $500.00, being subject to the authorization of council and the approval of the board of control.

All of these provisions are to the point that if authority to prepare plans for and enter into contracts for the construction of sewage disposal plants is vested anywhere by the Municipal Code and subsequent municipal enactments, it is vested in the director of public service, and I am of the opinion that the director of public service has power and authority to prepare plans, etc., for the construction of sewage disposal plants and to let and enter into contracts for the same.

It is true that no express authority is given to such director with respect to plans and contracts for the construction of sewage disposal plants by name and in so many words, but he is given contractual powers which, within the manifest purpose and intent of our code of municipal laws, include such contracts. Moreover, if such power of contract is not given to him, it is not given to any officer, body or authority for the purpose of carrying into execution the general power given to cities with reference to the construction of such plants, by sections 3647 and 3649, G. C.

I do not understand that any pretense is made that any power in this respect has been vested in the city council by any statutory provisions enacted subsequently to sections 4468 and 4469, General Code.

Section 4331, General Code, provides as follows:

> "When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

The provisions of this section are consistent with the idea that power to let and enter into contract for any work contemplated by this section is vested in the director of public service, and are inconsistent with the idea that such power is vested in any other officer, board or authority, for, as has been pointed out by one of the circuit courts of this state, it would be a very curious state of affairs if it is to be considered that the legislature intended that council should have the right and power to let and enter into the contract and yet permit the director of public service, at any time after council had made the conract, to alter the same to suit himself. Not only is no power given to the council of cities in this respect by the scheme of city government provided for by the statutory provisions we have been considering, but it would seem that by the provisions of section 4211, General Code, (Sec. 123, M. C.) such power is expressly denied.

The supreme court, in the case of City vs. Dobson, 81 O. S., page 76, in speaking of this section, says:

> "Prior to the adoption of the Municipal Code of 1902, the city council was an administrative as well as a legislative body, and one of the reforms contemplated by the adoption of the new code was to make its powers legislative only."
>
> (City of Akron vs. Dobson, 81 O. S., 66, 76.)

The conclusion here reached, with respect to the power of the director of public service of cities under the statutes we have been considering to prepare plans for the construction of sewage disposal plants and to enter into contracts for the same, is not without direct authority. It is apparent from the provisions of section 4326, that as to the power and authority of the director of public service, he stands in the same relation to sewage and sewage disposal plants as he does to water and water works.

In the case of Yaryan vs. Toledo, 28 C. C., 259, (8 C. C. N. S., 1), a question arose as to whether the department of public service had power to prepare plans for the construction of a water purification plant and to make a contract for the same, or whether such power was vested in council—section 127 of the Municipal Code then providing—"All powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein."

At the time the question in the case just cited arose, the department of public service was vested in directors elected by the people, but their powers were no greater than those now vested in the director of public service who now admin-

isters such department; nor, as far as concerns the question at hand, were they in anywise different. No more express power was there given to the department of public service with respect to the preparation of plans for and contracts for the construction of water purification plants than was there and is now given to such departments with respect to the construction of sewage disposal plants. The court, however, on a consideration of the statutory provisions before noted, herein, held that power with respect to the preparation of plans for the construction of water purification plants and with reference to contracts for such construction, was vested in the department of public service, and that such power had been properly exercised by the directors of said department. The decision of the circuit court in this case, was affirmed by the supreme court, but without report. (76 O. S., 584).

It may be here noted that section 127 of the Municipal Code above referred to and considered in the circuit court case before cited, was repealed in the adoption of the General Code.

It is obvious that the power of director of public service of cities to enter into contracts for the construction of sewage disposal plants under the general powers granted to municipalities with reference to such plants, is in no wise affected by the provisions of section 1249 et seq., General Code, giving the state board of health, under certain circumstances, power to direct municipalities to install works or means for purifying or otherwise disposing of sewage or other wastes.

These sections with reference to the powers of the state board of health are consistent with the idea that power to establish sewage disposal plants was already vested in municipalities by sections 3647 and 3649, General Code.

The purpose of sections 1249 et seq. is simply to empower the state board of health to direct and compel, by the sanction of penalties, the installation of such plants or other means of disposing of sewage detrimental to the public health.

Having come to the conclusion that the director of public service of cities is vested with the power of letting and entering into contracts for the construction of sewage disposal plants, under the general powers granted to municipalities with reference to the establishment of such plants, and it not appearing that the proposed plant at Canton is to be constructed or established otherwise than under the general power granted to municipalities in this behalf, it may not be a matter of particular importance to inquire as to what has become of sections 4468 and 4469, General Code. If, by force of the provisions of these sections, council, under any circumstances, is vested with power with reference to the preparation of plans for the construction of sewage disposal plants, and with power to enter into contracts for the same, it is clear that such powers of council can only be exercised according to the limitations of those sections, and be dependent on the recommendation of the local board of health and the approval of the board of health of the state. Surely, however, this would not be an exercise of the power conferred upon municipalities with respect to such plants, by the provisions of sections 3547 and 3649, General Code. The power granted by these sections, with respect to the construction and establishment of sewage disposal plants, is general and unqualified, depending on the recommendation or will of no officer, board or authority other than those charged with the duty of executing the power granted to the municipality.

In this connection, I am not unmindful that in 1908 the legislature enacted the provisions of section 1240, General Code, as follows:

> "No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system, or puri-

fication works for a water supply or sewage, of a municipal corporation or public institution * * * until the plans therefor have been submitted to and approved by the state board of health."

The provisions of this section are consistent with the existence of general power in municipalities, with respect to the construction of sewage disposal plants, to be executed by the director of public service in pursuance of the general power given him with respect to matters in his department and the provisions of the section just noted are, in a measure, inconsistent with the view that the sole power with reference to the execution of contracts for such plants, is vested in the city council, for if the sole power with respect to the execution of such contracts be in the city council, there was clearly on occasion for the provisions of section 1240, General Code, just noted, for the reason that by the terms of section 4469, the approval of the state board of health is made a condition precedent to the right of council to contract for the erection of such plants.

Section 1260, General Code, likewise enacted in 1908, provides:

"If a council, department or officer of a municipality, * * * fails or refuses for a period of thirty days, after notice given him or them by the state board of health of its findings and the approval thereof by the governor and attorney general, to perform any act or acts required of him or them by this chapter * * * the members of such council or department, or such officer or officers, * * * shall be personally liable for such default, and shall forfeit and pay to the state board of health five hundred dollars to be deposited with the state treasurer to the credit of the board."

Reading the provisions of this section in connection with those of sections 1249 et seq., it is clear that the provisions of section 1260 are a recognition of general power in municipalities with respect to the construction of sewage disposal plants, and of the fact that in cities, officers and departments other than council may be charged with the execution of such power.

The Municipal Code, in making provision for boards of health, (section 189), provided that they should have all the powers and perform all the duties not inconsistent with that act, which were conferred and required in section 2143, Revised Statutes, and other sections relating to the board of health under previous legislation, and it was provided that for all purposes, such sections should remain in full force and effect. Were it not that said section 2143, Revised Statutes, which has been carried into the General Code as sections 4468 and 4469, was specifically retained by said section 189 of the Municipal Code, there would be much reason for contending, upon established principles of construction, that the provisions of sections 4468 and 4469, insofar as they conferred power upon city councils with respect to the execution of contracts for sewage disposal plants, were repealed by implication.

Goff vs. Gates, (87 O. S., 142, 149).
Commissioners vs. Frega, (26 O. S., 488, 491).
Lorain Road Co. vs. Cotton, (12 O. S., 263, 272).
Attorney General vs. Commissioners, (117 Mich., 477).
Moore vs. Vance, (1 Ohio, 1, 10).
Roche vs. Mayor, (40 N. J. L., 257).

In face of the fact that the provisions of sections 4468 and 4469 were specifically retained by section 189 of the Municipal Code, it cannot, perhaps, be argued that there was any legislative repeal of these sections with respect to the powers of council as to sewage disposal plants, by the comprehensive scheme of legislation, which has granted general powers to municipalities with respect to these plants, and has charged officers other than council, with the administrative duties of executing such power. Nevertheless, I am of the opinion that insofar as sections 4468 and 4469 are applicable to the subject matter of sewage disposal plants, they are to be confined, in their operation, to the cases therein provided for, and are not to be looked to as prescribing the procedure in carrying out the general powers granted to cities, with respect to the construction of such plants.

Moreover, it occurs to me that although section 189 of the Municipal Code Act provides that section 2143, R. S., (4468-4469, G. C.), shall remain in full force and effect for all purposes, yet, that this can only mean that this section is to remain in force and have such operation and effect as it can have, consistent with the express provisions of other sections of the act, and consistent with the intent and purpose disclosed by the act as a whole. The Municipal Code Act is an entirety and conformable to cardinal rules of construction, the intent and purpose of the act in any particular respect is to be determined upon a consideration of the same as a whole; and particular sections are to be given such operation only as is consistent with the intent and purpose so disclosed. It seems to me that the intent, purpose and spirit of this act so considered as a whole indicate that the administrative duties pertaining to contracts for sewage disposal plants are vested in the department of public service.

Aside from the foregoing considerations, I am of the opinion that the suggestion that sections 4468 and 4469, General Code, furnish the only authority with reference to the award and execution of a contract for the sewage disposal plant in question, is not well made. As I gather from the facts presented to me, the construction of the proposed sewage disposal plant at Canton has been ordered by the state board of health after proceedings had under the authority of sections 1249 et seq., General Code.

By the provisions of section 4468, the authority of council to initiate and carry on proceedings for the construction of a sewage disposal plant, is limited to the condition that such action by council has been first recommended by the board of health of the municipality, or by some other officer or board in whom the powers of such local board of healh have been vested. It would present a curious and impossible state of affairs that a city, through its officers, should be subject to the order of the state board of health with respect to the construction of a sewage disposal plant, under the sanction of penalties for disobedience of said order, and yet the officers of the city be limited in their power to construct the plant by the condition that the local board of health shall first recommend such construction. This situation but illustrates the point hereinbefore made that sections 4468 and 4469, General Code, have no necessary application to the question at hand.

Upon the facts presented, with reference to the proposed construction of the sewage disposal plant in question, I am of the opinion that power, with reference to the preparation of plans for such plant and for awarding and entering in to the contract for the construction of such plant, is vested in the director of public service of the city of Canton. Inasmuch, however, as this contract will carry an expenditure of more than five hundred ($500.00) dollars, it will have to be authorized by council and approved by the board of control.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

833.

COLLATERAL INHERITANCE TAX — EXECUTOR — PAYMENT — REAL ESTATE—HOW VALUATION SHOULD BE MADE.

1st. An executor of an estate is not justified in computing a collateral inheritance tax for himself, but must, unless he proceeds under sections 5343 *and* 5344, *General Code, pay the amount which is certified against his estate for collection by the county treasurer.*

2nd. Where the real estate has not been appraised in the regular inventory, the probate judge under section 5343 *should make the valuation for the collateral inheritance tax appraisement, subject to the right of the prosecuting attorney, as representing the state, or the executor or any person interested in the succession to apply for an appraisement.*

COLUMBUS, OHIO, March 20, 1914.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 26th, in which you request my opinion upon the following questions, arising under the collateral inheritance tax law, sections 5331, et seq., General Code, as amended in part in 103 Ohio Laws, 463:

> "1. Is an executor justified in taking the value of the personal property fixed by the appraisers as a basis for the payment of the inheritance tax?
>
> "2. Where the real estate has not been appraised in the regular inventory, should the executor have the real estate appraised also, or is he justified in paying the inheritance tax on a fair and reasonable valuation of it?"

I may be permitted, at the outset, to point out what seems to me to be a fundamentally erroneous assumption, upon which your questions are asked, viz.: that the executor is to determine for himself the amount of the taxes that he will pay; subject, of course, to liability if he makes an erroneous determination.

I call your attention to the provisions of sections 5340, 5343 and 5344 of the General Code. These sections were not amended by the act found in 103 Ohio Laws, 463; although, as you will observe, section 5340 is in part inconsistent with amended section 5331, and consequently is by implication amended to the extent of such inconsistency. These sections, as you will note, require the value of the taxable estate to be officially ascertained and certified to the county treasurer for collection. The executor should pay the amount certified to the treasurer for collection, unless he is dissatisfied therewith; in which event he may apply to the probate court on behalf of the persons interested in the succession, or on his own behalf, under section 5343, and section 5344 of the General Code.

Strictly speaking, these sections, then, require me to answer to your first question that the executor is not justified in computing the tax for himself, but must, unless he proceeds under sections 5343 and 5344, General Code, pay the amount which is certified against his estate for collection by the county treasurer.

Your second question would be answered in the negative so far as the executor is concerned. In the case of real estate, the probate judge, under section 5343, should make the valuation, subject to the right of the prosecuting attorney, as representing the state, or the executor or any person interested in the succession, to apply for an appraisement.

With respect to your first question, however, I may say I have held in other opinions that costs of administration and debts of the decedent, where chargeable against a given inheritance, and which diminish the value of the part of the estate against which they are chargeable, as compared with the value shown in the inventory, should be deducted; so that the executor, in the administration of his trust, is justified in objecting in such proper cases to the appraisement, and, in a proceeding for that purpose, securing the reduction of the taxable value of the inheritance so as to account for such factors.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

834.

STATE BOARD OF PHARMACY—RIGHT TO REVOKE CERTIFICATE OF PHARMACIST.

The state board of pharmacy has no power under section 1307, General Code, to suspend or revoke a certificate of a pharmacist on the ground that he was once confined in a state institution for lunacy.

COLUMBUS, OHIO, March 16, 1914.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under favor of March 6th, you inquire as follows:

> "The attention of this board has been called to one Fred P. Schroeder, who is a registered pharmacist under the laws of this state, and who in March, 1912, was sent to a state institution on a lunacy charge, and discharged from such institution as cured in November, 1912.
>
> "This man occasionally does relief work as a registered pharmacist, and while so engaged is in charge of such drug store or pharmacy. The complaint is that he is an unsafe man to practice the profession of pharmacy.
>
> "The question is, therefore, has this board, according to 103 Ohio Laws, p. 487, section 1307 of the General Code, any grounds for the suspension or revocation of a certificate in such case?"

Section 1307 of the General Code, as the same appears in 103 Ohio Laws, 487, is as follows:

> "Each certificate and each renewal certificate issued by the state board of pharmacy shall entitle the person to whom it is granted to practice the profession of a pharmacist or assistant pharmacist for three years. *The board may refuse to grant a certificate to a person guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practice pharmacy,* and, after notice and hearing, may *suspend or revoke a certificate for like cause or for fraud in procuring it.* Within thirty days an appeal may be taken from the action of the state board refusing to grant or suspending or revoking a certificate, to the governor and attorney general, and the decision of these officials, affirming or overruling its action, shall be final. No certificate shall be suspended for a longer period than two years. If during such suspension the existing certificate shall have expired the board may, at the end of such suspension, renew such certificate upon payment to the treasurer thereof the fee prescribed in section 1311 of the General Code for renewal of a certificate."

Under this statute the board is empowered to revoke or suspend a certificate only for the causes enumerated therein for which they may refuse to grant a certificate; and for the additional cause of fraud in procuring a certificate. The board has only such powers in this respect as are expressly or impliedly conferred by the statute. The fact that the pharmacist in question was confined for a period of time in an insane asylum of this state does not supply grounds for suspension or revocation of his certificate, as the same are set out in the statute.

The board, therefore, has no power, under section 1307 of the General Code, to suspend or revoke the certificate of the pharmacist in question, on the ground that he was once confined in a state institution for lunacy.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

835.

FINNISH WORKING PEOPLE'S SOCIETY—BUILDING EXEMPT FROM TAXATION.

The Finnish Working People's Society of Ashtabula Harbor, Ohio, is an institution of pure public charity, and the building owned and occupied by this institution is exempt from taxation.

COLUMBUS, OHIO, March 19, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of March 13th, you request my opinion as to whether or not the building of The Finnish Working People's Society, of Ashtabula Harbor, is taxable. It appears that the purposes of the society are educational and charitable. Its disbursements, as shown by the letter of counsel, consist largely of relief of the poor, not only those of the Finnish race of the community and the mother country, but also the poor of the working classes generally. In addition to such expenditure of its funds the society secures speakers for the instruction primarily of its members, but also of the general public, it being at least implied, in the letter referred to, that the public is invited to the meetings of the society. Again, the society offers to those who attend its meetings simple instruction in music, gymnastics, etc.

The building in question is used by the society as a general assembly hall and for its general purposes.

I assume, of course, that there is no idea of profit on the part of the society or its members.

Under authorities cited in other opinions the society clearly constitutes "an institution of purely public charity" or "an institution of public charity only," as the phrase is used in the statutes; and I am of the opinion that the building in question is exempt from taxation.

The other questions submitted in your letter of March 13th, are separately considered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

836.

EMPLOYMENT OF SECRET SERVICE OFFICER BY PROSECUTING ATTORNEY—EMPLOYMENT OF ADDITIONAL SECRET SERVICE OFFICER.

A prosecuting attorney who is employing a secret service officer regularly under section 2915, General Code, may employ another secret service officer when necessary under the provisions of section 3004, General Code.

COLUMBUS, OHIO, March 3, 1914.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I have your letter of January 20, 1914, as follows:

> " I have Mr. W. B. Mathews regularly appointed as secret service officer under section 2951-1, General Code, but occasions frequently arise in which it is necessary for him to have some one to aid him in the discovery of evidence in order to properly make out a case, and I wondered whether it would be legal to pay for these extra services under section 3004, General Code. I have no doubt but what this is perfectly legal and I understand that a number of prosecutors are doing this way, but I thought it best to have your opinion."

Section 2915-1, General Code, makes provision for the appointment of any one secret service officer. You state you have taken advantage of this provision and have appointed Mathews to serve in this capacity. You now desire to appoint another man to assist Mr. Mathews.

Aside from section 3004, General Code, I am aware of no statute authorizing the appointment of such additional secret service officer, but it seems clear to me that such appointment can be made under this section, as being an expense "in furtherance of justice" and "not otherwise provided for."

I am, therefore, of the opinion that you can appoint an additional secret service officer and pay for such extra service under section 3004 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

837.

OFFICES INCOMPATIBLE—SUPERINTENDENT OF WATERWORKS AND SUPERINTENDENT OF LIGHT AND POWER PLANT—THE RULE OF INCOMPATIBILITY.

Where the same man is serving as superintendent of the waterworks and also as superintendent of the municipal light and power plant and two men are required to discharge the duties of these positions, the director of public service has the right to determine which position the present incumbent shall retain, and an appointment shall be made to fill the other position.

COLUMBUS, OHIO, March 16, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of January 24, 1914, Hon. Amos C. Ruff, city solicitor of Canal Dover, inquires:

> "Under the new civil service law can the same man at the same time serve as superintendent of waterworks and also as superintendent of the light and power plant?
>
> "At the present time we have one man holding both positions. Efficiency absolutely demands that there should be a competent superintendent or foreman for each utility. May the present incumbent choose which superintendency he will retain, or is that a matter for the director of service to decide?"

I assume from the above statement that two separate positions exist, one known as superintendent of waterworks and the other as superintendent of the light and power plant.

The new civil service act does not change the rule of law as to the right of one person to hold two positions at the same time.

The civil service act concerns the method of appointing and removing officers. The rule of incompatibility of offices concerns the duties of officers.

The rule of incompatibility of offices is stated by Dustin, J., in case of State vs. Gebert, 12 Cir. Ct. N. S., 274, when he says on page 275:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

The duties of the two positions now in question are not prescribed by statute. They are not subordinate one to the other and from the usual duties pertaining to such positions they cannot well be a check one upon the other. This will have to be determined by the duties of each position.

If one man can physically perform the duties of both positions, they are not incompatible and may be held by the same person.

It now appears that the efficiency of the public service requires that these two positions be filled by two persons. The civil service act will not prevent this.

The present superintendent is in fact the incumbent of both positions and by the strict letter of section 10 of the civil service act he would be entitled to hold both positions, subject to a non-competitive examination.

If the positions are to be separated, the incumbent has a right to hold one of

the positions if he passes the non-competitive examination. He cannot be deprived of both positions without cause.

If the same person cannot efficiently discharge the duties of both positions, this would make them incompatible. This would be cause for removing the employe from one of the positions which he holds.

The officer who has the right to appoint or remove the employe in question, would be entitled to determine from which position he should be removed.

Section 4250, General Code, provides:

> "The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

If a department of waterworks and a department of light and power have been created in your city, the superintendent of these departments would be heads of subdepartments, and the mayor would have the right to appoint or remove them. In such case the mayor would have a right to determine which position the present incumbent should retain.

Section 4247, General Code, provides:

> "Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, and likewise, subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes."

One of the executive officers herein referred to is the director of public service as shown by section 4246, General Code. Therefore, if there is no department of waterworks or department of light and power, the director of public service can appoint and remove the superintendents of such waterworks and light and power plants. You refer to them both as superintendents and as foremen in your letter. In such case the director of public service can determine which position the present incumbent shall retain.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

838.

ELECTION EXPENSES—EXPENSES TO BE CHARGED BACK AGAINST POLITICAL DIVISION—EXPENSES TO BE PAID BY THE COUNTY.

1st. The cost of supplies and the compensation of clerks and judges of election should be charged against the political division in which primaries are held and no other.

2nd. Compensation to members and clerks of the board of deputy state supervisors of elections for holding primaries and also for receiving nomination petitions is not an actual expense of the primary and cannot therefore be charged back to the political subdivision as an expense of a primary election under section 4991, General Code. This compensation is paid by the county. The precinct is the unit by which the amount of compensation to be paid in the county is determined.

COLUMBUS, OHIO, March 19, 1914.

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

GENTLEMEN:—Your favor of January 22, 1914, is received, in which you inquire:

> "How are the expenses of primary elections to be charged back under the provisions of section 4991, General Code, as amended, 103 Ohio Laws, 510?
>
> "Shall the cost of supplies, including the compensations of the members and clerks of the boards of deputy state supervisors, as based by section 4990, General Code, upon all of the precincts of a county, as well as the compensation of the judges and clerks of elections, be borne by the subdivision or subdivisions only in which such primaries were held? It might happen that a primary was held in only one township, one village, or one city in a county; if so, would that one township, one village, or that one city be compelled to bear the entire expense?
>
> "Is the fact that nomination petitions were filed in most, if not all of the subdivisions where no primaries were held sufficient service on the part of the election boards in receiving them, to justify a distribution of the expenses and compensations to all of the subdivisions of a county, as provided by section 5053, General Code, and your ruling of July 12, 1912, that expenses of primary elections held in odd numbered years be charged back?"

Section 4990, General Code, provides:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

Section 4991, General Code, as amended in 103 Ohio Laws, 510, provides in part:

> "All expenses of primary elections, including cost of supplies for election precincts and compensation of the members and clerks of boards of

deputy state supervisors, and judges and clerks of election, shall be paid in the manner provided by law for the payment of similar expenses for general elections except that the expenses of primary elections in political divisions less than a county shall be a charge against the township, city, village or political division in which said election was held, and the amount so paid by the county shall be retained by the county auditor, from funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor."

This section authorizes the county to charge the expense of a primary election to the political division "in which said election was held." Three classes of expenses are specifically mentioned. The costs of supplies; the compensation of the judges and clerks of election; and the compensation of the members and clerks of boards of deputy state supervisors. These classes of expenses will be considered separately.

Your inquiry arises from the fact that in many political divisions no primaries are held in the odd-numbered years. Where there are primaries in every precinct of a county the division of the expense is a matter of calculation.

The supplies in question would be for precincts in which primary elections are held. There would be no supplies for precincts in which no primary election was held.

The same is true as to the compensation of the judges and clerks of elections. If there is no primary in a precinct, there is no expense for clerks and judges for such precinct. The same is true as to other general expenses pertaining to a primary election.

Therefore, the cost of supplies and compensation of judges and clerks of election should be charged against the political division in which primaries are held and to no others.

The court of common pleas of Mahoning county, Ohio, has held that under section 4990, General Code, the members and clerks of the board of deputy supervisors of elections are entitled to the compensation therein specified for each precinct in the county whether a primary election has been held in each precinct or not. This decision has been affirmed by the court of appeals.

Prior to the amendment of section 4991, General Code, the compensation of the members and clerks of these boards for conducting primaries was paid by the county and was not charged back, except in counties containing registration cities, wherein the compensation was prorated. This was the holding in the opinion of this department to you under date of February 27, 1912.

In the Mahoning county case, State of Ohio ex rel., vs. Hogg, Auditor, Robinson, J., said:

"If it were true they had nothing to do with the nomination by petition there might be a strong argument that the constitutional provision had deprived them of compensation in those precincts in which no election was had, but they still have very similar and important duties, and the fair application of the statute would seem to be to follow its general construction. It would not be a shifting compensation, for next year these thirty precincts may vote to have a primary election, but it is intended that they shall be compensated for all of the precincts in the county, for the reason that they have some work, at least, to do, notwithstanding the constitutional provision as to such of the precincts."

The court bases its conclusion, among other things, upon the fact that the members and clerks of the various election boards must receive nomination petitions of candidates for offices in those political divisions in which no primaries are held. There is no reference in this opinion to the provisions of section 4991, General Code, as amended.

The court does not pass upon the question as to whether or not the filing of nomination petitions is sufficient reason for charging back such compensation under section 4991, General Code, supra, or that any of such compensation can be charged back.

Section 4991, General Code, as amended, requires that the "expenses of primary elections in political divisions less than a county shall be a charge against the township, city, village or political division in which said election was held."

The word "expenses" in the part above quoted applies to the actual expenses of a primary election.

In view of the court's decision in the Mahoning county case, can it be said that the compensation of the members and clerks of the board of deputy supervisors is an actual expense of a primary election? The court in effect holds that the compensation to be paid these persons is determined by the number of precincts in the county, whether primaries are held therein or not. This compensation by virtue of section 4822, General Code, read in connection with section 4991, General Code, is paid quarterly from the general fund of the county. The compensation is divided over the entire year. The precinct is the unit by which the amount of compensation to be paid in the county is determined.

This compensation is for holding primaries and also for receiving nomination petitions, as decided by the case cited. It is not an actual expense of the primaries and cannot, therefore, be charged back to the political divisions as an expense of a primary election under section 4991, General Code. This compensation is paid by the county.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

839.

MUNICIPAL CIVIL SERVICE—RIGHT TO HOLD ANOTHER OFFICE IN ADDITION TO THAT OF CIVIL SERVICE COMMISSIONER.

A member of a municipal civil service commission cannot hold an office or position in the city or city school district that has the power of appointment, promotion, lay off or suspension of an officer or employe, nor can he hold a position in the classified service in such city or city school district. So far as his holding state and county offices is concerned, each office must be examined to determine whether it comes within the rule as to incompatibility of offices.

COLUMBUS, OHIO, March 19, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of March 7, 1914, you inquire:

"Section 3 of the civil service act in the last sentence provides:

"No commissioner shall hold any other office of profit under the government of the United States, the state of Ohio, or any political subdivision thereof.

"We learn from correspondence with municipal civil service commissions over the state that many cities pay no salaries whatever, and some of them very small compensation. In many cases, civil service commissioners drawing either no salary or a very small salary are holding other public positions carrying larger remuneration. We have a number of inquiries from these municipal commissions desiring to know whether or not their members can hold any other position of profit, whether drawing salaries or not as municipal commissioners."

Section 3 of the civil service act, section 486-3, General Code, provides:

"Commissioners. Within ten days after this act goes into effect the governor shall appoint, by and with the advice and consent of the senate, three persons of recognized character and ability to serve, one for two years, one for four years, and one for six years, as civil service commissioners, who shall constitue the state civil service commission of Ohio. Upon the expiration of the term of office of each commissioner so appointed, his successor shall be appointed by the governor to serve for a period of six years from the date of his appointment, and until a successor is appointed and has qualified. A vacancy in the office of commissioner shall be filled by the governor for the remainder of the unexpired term.

"The governor may remove any member of the state civil service commission of Ohio at any time for inefficiency, neglect of duty, or malfeasance in office, having first given to such commissioner a copy of the charges against him and an opportunity to be publicly heard in person or by counsel in his own defense, and any such act of removal by the governor shall be final.

"A statement of the findings of the governor, the reasons for his action and the answer, if any, of the commissioner, shall be filed by the governor with the secretary of state and shall be open to public inspection. At the time of any appointment, not more than two commissioners shall be adherents of the same political party. *No commissioner shall hold any other office of profit under the government of the United States, the state of Ohio, or any political division thereof.*"

The provisions of this section, standing alone, apply to the members of the state civil service commission.

Section 19 of said act, section 486-19, General Code, provides in part:

"Municipal civil service. The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district in which such city is located; provided, however, that members of existing municipal civil service commissions shall continue in office for the terms for which they have been appointed and that their successors, the first appointees of the mayor or other chief appointing authority of such city, shall be appointed to serve respectively for four years, five years and six years and until their successors are appointed and have qualified. Each alternate year thereafter the mayor or other chief appointing authority shall appoint one person as successor of the member whose term expires to serve six years and until his successor is appointed

and has qualified. A vacancy shall be filled by the mayor or other chief appointing authority of a city for the unexpired term. At the time of any appointment not more than two commissioners shall be adherents of the same political party. * * *

"If the appointing authority of any such city fails to appoint a civil service commission or commissioner as provided by law within sixty days after he has the power to so appoint, or after a vacancy exists, the state civil service commission shall make the appointment, and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified. If any such municipal commission fails to prepare and submit such rules and regulations in pursuance of the provisions of this act within six months after this act goes into effect, the state civil service commission shall forthwith make such rules. *The provisions of this act shall in all other respects, except as provided in this section, be in force and full effect in such cities.*"

This section provides for the appointment of the members of the municipal civil service commission. There is no specific provision in this section that the members of such commission cannot hold any other position of profit in the service of the public. This section fixes the qualifications of municipal civil service commissioners.

The last sentence above quoted and italicized does not apply to the qualifications of a commissioner as stated in section 3 of the act. It applies to the provisions of the act pertaining to the appointment, promotion, examination, etc., of officers and employes, and of applicants.

The inhibition of section 3 does not, therefore, apply to the members of the municipal civil service commission.

The doctrine of incompatibility of office would apply to these commissioners.

The rule is stated by Dustin, J., at page 275 of State ex rel. vs. Gebert 274, where he says:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

The members of the municipal civil service commission examine applicants and certify names for appointment to all appointing officers in the city and city school district thereof. They are, therefore, a check upon these officers as to their power of appointment. Also they could not very well examine themselves for positions in the classified service.

Section 21 of the civil service act provides in part:

"After the expiration of twelve months from the taking effect of this act, it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service until an estimate, payroll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil

service commission, or in case of the service of a city the certificate of the municipal service commission of such city, that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended or laid off or are being employed in pursuance of this act, and the rules adopted thereunder."

By virtue of this section the certificate of the civil service commission is necessary before employes in the classified service can secure their pay.

Also section 22 of the civil service act gives the municipal civil service commission the power of investigating the conduct of other officers.

Said section 22 reads:

"Whenever a civil service commission shall have reason to believe that any officer, board, commission, head of department or person having the power of employment, lay off, suspension or removal, has abused such power by making an appointment, lay off, suspension, or removal in violation of the provisions of this act, it shall be the duty of the commission to make an investigation, and if it shall find that any such violation of the provisions or the intent and spirit of this act has occurred, it shall make a report thereof to the governor, or in the case of a municipal officer or employe to the mayor or other chief appointing authority, who shall have the power to remove forthwith such guilty officer, board, commission, head of department, or person; an opportunity first having been given to such officer or employe of being publicly heard in person or by counsel, in his own defense."

A civil service commission could hardly impartially conduct an investigation of one of its own members, as to his conduct when holding some other position.

Therefore, a member of a municipal civil service commission cannot hold an office or position in the city or city school district thereof, that has a power of appointment, promotion, lay off, or suspension of an officer or employe, nor can he hold a position in the classified service, in such city or city school district.

As to county and state offices the duties of the particular positions must be examined to determine whether they come within the rule laid down by Judge Dustin, as to incompatibility of offices.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

840.

STATE BOARD OF PHARMACY—RIGHT TO RECOGNIZE CERTIFICATE OF PHARMACIST FROM FOREIGN STATE.

The state board of pharmacy is authorized to recognize a certificate of a pharmacist registered in New York City only, provided that said board is satisfied that the standard of qualifications and requirements as to competency for such certificate as he holds is equal to that required of holders of such certificate in this state.

COLUMBUS, OHIO, March 16, 1914.

HON. M. N. FORD, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 6th, wherein you state:

"This board has an applicant who asks registration as an assistant pharmacist in this state upon his registration as a pharmacist by examination before the New York board of pharmacy.

"The applicant's New York registration is good in New York City only. Such being the case, can this board, according to section 1305 of the General Code, issue said applicant such certificate of registration?"

Sections 1305 and 1306 of the General Code are as follows:

"Sec. 1305. The state board of pharmacy shall register a person as assistant pharmacist without examination and issue him a certificate of such registration if he is legally registered by examination as a pharmacist, and holds a certificate of such registration under the laws of another state. The board may register a person as a pharmacist without examination and issue him a certificate of such registration if he is legally registered as a pharmacist and holds a certificate of such registration under the laws of another state, upon the following conditions: Each applicant for such registration shall not be less than twenty-one years of age and be registered after examination in the state from which he holds a certificate.

"Sec. 1306. The standard of qualifications and requirement as to competency in another state shall at least be as thorough as that established by the board of pharmacy of this state. The board shall not recognize certificates of registration granted by another state unless recognition is given to residents of this state holding certificates from its board of pharmacy."

In answering your question I assume that the state of New York recognizes residents of this state holding certificates from its board of pharmacy.

Under these sections of the General Code, your board is required to register a person as assistant pharmacist if he holds a certificate of registration as a pharmacist after examination *under the laws of another state;* provided, that the standard of qualification and the requirement as to competency in such other state is as thorough as that established by the board of this state.

I am satisfied that if the applicant in question is registered as a pharmacist, even though his registration be recognized in New York City alone, he holds a

certificate of registration under the laws of another state within the language of section 1305.

The question as to the standard of qualification and requirement as to competency, which the applicant was required to meet as a condition to the receipt of the certificate he holds, is one which the facts stated in your letter will not permit me to answer. This question is primarily one for the board itself.

Answering your question in short I may say that under these statutes your board is authorized to recognize the certificate of this applicant, provided you are satisfied that the standard of qualification and requirement as to competency, for such certificate as he holds, is equal to that required of holders of such certificates in this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

840-A.

OFFICES COMPATIBLE—VILLAGE MARSHAL—VILLAGE HEALTH OFFICER.

One person may at the same time hold the office of village marshal and village health officer and draw the salary attached to both offices from the city treasury.

COLUMBUS, OHIO, March 28, 1914.

HON. J. O. BECKET, *Member Ohio State Senate, Commercial Point, Ohio.*

DEAR SIR:—I have your letter of March 20th, wherein you inquire:

> "May the offices of marshal of the village of Commercial Point and health officer of said village (there being no village board of health) be held by the same person."

Section 4384, General Code, provides for the election of a marshal in villages for a term of two years and until his successor is elected and qualified. By virtue of section 4385 he is constituted the chief peace officer of the village and the executive head of the police department, under the mayor. His duties, as defined by the succeeding sections, are to suppress riots, disturbances and breaches of the peace, to arrest disorderly persons in the corporation, and to pursue and arrest fugitives from justice, etc.

It is made mandatory by section 4404, General Code, upon the council of each municipality in the state, to establish a board of health, except that in villages the council may dispense with a board of health and appoint a health officer, with the approval of the state board of health, who shall act instead of a board of health and have the same powers and duties as are conferred by statute upon local boards of health. I understand the latter plan was followed at Commercial Point.

The duties of a health officer in such case, are to make all necessary and proper regulations for the public health, to prevent and restrict disease and to take steps to prevent, abate and suppress nuisances.

Incompatibility of offices is of two kinds, viz., statutory and common law. The former exists when a statute expressly prohibits the holding by one person of two or more offices at the same time. The statutes do not expressly prohibit a village marshal from acting as health officer of the village.

The rule of common law incompatibility is stated by the circuit court in the case of State ex rel. vs. Gebert, 12 C. C., (n. s.), as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

The functions of a marshal and health officer are entirely separate and independent. There is nothing in the duties pertaining to either of these two offices that would make one subordinate to or a check upon the other. Neither statutory nor common law incompatibility exists and I am therefore of the opinion that one person may hold both offices at the same time and draw compensation for both from the municipal treasury.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

842.

ALTERNATING CURRENT—REGULATION AND USE IN MINES.

Mines where alternating current has been installed and in use before the passage and operation of section 948 of the General Code are not required to discontinue the use of this current by the provisions of this section.

COLUMBUS, OHIO, March 23, 1914.

MR. J. C. DAVIES, *Chief Deputy, Department of Inspection, The Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of March 16, 1914, you submit the following inquiry:

> "We request an opinion from your department as to whether or not alternating current which had been already installed and in use in the underground workings of a mine at the time of the passage and approval of section 948 of the General Code can legally be continued."

Paragraph 3 of section 948, which has reference to alternating current, reads thus:

> "At each mine equipped with electric power after the passage and approval of this act, no alternating current shall be used underground to operate any machinery other than that necessary to convert the alternating current to direct current, and no wires carrying alternating current shall be used underground except same be carried in an entry or passageway where persons and animals are not permitted to travel."

The plain language of the statute in question seems to indicate the inhibition against electric current is applicable only to those mines which are equipped with electric power after the passage and approval of the act in question. If the act were intended so to be read as to prohibit the use of alternating current after the passage and approval of the act in question, this would have been accomplished by the omission of the words: "after the passage and approval of

this act," and we cannot assume that the legislature inserted these words without having intended that something should be accomplished by such insertion. The result thus accomplished is, as we have before indicated, to permit the mine equipped with electric power prior to the passage of the act in question, to use alternating current underground to operate machinery, etc.

I desire, however, to call your attention to the concluding paragraph of section 948, which reads thus:

> "At each mine equipped with electric power *prior to the passage and approval of this act,* where the pressure or potential is in excess of 325 votls, direct current, *or where alternating current is used* and the conditions surrounding the use of same are such, in the opinion of the chief inspector of mines, that the provisions of the preceding section do not provide the required protection from shock to persons employed therein, such additional safe-guards shall be employed as may be required by the chief inspector of mines, and the district inspector of mines jointly."

The next preceding section, viz.: Section 947, regulates the use of electricity and the control of current, as well as the manner of placing of wires in mines. Should the safe-guards therein provided be insufficient because alternating current is used in the mine, your board can legally provide such additional safeguards as may be necessary for the protection from shock to persons employed in such mine.

The paragraph last quoted gives added force to the contention that the prohibition against alternating current applies only to mines equipped with electricity after the passage of the act, because this paragraph refers to the use of alternating current in a mine equipped prior to the passage of the act. It does not limit the use of such alternating current in the manner in which it is limited in the third paragraph, which is also quoted in this opinion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

843.

TAXES AND TAXATION—WRONG DISTRIBUTION OF TAXABLE PROPERTY—NO REMEDY IN SUCH CASES.

Where the taxable property of a railroad company located in a certain village and township has been erroneously distributed as between two taxing districts on account of a mistake as to the relative mileage of the main track of the railroad located in them respectively, and as a continuance of this error the village has been the loser and the township the gainer in taxes, the county auditor is without authority to place on the current or future duplicate of the village as omitted taxes that portion of the valuation which should have been contributed to the village during the past years.

COLUMBUS, OHIO, March 25, 1914.

MESSRS. BLACHEY & KEARNS, *Legal Counsel for the Village of Ohio City, Van Wert, Ohio.*

GENTLEMEN:—I regret very much that my convenience, which you were kind enough to consult, did not permit me to answer your letter of October 22, 1913, at an earlier date. This department has, during the past few months been burdened

with so many matters of immediate urgency, that through sheer physical inability, to do otherwise, I have been obliged to fall somewhat behind in the attention which I have given to matters presented in the regular way.

Your letter requests my opinion upon the power of the county auditor, under the following set of facts:

> "For ten or fifteen years last past the taxable property of the Chicago & Erie Railroad Company, located in the village of Ohio City and in Liberty township, Van Wert county, has been erroneously distributed as between these two taxing districts, on account of a mistake as to the relative mileage of the main track of the railroad located in them respectively. As a consequence of this error the village has been the loser and the township has been the gainer.
>
> "Can the county auditor place on a current or future duplicate of the village, as omitted taxes, that portion of the valuation which ought to have been attributed to the village during the past years; and if so, for how many years past may he take such action?"

The taxable property of a railroad, which is apportioned along the line of the road on a mileage basis, is not, strictly speaking, either "real property" or "personal property" within the meaning of the general taxing statutes. So if the question is as to the power of the county auditor to act under sections 5398 to 5401, inclusive, it must be answered that such power does not exist. (Railway Company vs. Hynicka, 4 N. P. n. s., 345.) In other words, the addition cannot be placed on the duplicate on the theory that the village's portion of the assessment as it should have been made is "omitted personal taxes." The case last above cited is also authority (and more directly so) for the proposition that the county auditor may not proceed under section 5574, General Code, which pertains to the assessment of real estate and provides that whenever a county auditor discovers that lands, town lots, improvements, structures or fixtures therein, subject to taxation, have *escaped taxation* by reason of an error of the auditor, he shall place the property upon the duplicate and levy against it the rates for the preceding years as far back as the last appraisement and equalization of real estate, or the last date of ownership. The reason for this is that the property has not "escaped taxation" at all; it has been *taxed*, but the proper rates have not been levied against it. The same reason underlies the holding that it is not omitted property; for the property is on the tax list and has been taxed, but only at improper rates, and in the wrong districts.

Section 2593 affords a remedy which is more nearly applicable than either of the two already considered, in that it authorizes the auditor, when given "lots or lands" have not been charged with particular levies, to charge against such property such omitted taxes, as far back as the last appraisal of real estate or the last change of ownership. However, by parity of reasoning upon the decision in Railroad vs. Hynica, supra, this remedy would have to be rejected. That is to say, railroad property is not "lots or lands." It is to be observed that ordinary personal property which has actually been on the tax duplicate, but against which rates have not been extended for given levies in past years, cannot be reached under section 2593. A fortiori, then, railroad property which is of a peculiar character cannot be so reached.

I now refer to sections 2588, et seq., General Code, which authorize the county auditor to "correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes * * * the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment." These sections might, under

one construction, give to the county auditor the power to current or living duplicate. In fact, it appears from your statement of facts that the auditor actually did this with respect to the current duplicate in the case mentioned by you. But those provisions of these sections which authorize the duplicate to be corrected can have no reference to preceding years. It is axiomatic that the auditor must be authorized to certify to the treasurer some evidence of the claims for taxes before the treasurer can collect them. This he must do either by placing taxes for previous years on an existing duplicate, which is not authorized by the language found in the section now under consideration; or by making a special certificate of collection, which is authorized by other sections to which I need not refer, but not by the one under consideration.

The inference that the general provisions of sections 2588, et seq., General Code, do not authorize *additions* for previous years is made irresistible by the provisions of section 2589, authorizing a refunder of "erroneous taxes or assessments * * * charged and collected in previous years." If the railroad had paid *too much* taxes, these sections would, in my opinion, afford it relief; indeed, to be perfectly technical, it may be that as to the *township* levies, made in the years in question, upon the excessive mileage, the railroad may actually be entitled to a refunder for certain years. I enclose herewith copy of an opinion given to Hon. W. V. Wright, prosecuting atttorney of Tuscarawas county, bearing upon this question.

The very fact that the statute speaks of refunders of excessive taxes paid in previous years, and makes no provision for collecton of additional taxes where the erroneous charge resulted in the payment of *less than* should have been paid, makes it clear that these sections cannot apply.

I have already referred generally to sections 5398, et seq., General Code, and have stated my conclusion with respect to them; which is that the *county auditor*, thereunder, may not add to the duplicate any taxes on account of the errors of which you speak. This conclusion is made certain by the express language of section 5400, General Code, which provides as follows:

> "The power and duty of the county auditor under the provisions of the next preceding section, shall extend to all cases where property, taxable within his county, has for many reasons not been assessed and taxed according to its true value in money, as provided by law, except that where provision is made by law for the appraisement and assessment of property by a board composed of officers of more than one county, and such property or part thereof has escaped taxation, the duties provided in such section shall be performed by such board. The board, at any subsequent meeting, may appraise and assess such omitted property for the year or years so omitted, and certify its assessment to the proper officer or officers to be placed upon the tax lists of the proper county or counties for the collection of omitted taxes thereon in a like manner as current assessments are certified by said board, and such officer or officers shall give a certificate therefor to the county treasurer, as in other cases."

This section makes it clear that the county auditor has no power under the group of sections of which it is a part, when the property in question is such as for which "provision is made by law for the appraisement and assessment (thereof) by a board composesd of officers of more than one county."

Railroad property, of course, is property such as is described by the phrase above quoted, and it is therefore clear that the county auditor's powers and duties under section 5399, which alone authorizes corrections for previous years, do not extend to railroad property.

My conclusions thus far reached are sufficient to support the general opinion that the county auditor has no power in the premises; although, as explained in the opinion a copy of which is enclosed herewith, the auditor would have had power to make a refunder upon the order of the commissioners if the railroad had paid too much taxes instead of too little taxes.

While your question is limited to the powers of the county auditor, I have deemed it proper to inquire whether or not such authority is reposed in any other officer or board. Section 5400 suggests inquiry into the powers of the "board composed of officers of more than one county," of which it speaks. Under previous laws railway property was valued by a board consisting of the auditors of the counties through which the line of the road passed. When the act creating the tax commission was passed all such boards were abolished; and although their powers and duties were not exactly conferred upon the tax commission, it was held, in an unreported case entitled The Steubenville & Wheeling Traction Company vs. Blinn, Treasurer, that the effect of that act was to impose in the commission the right to complete any work relating to the valuation of railways formerly devolving upon the taxing authorities provided for by the pre-existing law. One of the sections of the tax commission act provided also that the act itself should not affect pending causes of action. (101 O. L. 399, section 123.)

The section just cited is not as broad as is section 26 of the General Code, which preserves, as against the effect of the repealing act, not only pending causes of action and pending actions, proceedings and prosecutions, but also, when the appeal relates to the remedy, pending *causes of proceedings.* Section 26, General Code, however, by its own terms, does not apply when provision is otherwise in the repealing act. This provision of the section is interpreted in the case of Friend vs. Levy, 76 O. S. 26, to mean that, where any provision respecting the effect of a repealing act upon pending matters is made by that act, such a provision *ipso facto* withdraws the repealing act from the effect of section 26, General Code.

Now, if there ever was any right in the "board composed of officers of more than one county," under section 5400, to make the addition which you have in mind, there would be grave doubt as to whether or not such power would be preserved and vested in the tax commission, so that it could act at the present time with respect to years prior to 1911; for, although section 5400 has not been "repealed," and though the tax commission has in all probability all the powers of the old board, yet, the peculiar phraseology of section 123 of the first tax commission law might, as already stated, lead to the conclusion that the commission could not exercise its powers as to matters and things which should have come before the old board during its existence.

However, I do not find it necessary to pass upon this question, because I do not think that, even if the tax commission has the authority at the present to exercise the power of the old county board, those powers themselves extend to the additions contemplated by your question. It is only when property or part thereof "has escaped taxation" that the board could act under section 5400. The property must be omitted from the duplicate in order to give occasion to the exercise of the power; and, as already stated, that is not the case here, the error being a matter of the extension of rates and not one of the assessment. Technically, perhaps, the error is one of assessment, in that it occurs not in the extension of the rates themselves, but rather in the apportionment of the valuation. But here we are relegated again to sections 5398 and 5399, General Code, for it is "the power and duty of the county auditor under the provisions of the next preceding section" which are to be exercised by the "board composed of officers of more than one county." So that, for an interpretation of the phrase "where * * * such property or part thereof has escaped taxation," we must turn to those sections, in order to find the cir-

cumstances constituting an "escape." Those circumstances, as disclosed by the two preceding sections, are as follows:

1. The making of a false return or statement.
2. Evasion of making a return or statement.
3. The failure to make a return or statement.
4. The return or statement of only a portion of the taxpayer's taxable property.
5. The return of taxable property or part thereof at a false valuation.

None of these circumstances exist in the facts submitted by you. It is true that in all probability the county auditor acted, as you state, upon information furnished him by the railroad company. However, an error in such information, whether required in the form of a statement under oath or not, would not amount to a "false return," "evasion" or any of the other things referred to in the two sections; although it might be otherwise if the required report or statement was false in a matter affecting value. Railway Company vs. Hynicka.

It would therefore seem that section 5400 could not be employed by the tax commission of Ohio, as the successor of the old board of county auditors, for the purpose of making such corrections as might be necessary in order to adjust the matter of which you speak.

While on this subject, however, I beg to refer to section 5403-1, General Code, which prohibits any county auditor, assessor or other officer from placing upon the tax list or duplicate, for taxation as of the year 1910, or as of any year preceding said year, any personal property which should have been assessed for taxation as of such year; or from changing in any manner the valuation for the year 1910, or any preceding year, of personal property returned for taxation prior to the determination.

This section clearly prohibits any addition whatsoever respecting the *listing* or *valuation* of personal property as of the year 1910 or preceding years. Therefore, it is clear that in any event the tax commission could not act in the place of the old board of county auditors; that board having been abolished in 1910, and the right to place omitted property on the duplicate having been taken away, as to the year 1910 or preceding years.

In fact, the section just cited furnishes in a way a complete answer to your question insofar as the year 1910 and preceding years are concerned, viz.: no board or officer has any authority to add anything to the duplicate as omitted personal property, for the year 1910 or any preceding year.

Therefore, if any additions are to be made for the year 1910, or any preceding year, it is very clear that they must be made either upon the theory that railroad property is not "personal property," within the meaning of section 5403-1, or that the proposesd corrections do not constitute an "assessment" or "valuation" of such property "for taxation for the year 1910 or any preceding year."

For all the various reasons which I have discussed, then, I am of the opinion that we must look to the tax commission act in order to find a possible method of procedure in the case you submit.

I find the following provisions of that act which may be pertinent:

Section 5461, being section 72 of the revised tax commission act, 102 O. L. 240 (there being no corresponding provision in the original act, in 101 O. L. 399):

> "When a public utility or corporation fails to make any report or furnish any statement, which it is required to make or furnish, to the commission, or makes a return or statement of a portion only of the gross receipts or gross earnings, which it is required by law to make or return, and fails to make return or statement of the remainder, or fails to report

a part or all of its taxable property, or report the same, or part thereof, according to its true value in money, the commission shall ascertain, as nearly as practicable, the gross receipts or gross earnings, or omitted portion of the same, or taxable property, or omitted part of the same, or such as was not reported according to its true value in money, that should have been reported or returned by such public utility or corporation, and certify such gross receipts or gross earnings, or the value of such property, so ascertained, as required in this act, with respect to its gross receipts, gross earnings and property of public utilities and corporations. * * * The power and duty of the commission, above provided for, shall extend to preceding years in such manner as that the commission shall, for such year or years preceding the year in which the inquiries are made, and omissions ascertained, certify such omitted amounts, so ascertained, as required in this act, with respect to such companies, in which event such omitted amounts shall be taxed at the rate of taxation belonging to the year or years in which the failure or omission occurred, in the case of property, and in all other cases the amount of the tax or fee upon such omitted amounts shall be calculated upon the amount so ascertained by the commission, at the rate provided by law, for such year or years; provided, however, that the power and duty of the commission with respect to property shall extend only to the five years next preceding the year in which such inquiries and corrections are made, and not in any event prior to the year 1911, except where no property of a company has been returned or assessed in any such year or years.

"Section 5617-1. The commission shall require county auditors to place upon the tax duplicate any property which may be found, for any reason, to have escaped assessment and taxation.

"Section 5617-4. * * * It may correct an error in an assessment of property for taxation or in the duplicate of taxes in a county, but its power under this section shall not extend to taxes levied under the provisions of subdivisions two of chapter fifteen of title two, part second, of the General Code.

"Section 5617-6. The commission may receive complaints and examine into all cases where it is alleged that property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unfairly assessed, or the law, in any manner, evaded or violated."

In my opinion the section first above cited affords a remedy exclusive of the general remedies provided for by the other group of sections. A railroad is a "public utility" (sections 5415 and 5416, General Code) and has been since the year 1910, within the purview of our statutes. Section 5461, then, is an express provision for the placing of omitted public utility property on the duplicate; and under the familiar rules of statutory interpretation, this express provision is to be regarded as an implied exception to the general power of the commission. Under section 5617-1, to require county auditors to place any omitted property on the duplicate. Therefore, if the theory of the present changes be that of adding omitted property, I am satisfied, in view of the limitation of section 5403-1, that the only action which can be taken is the action of the tax commission under section 5461; and this action, in turn, is limited to the years beginning with the year 1911. Since that year, of course, the railroad companies have been reporting to the tax commission, and the apportionments among taxing districts have been made by the tax commission (and not by the county auditor, for such years, as you seem to assume). See sections 5430, et seq., General Code.

Therefore, if there has been an error on the part of any officer, the error has been that of the tax commission and not that of the county auditor; unless the county auditor has failed to follow the apportionment as made by the commission, which does not appear to be the case.

I am not sure, however, that the question which you submit can be worked out upon the theory of the addition of omitted property. The railroad company, in making an erroneous statement of mileage, was certainly not guilty of "failing to make any report or furnishing any statement;" it was not guilty of "failing to report a part or all of its taxable property;" it was not guilty of "reporting the same or part thereof otherwise than according to its true value in money." Therefore, it does not seem to me that the tax commission, under section 72 of the act, can adjust for previous years an apportionment of railroad property, based upon an erroneous statement of the company respecting its mileage, into adjacent taxing districts.

Turning again to the other group of sections above quoted, I beg to point out that section 5617-4 contains a provision which seems to fit the case exactly, viz.: that authorizing the tax commission to "correct an error * * * in the duplicate of taxes in a county." However, this provision, like the somewhat similar provision of section 2588, already commented upon, cannot apply to corrections for previous years, because no machinery for making a charge for the previous years, and levying the rates of previous years against the addition, is afforded by the section. In this respect it differs from section 5461, supra, which does contain such machinery. Therefore, in my judgment, although the tax commission could order the auditor to correct a living duplicate, in the particular mentioned in your letter, just as the auditor on his own initiative could have made the correction under section 2588, neither the commission nor the auditor can make the correction for a preceding year.

Nor in my judgment is this conclusion impaired by the general powers of the commission under section 5617-6 and other similar sections. The same defect exists in all of them for the purposes at hand, viz.: that they do not provide adequate machinery for placing in the hands of the county treasurer a certificate or duplicate of taxes for preceding years, computed at the rates for those years.

I have examined the act found in 103 Ohio Laws, 786, known as the "Warnes law," and I am satisfied that there is no provision therein which in any way bears upon the question. That law relates solely to the assessment and valuation of ordinary real and personal property, and has no relation to the assessment and valuation of railroad or other public utility property.

I do not think I have overlooked any of the pertinent provisions of the General Code. Upon such examination as I have made, I have come to the conclusion that no remedy whatever exists for the correction of the errors which have occurred.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

844.

BOXWELL-PATTERSON LAW—PUPIL MUST COMPLY WITH THIS LAW IN ORDER TO RECEIVE FREE TUITION IN HIGH SCHOOL—WHAT HIGH SCHOOL GRADUATE TO ATTEND.

1st. A township board of education is not liable for the tuition of a student who passes a Boxwell examination and receives her grades but did not take part in the county commencement as required by law, and received no diploma.

2nd. A township board of education maintaining a third grade high school is not legally liable for the payment of the tuition of a Boxwell-Patterson graduate, holding a diploma as such for period of two years at a first grade high school, and who is not a graduate from a third grade high school maintained by the township school district wherein such pupil resides.

COLUMBUS, OHIO, March 31, 1914.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Under date of December 15, 1913, you submitted two requests for an opinion, which may be stated as follows:

> "1. Would a township board of education be liable for the tuition of a student passing the Boxwell examination and receiving her grades, of which I enclose you a copy in the case where such student did not comply with the law in this; that she did not take part in the county commencement and never received her diploma?
>
> "2. Would a township board of education, maintaining a third grade high school, be liable for the tuition of a Boxwell graduate holding a diploma but never graduating from the township high school; which said student, after passing the Boxwell examination and receiving his certificate, entered a first grade high school, paying his own tuition for the first two years and only asks that the township pay such tuition for the two years as provided by the law, given a student who is a graduate of the township third grade high school?"

Respecting your first question, section 7740 of the General Code provides in substance that two examinations shall be held only, one on the third Saturday of April and one on the third Saturday of May, to be given by the county school examiners to pupils of township and special districts, as follows:

> "Each board of county school examiners shall hold examinations of pupils of township and special districts, and of village districts in the subjects of orthography, reading, writing, arithmetic, English grammer and composition, geography, history of the United States, including civil government and physiology. Two such examinations must be held annually, on the third Saturday of April, and one on the third Saturday of May, at such place or places as such board designates."

Section 7741 of the General Code provides in substance that the questions for such examination shall be uniform throughout the state and shall be prepared under the direction of the state commissioner of common schools.

Section 7742 provides in substance for the holding of a township commencement not later than the month of June, at some convenient place in the township.

Section 7743 specifies who shall take part in such commencement as follows:

> "At such commencement each successful applicant residing in the township school district or any special or joint subdistrict whose school house is located within the civil township of which the township district forms a part, shall be required to deliver an oration or declamation, or read an essay. Thereupon such board of education must issue a certificate to each successful applicant, stating that such applicant took part in the commencement."

Section 7744 of the General Code provides for the holding of a county commencement, as follows:

> "The board of county school examiners shall provide for the holding of a county commencement not later than August fifteenth, at such place as it determines. At this commencement an annual address must be delivered, at the conclusion of which *a diploma shall be presented to each successful applicant who has complied with the provisions hereof. Such diploma shall entitle its holder to enter any high school in the state.*"

Section 7747 provides that the tuition of pupils holding such diplomas shall be paid by the board of education of the school district in which they have legal school residence, as follows:

> "The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

Calling attention to the provisions of section 7744 and 7747 of the General Code, supra, it is to be noted that said section 7744, supra, specifically provides that the diploma which is granted to such applicant who has successfully passed the examination provided by section 7740 of the General Code, shall entitle its holder to enter any high school in the state. However, before such diploma can be granted to an applicant, who has successfully passed such examination, such applicant is compelled to comply with the provisions of 7743, supra, and also with the provisions of section 7744, supra; and section 7747 further provides that the board of education of the school district in which such successful applicant has legal school residence cannot legally pay the tuition of such applicant unless such applicant is the holder of a diploma as provided for by section 7744. Therefore, coming to answer your first question directly, it is my opinion that a township board of education is not legally liable for the tuition of a student passing the Boxwell examination and receiving her grades, unless she has further complied with the provisions of sections 7743 and 7744 and thereby acquired a diploma which entitles such student to have his or her tuition paid by the board of education of the township or special district in which she has legal school residence.

Answering you second question, section 7748 of the General Code provides as follows:

> "A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at

a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. * * *"

In answering your second question it is necessary to construe sections 7747 and 7748, supra, together. Analyzing said section 7747, it is found that the provisions thereof apply only to pupils holding diplomas who reside in township or special districts in which no high school is maintained, and that the tuition of such pupils shall be paid by the board of education of such school district in which they have legal school residence. As hereinbefore pointed out in this opinion, said diplomas entitle such pupils to enter any high school in the state, and section 7748, supra, places a limitation on this right by providing that if a board of education maintains a third grade high school as defined by law, then such board of education shall pay the tuition of the *graduates from such school residing in the district,* at a first grade high school for two years or at a second grade high school for one year and a first grade high school for one year, and further provides that if a board maintains a second grade high school, then such board shall pay *the tuition of such graduates residing in the district* at any first grade high school for one year. By reason of the foregoing provisions, it seems to follow that only a board of education of a township or special school district not maintaining a high school, has the authority to pay the tuition of Boxwell-Patterson graduates, who attend some high school in a school district other than the one in which they have legal school residence. If in the event such township or special school district maintains a high school, then such township or special school district comes within the provision of section 7748 of the General Code, supra, and the board of education of such district is limited to paying the tuition of its graduates from such school residing in such district, at any first grade high school for two years or at a second grade high school for one year and a first grade high school for one year, if the high school it maintains is a third grade high school, as in the case which you state in your request.

Apparently, it seems to be the manifest intention of the legislature that all the pupils of the state should receive their school education as far as possible, in the respective school district wherein they have legal school residence, probably so as to minimize, as far as possible, the paying of tuition on the part of the respective boards of education of the state, and it apparently seems to be the further intention of the legislature to require each board of education to educate the pupils having legal school residence, within its respective district to the full extent of the course of study maintained and not to throw the burden of educating such pupils on to boards of education of districts other than those wherein such pupils have legal school residence, until they have completed the full course provided and maintained by the board of education of their respective school districts. Therefore, in direct answer to your second question, I am of the opinion that a township board of education maintaining a third grade high school is not legally liable for the payment of the tuition of a Boxwell-Patterson graduate holding a diploma as such for a period of two years at a first grade high school, and who is not a graduate from the third grade high school maintained by the township school district wherein such pupil resides. To have made the board of education liable for such pupil's tuition, it was necessary for such pupil to complete the two-year course of such pupil's own high school and to have become a graduate of such high school, where-

upon the board of education of such pupil's school district would have been liable for such pupil's tuition in attending a first grade high school for two years, or at a first grade high school for one year and a second grade high school for one year.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

845.

REGULATION OF DISCIPLINE IN COLLEGES AND UNIVERSITIES—SUCH MATTERS MAY BE REGULATED BY FACULTY—POWER MAY BE DELEGATED TO PRESIDENT.

The faculty of a college or university may regulate matters of discipline, and other matters not so regulated by the board of trustees, as they deem best. The faculty acting as a whole may enforce such regulations, or it may by proper action transfer the power of enforcing such regulation to the president, and may also designate an assistant to the president of the college in the enforcing of such rules, to act in conjunction with the president or in his place when he is absent from the college or university.

COLUMBUS, OHIO, March 31, 1914.

HON. S. P. AXLINE, *Ada, Ohio.*

DEAR SIR:—Under date of January 8, 1914, you requested an opinion as follows:

> "Would it be inconsistent with the duties of your office to give your construction of section 9925 of the General Code of Ohio? In matters of discipline and other matters not regulated by the board of trustees, can the president act alone and can any member of the faculty less than the whole be chosen by him or by the faculty to act with him, or in his absence, on matters pertaining to the general government and discipline in and about the college?"

Relying thereto I desire to say that in the case of Koblits vs. Western Reserve University, 81 C. C. R., p. 144, the court in the 5th syllabus thereof holds as follows:

> "The faculty of a university, under the custom of the land, which has been uniform for so long a time that it has become law, are justified in disciplining students in the institution, and the student who enters such institution agrees to conform to that rule of law and to be tried for his misdemeanors by the rule that has been applied by such institutions for so long a time that it has become a rule of law."

At page 155 of the opinion the court says:

> "It has been the custom of all school authorities for so long a time that it has become a rule of law, to commit the discipline of the school very largely, if not wholly, to the teachers—and this custom having become law, being recognized as the usual mode of proceeding both by the school authorities and by the state, we have no hesitation in saying that if the plaintiff had a contract such as he says he has, that then he submitted himself in that contract, to be disciplined by the professors of the school."

The reason for this rule is very clearly stated by the court at page 156 of the opinion, as follows:

> "The trustees of such institutions live in remote parts of the country; they are generally men of business affairs who cannot be summoned at any moment to the seat of learning, and who have not the experience in teaching that the professors have—who do not know what is required to keep proper discipline in such institutions as well as the professors do, and are not as well adapted to carry out the purposes and designs of the institution in regard to governmental affairs as are the professors themselves. Such regulations would lead to long delays and would leave a rebellious student in the institution to corrupt others, without any speedy remedy—and is altogether impracticable in a large number of cases. The trustees of such institutions are not accustomed to meet more than once or twice a year at the seat of learning; then, being men of pressing business of their own, they are not capable of remaining there to go through a long and tedious trial, an examination of witnesses and a full hearing.
>
> "So by common censent and common usage, such matters have been left largely, if not entirely, to the faculty, and their action in such matters is binding upon the institution they represent—and this is not unusual at all."

In this connection the legislature has enacted section 9925 of the General Code, which provides as follows:

> "The president and professors shall constitute the faculty of any incorporated literary college or university, may enforce the rules and regulations enacted by its trustees for the government and discipline of the students, and suspend and expel offenders, as they deem necessary."

Said section 9925 specifically provides that the faculty of any incorporated literary college or university shall consist of the president and professors, and provides secondly that they may enforce the rules and regulations enacted by its trustees for the government and discipline of the pupils to the extent that they may even suspend or expel offenders, if, in their judgment, the same is necessary. It is to be noted that said section places no limitation upon such faculty as to the manner or method whereby they may enforce such rules and regulations for the government and discipline of the students, there being no limitation in that regard. It follows that such faculty may enforce such rules and regulations in such manner as they may deem best. The faculty acting as a whole may enforce such regulations or it may by proper action transfer the power of enforcement of such regulations to the president, and may also designate an assistant to the president of the college in the enforcement of such rules, to act in conjunction with such president as well as to act in his place or stead, when absent for any cause from the college or university.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

846.

CITY WATERWORKS PLANT—BOND ISSUE—BONDS—PROCEDURE.

In the enlargement and extension of a city waterworks plant involving an expenditure of more than five hundred dollars, requiring the approval of council and advertising for bonds as provided in section 4328, General Code, it is necessary that a certificate be filed and that the money to meet the obligation of the contract for construction is in the treasury, and not otherwise appropriated.

In making such certificate section 3810, General Code, is controlling, and before the bonds can be included in the certificate, they must not only be authorized as required by law, but they must be sold and in process of delivery.

COLUMBUS, OHIO, April 7, 1914.

HON. AMOS C. RUFF, *City Solicitor, Canal Dover, Ohio.*

DEAR SIR:—I have your letter of January 14, 1914, in which you inquire:

> "Can a city make a legal contract for the extension and enlargement of its waterworks prior to the selling of its bonds for such enlargement?"

Section 3806, General Code, reads:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Assuming that all the legislation has been passed necessarily preceding a sale of the bonds, and accepting the language of Summers, J., "that sections 45 and 45a do not apply to improvements for which the city has authorized bonds to be issued to pay the entire estimated cost and expense," (Emmert vs. Elyria, 74 O. S., 198), the conclusion would be easy, but the syllabus of that case reads:

> "do not apply to contracts for street improvements when bonds have been authorized by the municipality to be issued to pay the entire estimated cost of the improvement."

And section 3810 reads:

> "Money to be derived from lawfully authorized bonds or notes sold and in process of delivery, shall for the purpose of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund."

It cannot be overlooked that the words—"or notes sold and in process of delivery" are found in the law but omitted in the syllabus and opinion.

Section 45a, mentioned by Summers, J., is now section 3810, G. C., and the language of the syllabus and of Judge Summers, both omit the meat of 45a, which is that the bonds must not only be authorized but sold and in process of delivery. Considering sections 3806 and 3810, G. C., together, and giving due weight to the language copied from Emmert vs. Elyria, the conclusion appears inevitable that section 3806 calls for a certificate, 3810 authorizes money arising from proceeds of bonds *sold* and in process of delivery be considered in the treasury for the purpose of certification, but do not justify our resting upon the language used in Emmert vs. Elyria.

Section 2702(as was held in Comstock vs. Nelsonville, 61 O. S., 288,

> "applied to so much of the cost of a street improvement as was to be paid by the city out of a levy and that it did not apply to so much as was to be paid by special assessment, for the reason that the payment that was to be made by the city was included in the general levy which was subject to limitation."

Emmert vs. Elyria, 74 O. S., 197.

The language used in Comstock vs. Nelsonville had led many to the belief that the Burns law (so called) applied where payment was to be made from taxes levied and collected, and not where other means of payment were provided by law. This conclusion seems to be justified by the language of Burket, J., 61 O. S., but it cannot be harmonized with all the language there used nor with the decisions in Village vs. Dieckmeier, 79 O. S. 323, nor Emmert vs. Elyria, 74 O. S., 194, where it cites with approval 58 O. S., 558, 60 O. S., 406, 61 O. S., 288 and 65 O. S., 219.

However, another vein presents itself. Section 2 of article XII of the constitution, as amended reads:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Section 3961 reads:

> "Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, waterworks building, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of waterworks."

Title XII as used in section 3961 includes municipal corporations and sections 3497 to 4678, General Code.

The construction of waterworks therefore is within the provisions of 3906 and 3910, General Code, and independent of the constitutional amendment above

quoted, there must be a certificate filed as required by section 3806, subject to the provisions of 3810, General Code, and notwithstanding Emmert vs. Elyria, in which the full text of section 3810, then 45a, seems to have been overlooked or disregarded.

Does the amendment operate as a repeal of the Burns law? That the amendment was intended to meet some of the matters calling for an enactment of the Burns law, for instance, the providing of funds to meet the obligations of a contract about to be made, cannot be doubted, but that it is so inconsistent therewith that both may not stand and have operaton at the same time, will hardly be claimed.

I am, therefore, of the opinion that in the event the enlargement and extension of your waterworks involving more than $500.00, and thus requiring the approval of council and advertising for bids (section 4328, G. C.), it is necessary that a certificate be filed; that the money to meet the obligation of the contract for construction is in the treasury, and not otherwise appropriated; that in making such certificate section 3810 is controlling and that before bonds can be included in the certificate, they must not only be "authorized as required by law" but "sold and in process of delivery." Of course, this appears to be out of harmony with Emmert vs. Elyria, but when compelled to choose between the language used in a court decision and that found in a legislative enactment, I feel implied to adopt the latter.

In regard to the question submitted by you under date of February 7th, opinion will follow later.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

847.

ROAD IMPROVEMENT—LAND OWNER—COUNTY COMMISSIONERS—ROADS AND HIGHWAYS.

In determining whether a petition for a road improvement, under sections 6926 to 6956, General Code, as these sections existed before they were declared to be repealed by implication, by the supereme court in the case of Goff et al. vs. Gates, 87 O. S., 142, was signed by the required majority of land owners, the county commissioners could not take into account resident owners of land within one mile of the termini of the improvement, nor assess such owners for the cost of such improvement, nor any part thereof. In construing the provisions of these statutes relating to the construction of roads "along the county line between two or more counties," effect should be given to the dictum of the supreme court in the above mentioned case rather than the holding of the circuit court in the same case.

COLUMBUS, OHIO, April 1, 1914.

HON. E. R. WILLIAMS, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I have your letter of January 16th, which is in part as follows:

> "The supreme court of this state in the case of Goff et al. vs. Commissioners, and Commissioners vs. Granger, 87 Ohio State Report, page 142, held that the act of the general assembly, passed May 10, 1910, entitled: 'An act to provide for the laying out, construction, repair, or improvement of any public road or any part thereof, and for the straightening, widening, or altering, and draining of the same by the county commissioners, 'sections

6956-1 to 6956-15, General Code, completely revises the whole subject-matter covered by sections 6926 to 6956, General Code, inclusive, and is evidently intended as a substitute for these sections, and, therefore, repeals the same by implication.'

"The last general assembly passed an act, senate bill No. 149, Ohio Laws, vol. 103, page 132, entitled: 'An act to validate all petitions filed or granted and all proceedings had or contemplated under such petitions, all contracts made or to be made, bonds issued or to be issued, taxes and assessments levied or to be levied under the provisions of sections 6926 to 6956, inclusive, of the General Code of Ohio.'

"* * * All roads improved in this county under the provisions of sections 6926 to 6956, all resident owners owning lands lying and being within one mile on either side, end or terminus of said improvement have been counted, taxed and assessed.

"We desire your opinion whether or not senate bill No. 149, found in Ohio Laws, vol. 103, page 132, is constitutional, and if so, whether or not the county commissioners may count resident landowners owning lands lying and being within one mile from the termini of the improvement. * * * Section 6930, General Code, as re-enacted Ohio Laws, vol. 103, page 199, provides in part as follows:

"'When the road proposed to be improved is along the county line between two or more counties, a copy of the petition certified to by the commissioners of the county in which the original is on file, shall be filed with the commissioners of each of the several counties along the line of the proposed road.'

"The circuit court in the case of Gates et al. vs. Granger (the substance of which is found in the 87 O. S., page 152), held that the statute when it speaks of a road improvement along the county line, does not necessarily mean that it shall lie upon the county line.

"Judge Donahue, commenting upon this decision of the circuit court, on page 153 of the opinion, says:

"'It is contended upon the part of the defendant in error, and the circuit court so found, that under the provisions of either section 6930, or section 6956-3, General Code, when an improvement is within this limit of one mile from another county line, the petition must be filed with the commissioners of each of the several counties. That is to say, where it is proposed to assess land lying within a mile of the improvement the whole burden shall not fall upon those residing in the county in which the improvement is to be made, but shall be borne by all the land lying within the mile limit, even though part of the land should be in an adjacent county. With the equity of this claim we have no quarrel. But there is a serious doubt as to that being the true construction of this legislation.'

"Should the commissioners follow the opinion of the circuit court, or the serious doubts of the supreme court?

"I wish to say that section 6930 as re-enacted is identical with the old section."

You have advised that in view of the rule of this department against passing upon the constitutionality of acts of the general assembly, an answer to your first question is not desired.

Your second question calls for a construction of section 6926, General Code, as it existed prior to the decisions of the case of Goff vs. Gates et al., 87 O. S., particularly with reference to whether the county commissioners had the right to count resident owners of land within one mile of the termini of a road improvement.

Said section provided:

"When a majority of the resident owners of real estate situated within one mile of a public road, presents a petition to the board of county commissioners asking for the grading and improving of such road, the county commissioners shall go upon the line of the road described in such petition. If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvement shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of such road improvement shall be of stone, gravel or brick, and enter their decision on their journal."

This statute was under consideration in the case of Kasson vs. Commissioners (15 C. C. n. s., 460), and it was there held:

"Under the one mile road assessment act the taxing district is confined to one mile of the improvement within a line drawn at right angles with the termini thereof."

A similar construction was given to a similar statute by our supreme court in the case of Lear vs. Halstead, 41 O. S., 566.

I am of the opinion, therefore, that the county commissioners had no right, under said section 6926, to count owners of land lying within one mile of the termini of the improvement, nor to assess such owners therefor.

In answer to your third question I advise that the county commissioners follow the doubts of the supreme court rather than the opinion of the circuit court. While the statement quoted from the opinion by Judge Donahue is merely obiter, yet I believe it states the correct meaning of these statutes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

848.

MEMBER OF GENERAL ASSEMBLY ELIGIBLE TO APPOINTMENT TO OFFICE OF COUNTY SUPERINTENDENT OF SCHOOLS.

The position of county superintendent of schools is not an office, and consequently a member of the general assembly which created this position of county superintendent of schools would be eligible to appointment as county superintendent of schools during the term for which he was elected or within one year thereafter.

COLUMBUS, OHIO, April 9, 1914.

HON. GEORGE M. HOAGLIN, *Member of House of Representatives, Payne, Ohio.*

DEAR SIR:—Your letter of April 6, 1914, is received, in which you inquire:

"My question was, whether or not a man who was a member of the general assembly when the school legislation was enacted would be eligible to the position of county school superintendent?

"Should I decide to become an applicant for the position in this county, I would resign as member of the general assembly, before entering upon the duties of the new position."

The position of county superintendent of schools was created at the recent special session of the general assembly.

Article II, section 19 of the constitution of Ohio, provides.

> "No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected."

The inhibition contained in this section is against the appointment to a civil office.

A civil office is defined at page 157 of volume 7 of cyc.:

> "Civil office. A grant and possession of the soverign power, and the exercise of such power within the limts prescribed by the law which creates the office constitutes the discharge of the duties of the office."

A civil office is one the occupant of which exercises a part of the sovereignty of the state.

The duties of the county superintendent of schools were prescribed at the recent special session of the legislature, and the statutes hereinafter quoted are as they were amended at this special session.

Section 4744, General Code, provides:

> "The county board of education at a regular meeting held not later than July 20th, shall appoint a county superintendent for a term not longer than three years commencing on the first day of August. Such county superintendent shall have the educational qualifications mentioned in section 4744-4. He shall be in all respects the executive officer of the county board of education, and shall attend all meetings with the privilege of discussion but not of voting."

Section 4744-1, General Code, provides:

> "The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

Section 4744-4, General Code, referred to, prescribes certain educational qualifications.

By virtue of these sections the county superintendent is appointed by the county board of education and is to be the executive officer of such board. In

such capacity the county superintendent acts for the board and would be an employe of the board, and not an officer exercising a part of the sovereignty of the state in his own right.

Other duties are prescribed for the county superintendent.

Section 4739, General Code, provides:

"Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of educations of such school districts in joint session shall elect such superintendent. *The district superintendent shall be employed upon the nomination of the county superintendent but the board electing such district superintendent may by majority vote elect a district superintendent not so nominated.*"

Section 7706-3, General Code, provides:

"The county superintendent shall hold monthly meetings with the district superintendents and advise with them on matters of school efficiency. He shall visit and inspect the schools under his supervision as often as possible and with the advice of the district superintendent shall outline a schedule of school visitation for the teachers of the county school district."

Section 7706-4, General Code, provides:

"The county superintendent shall have direct supervision over the training of teachers in any training courses which may be given in any county school district and shall personally teach not less than one hundred nor more than two hundred periods in any one year. It shall be his duty to see that all reports required by law are made out and sent to the county auditor and superintendent of public instruction and make such other reports as the superintendent of public instruction may require. Any county superintendent or district superintendent who becomes connected with or becomes an agent of or financially interested in any book publishing or book selling company or educational journal or magazine, shall become ineligible to hold such office and shall be forthwith removed by the board having control over such county superintendent or district superintendent."

Do these duties make the county superintendent an officer?

In a case not reported in full the supreme court of Ohio says in State ex rel. vs. Vickers, 58 Ohio St., 730:

"Judgment for defendant on the ground that a superintendent of schools is not an officer."

No facts are given in this report.

In Ward vs. Board of Education 11 Cir. Dec., 671, it is held:

"A superintendent of public schools as designated in section 3982, Rev. Stat., relating to election of superintendents, etc., is an employe of the

board of education and not an officer within the purview of the constitution prohibiting any change in the salary of an officer during his existing term."

In State ex rel. vs. Jennings, 57 Ohio St., 415, it is held:

"To constitute a public office, against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of someone else."

The duties of the county superintendent in supervising the schools of the county school district, are not different in character from those of the superintendent of schools under the old law. He may cover a larger territory.

The county superintendent of schools does not exercise any part of the sovereignty of the state. He is an employe of the county board of education, engaged in supervising the schools and instructing the teachers. He may nominate district superintendents, but he cannot elect them. Even nomination by him is not required when a majority of the board of education selects some other person.

The position of county superintendent of schools is not an office.

Therefore, the inhibition of section 19 of article two of the constitution of Ohio does not apply to the position of county superintendent of schools.

A member of the general assembly which created this position would be eligible to appointment as county superintendent of schools during the term for which he was elected or within one year thereafter.

I do not here pass upon the right to hold both positions at the same time.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

849.

BOARD OF DIRECTORS—DISQUALIFICATION OF MEMBERS OF SUCH BOARD—ENCUMBRANCE ON STOCK.

The fact that members of the board of directors of a bank have not as stockholders the amounts called for on their respective subscriptions, does not create or constitute an encumbrance on stock held by them, nor disqualify them from acting as directors of such bank.

COLUMBUS, OHIO, April 2, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of November 22, 1913, you wrote me asking for opinion, saying:

"A certain savings bank company was incorporated in 1901 with an authorized capital of $100,000.00

"At the time of the first examination of this bank in 1909, 50% of the authorized capital was paid in.

"Sometime during the year 1912, the directors of this bank called for payment of the unpaid portion.

"At this time only a small amount remains unpaid, a few of the stockholders having failed to respond to the call for payment.

"What action should this bank take to force payment?

"It seems that two directors of the bank are among those who have not paid in full; one of these directors is holding 7 shares upon which 50% is paid.

"Are these two directors qualified under the requirement of section 9731 that such director shall hold free and unincumbered at least five shares of stock?"

Applicable to the first question made by you on the facts above stated, section 3797, Revised Statutes, in force at the time the savings bank company in question was organized, but since repealed, among other things provided that no such savings bank company should commence business until at least one-half of each subscription to the capital stock of such company had been fully paid up. There was not at that time any special statutory provision as to how or when the amount unpaid on a bank stock subscription should be paid, nor any special provision directing how the payment of any such balance should be enforced. A rule of law, then, as now, applicable to corporations generally is that any balance remaining unpaid on a subscription to the capital stock of a corporation, in the absence of special agreement as to the time of payment, becomes due and payable on call of the board of directors of the corporation, and in the amount thereof called for. This rule is likewise declared by statute (3243 R. S.; 8632,G.C.). Section 3253, Revised Statutes, still in force as sections 8674, 8675 and 8676, General Code, provides as follows:

"If an installment of stock remains unpaid for sixty days, after the time it is required to be paid, whether such stock is held by an assignee, transferee, or the original subscriber, the same may be collected by action, or the directors may sell the stock so unpaid at public auction, for the installment then due thereon, first giving thrity days' public notice of the time and place of sale, in some newspaper in general circulation in the county where the delinquent stockholder resided at the time of making the subscription, or of becoming such assignee or transferee, or of his actual residence at the time of the sale; or, if such stockholder resides out of the state, such publication shall be made in the county where the principal office of the company is located; if any residue of money remain after paying the amount due on stock, the same shall on demand, be paid to the owner; and if the whole of the installment be not paid by the sale, the remainder shall be recoverable by an action against the subscriber, assignee or transferee."

The subscription to the stock of this bank was a contract between the subscriber and the bank company, measured in its obligation by the terms of the agreement and the law applicable thereto just noted. It follows, that unless there was some special agreement between the delinquent stockholders and the bank as to the payment of the balance on their respective stock subscriptions, the same became due on the call made by the directors of the bank, and notice of such action to the stockholders affected by the call. By force of the statute, if such delinquent stockholders do not make payment of the amount called for on their respective subscriptions within sixty days after the time when, by the terms of the call, the same was to be paid, the bank may proceed by several actions against the delinquent stockholders to collect the amount due from them, respectively, on the call; or the directors of the bank may proceed to sell stock of the delinquent stockholders, or of any of them, by proceedings in strict conformity to the provisions of the statute above noted.

Section 9716, General Code, the same being section 2 of the Thomas banking act of 1908, provides that the entire capital stock of bank companies shall be subscribed and at least fifty per cent. of each share paid in before they may be authorized to commence business. This section further provides that the remainder of the capital stock of such companies shall be paid in monthly installments of at least ten per cent. each on the whole of the capital, payable at the end of each succeeding month from the time it is authorized by the superintendent of banks to commence business. Section 9717, General Code, provides:

> "When a stockholder or his assigns fails to pay an installment on his stock, as required by the preceding section to be paid, or for thirty days thereafter, the directors of such company may sell his stock at public sale for not less than the amount due thereon, including costs incurred, to the person who will pay the highest price therefor."

This statute further makes provision for publication of notice of the sale of stock authorized therein, and for sale of same by directors in case no bidder for same can be found. As I see it, however, sections 9716 and 9717, General Code, have no application to the situation of fact presented by your inquiry. The relation arising on subscription to the stock of this bank was primarily one of contract between the subscriber and the bank, and insofar as the obligation of this contract was measured by law, it is the law in force at the time of the contract which applies. This consideration, and the further fact that section 9716 is in its nature prospective only in its operation, excludes this section from application to the situation of fact presented by your inquiry.

N. Ky. & O. R. R. Co. vs. Van Horn, (57 N. Y., 473, 477).
Oldtown & L. R. R. Co., vs. Veasie, (39 Me., 571, 581).

Section 9717, General Code, is remedial in its nature, but by its terms is confined in its operation to stock subscription installments becoming due and payable under the provisions of section 9716. It follows that the remedy of the bank against its delinquent stockholders is that first stated herein.

With respect to your second question, section 9731, General Code, provides as follows:

> "Every director must be the owner and holder of at least five shares of stock in his own name and right, unpledged and unincumbered in any way, and at least three-fourths of the directors must be residents of this state."

I am inclined to the opinion that the mere fact that these directors in question, have not, as stockholders, paid the amounts called for on their respective subscriptions, does not create nor constitute an incumbrance on the stock held by them respectively, nor disqualify them from acting as directors of the bank.

An incumbrance on a thing carries with it the idea of an outstanding lien, charge or interest in the thing itself, to the diminution of the value of the thing in the hands of the person in whose name it is held. The relation existing between the bank, as a corporation, and a delinquent stockholder is, after call has been made for the unpaid balance of his stock subscription, simply that of creditor and debtor, with the right in the corporation to proceed by action at law against the stockholder to collect the amount called for. The fact that an additional remedy is given by statute to the corporation to collect the debt by sale of the stock does not alter the legal relations between the parties, nor cast any lien or charge on the stock before sale.

In the case of Dearborn vs. Washington Savings Bank (18 Wash., 8), it was held:

> "Gen. Stat., sec. 1507 (Bal. Code, sec. 4262), providing for the forfeiture and sale of corporate stock for default in payment of assessments, does not give a corporation a lien on its capital stock for debts due from its stockholders."

In this case the court in its opinion, speaking of the claim therein made that the corporation had a lien upon stock issued to a stockholder, says:

> "If there was such a lien upon the stock in question, it must have been created by some express legislative enactment, for it is well settled, at common law, that corporations have no lien upon their capital stock for the debts of their stockholders. 1 Morawetz, Private Corporations (2nd ed.), section 122; Boone, Corporations, sec. 124.
>
> "And there is no statute in this state providing for such liens. It is true that provision is made by our statute for forfeiture and sale of stock for default in payment of assessments under certain circumstances, but, in our judgment, it does not follow from the fact that stock may be sold for such purposes that the corporation has a lien thereon for unpaid assessments."

Again, aside from the question whether the statutory provision authorizing the bank corporation to sell the stock of a delinquent stockholder creates a lien upon such stock in favor of the corporation, I am inclined to the view that the provisions of section 9731, requiring every director to be the owner and holder thereof of at least five shares of stock in his own name and right, unpledged and unincumbered in any way, is limited in its meaning as to incumbrances to such as are outstanding in third persons, and that the purpose of the statute was not to disqualify directors by reason of the fact that their stock might be incumbered by a lien existing in favor of the corporation itself. In this view, the general words of the statute should be limited in their meaning, to the objects to which it is apparent the legislature intended to apply them.

Board of Education vs. Board of Education (46 O. S., 595-599).

Of course, if the bank should sell the stock of a delinquent stockholder in the manner provided by statute, and thus deprive him of the same, he would thereby become disqualified to act as director, since possession of stock is essential to his qualification as a director.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

850.

TEACHERS' INSTITUTE—COMPENSATION TO SECRETARY—TEACHER ATTENDING SUCH INSTITUTE MAY ACT AS SECRETARY.

A teacher attending a county institute may receive compensation for acting as secretary, as provided for by section 7866 of the General Code and for making the report as required by section 7865. Such teacher is also entitled to the compensation provided for in section 7870 of the General Code.

COLUMBUS, OHIO, April 10, 1914.

HON. T. J. ROSS, *Williamson Bldg., Cleveland, Ohio.*

DEAR SIR:—Under date of December 26, 1913, you submitted a request for an opinion as follows:

> "Whether or not a teacher attending the county institute and receiving compensation as secretary and for making the report provided for in sections 7865 and 7866, G. C., is also entitled to compensation under section 7870, G. C., the county institute having been held during vacation."

Chapter 8 of title 5 of the General Code of Ohio provides for teachers' institutes and sections 7859 to 7870, inclusive, of the General Code, provide for the holding of county teachers' institutes. Section 7859 of the General Code provides in substance for the organization of county teachers' institutes. Section 7860 of the General Code, provides for the election of an executive committee, fixing their terms of office, and also provides for the election of a president and secretary of the institute, who shall be ex-officio members of such executive committee and act as chairman and secretary thereof.

Sections 7861 and 7862 provide respectively, when such election shall be held and for the filling of any vacancy in such offices, caused by death, resignation, removal from the county, or other causes.

Section 7870 of the General Code, provides for the payment of teachers while attending county institutes, as follows:

> "The board of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance, as certified by the president and secretary of such institute, for not less than four nor more than six days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

In construing said section 7870, General Code, supra, as said section provided prior to its last amendment, the supreme court of Ohio in the case of Beverstock, a taxpayer vs. Board of Education, et al., 75 O. S., p. 144, held as follows:

"Where a board of education has employed teachers for the public schools of the district for the school year next ensuing thereafter, and such teachers, during vacation and after their employment, attend the county institute, during the week it is held in the same county, said board is authorized by the provisions of section 4091, Revised Statutes, to pay them for the institute week as an addition to their first month's salary as fixed by the terms of their employment, and at the same rate, on presentation of the certificates prescribed by said section."

The only change made in the last quoted section by the last amendment was to the effect that if the institute is held when the public schools are not in session, then such teachers or superintendents shall be paid $2.00 per day for actual daily attendance, as certified by the president and secretary of such institute, for not less than four nor more than six days of actual attendance, instead of paying them for the institute week as an addition to their first month's salary, as fixed by the terms of their employment, and at the same rate.

At this point it is to be noted that said section 7870 specifically and mandatorily requires that the boards of education of all school districts are required to pay the teachers and superintendents of their respective districts, their regular salary for the week they attend the institute, upon their presenting certificates of full, regular and daily attendance, signed as required by law. Or, if the institute is held when the public schools are not in session, then said section specifically and mandatorily requires that the board of education shall pay such teachers and superintedents $2.00 per day for actual daily attendance, as certified in accordance with the provisions of said section, such payment not to be less than four nor more than six days of actual attendance.

By reason of the provisions of said section, *the funds for the payment of teachers and superintendents who attend such county institutes are expended by the respective boards of education of the state to the respective teachers under their employment, or who come into their employment within three months after the holding of such institutes, and all of such payments are made out of the funds of such respective boards of education of the state.*

The creation of the funds for the maintenance of county institutes is provided by sections 2457 and 7820 of the General Code. Section 2457 of the General Code provides for the application of funds which result from bequests which are made for educational purposes, as follows:

"The commissioners of a county may receive bequests, donations, and gifts of real and personal property and money to promote and advance the cause of education in such county. All property and money so received by the commissioners or which has been bequeathed and bestowed upon such commissioners and remains undisposed of, at their discretion, may be paid to any incorporated institution of learning in the county, or a part thereof may be used each year to defray the expense of the teachers' institute, upon such terms and conditions as the commissioners in their discretion prescribe, having reference to the terms of the trust and safety of the fund and its proper application."

Section 7820, General Code, provides that all fees from applicants for county teachers' certificates, shall *be applied to the support of the county teachers' institutes,* as follows:

"The clerk of the board of county school examiners must promptly collect all fees from applicants at each examination and pay them into

the county treasury quarterly. He shall file with the county auditor a written statement of the amount, and the number of applicants, male and female, examined during the quarter. All money thus received, must be set apart by the auditor for the support of county teachers' institutes, *to be applied as provided for in chapter eight of this title.*"

Section 7863, General Code, governing county teachers' institutes, specifies the duty of the respective executive committees of such county institutes, as follows:

"Such executive committee shall manage the affairs of the institute. The committee must enter into a bond, payable to the state, with sufficient surety, to be approved by the county auditor, in double the amount of the institute fund in the county treasury, for the benefit of the institute fund of the county, and conditioned that the committee shall account faithfully for the money which comes into its possession, and make the report to the commissioner of common schools required in section seventy-eight hundred and sixty-five."

Section 7865 specifies the duties of the secretary of such executive committee, as follows:

"Within five days after the adjournment of the institute, its secretary shall report to the state commissioner of common schools the number of teachers in attendance, the names of instructors and lecturers attending, the amount of money received and disbursed by the committee and such other information relating to the institute as the commissioner requires."

Section 7866, General Code, provides for his compensation for the performance of such duties, as follows:

"The secretary may be allowed compensation not to exceed ten dollars for making such report and for his services as secretary, to be paid out of the institute fund of the county. No other compensation shall be allowed any officer or member of the executive committee. On failure to make such report, the secretary shall forfeit and pay to the state the sum of fifty dollars."

The funds from which such secretary is paid is not under or within the control of the board of education, but, as specifically provided by the foregoing quoted sections of the General Code, such funds are entirely under the control of the executive committee of the county teachers' institute, to be paid out in accordance with the provisions contained in said chapter 8, title 5, of the General Code.

The duties of the secretary of the teachers' institute, and for which he may be paid the sum of $10.00, are in addition to those specified in section 7870, which merely require him to attend such institute as a member and by virtue of his being a teacher in the schools of the county at the time the institute is held, or, by reason of his becoming so employed as such teacher within three months after the holding of such institute. Section 7866 clearly provides that such secretary may be allowed $10.00 for his services as secretary and for making a report to the state superintendent of public instruction, who is the successor of the state school commissioner, such compensation *to be paid out of the institute fund of the*

county. Inasmuch as the duties of said secretary are in addition to those of a mere member of a county institute, and furthermore, inasmuch as the compensation of such secretary is paid out of the fund of the county institute, and not out of the funds of the respective boards of education, by which he is or may be employed as a teacher, I am of the opinion, answering your question directly, that as such secretary he is entitled to the compensation provided for by section 7866 for making the report as required by section 7865, and is also entitled to the compensation provided for in section 7870 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

851.

ABSTRACT OF TITLE.

Property situated in the city of Defiance, Ohio.

COLUMBUS, OHIO, April 7, 1914.

COL. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 23rd, wherein you state:

> "I herewith transmit deed and abstract for Defiance armory site described as follows:
>
> "'Situate in the city of Defiance, county of Defiance, and state of Ohio, and known as lot number two (2) and twenty (20) feet off of the northerly side of lot number three (3), all in block number nine (9) in Bouton and others addition to the city of Defiance, Ohio. The whole of said property hereby conveyed being eighty-six (86) feet fronting in Clinton street in said city.'
>
> "An opinion is requested as to title acquired by state under said deed and as shown by said abstract."

I have carefully examined the abstract and, it is my opinion that the city of Defiance, as disclosesd thereby, has a good and indefeasible estate in fee simple in and to said real estate, free and clear from liens and incumbrances of any kind whatsoever.

There are, however, some objectionable features in the legislation of the council of the city of Defiance, authorizing the donation of this land to the state of Ohio, and in the deed conveying the same to the state, to which I wish to direct your attention.

Ordinance No. 277 of the city of Defiance, passed December 19, 1911, authorizes the proper officials of said city to make and execute a deed to the state of Ohio for lot No. 2 in block No. 9 in Bouton and others addition to the city of Defiance. Section 2 of the ordinance contains a condition that if an armory building is not erected on said lot within three years from the passage of the ordinance, the property shall revert to the city of Defiance. Another ordinance, passed by the council of said city on February 10, 1914, provides for the donation to the state of Ohio, for armory purposes, of 20 feet off of the northerly side of lot No. 3 in addition to lot No. 2, and authorizes the proper officials of said city to make and execute to the state of Ohio a deed therefor. This ordinance contains a condition that if an armory is not erected within two years from the passage of the

ordinance, the property shall revert to the city of Defiance. Second ordinance does not repeal the first one and it is very doubtful whether the condition of the first ordinance requiring the construction of an armory on lot No. 2 within two years from the date of the passage of the ordinance (Dec. 19, 1911) is extinguished by the second ordinance. The second ordinance seems only to supplement the first by authorizing the donation of an additional piece of land, without changing the conditions of the first ordinance. Another objection to both ordinances is that they authorize the *"proper officials"* of the city of Defiance to execute the deeds. As the statutes do not make it the duty of any particular officer to sign conveyances on behalf of the city, the officers whom council desires to execute the deed on behalf of the city should be expressly named in the ordinance.

To avoid confusion and doubt, and to secure a good title for the state, I recommend that new legislation be enacted, both of these ordinances be repealed and another deed executed pursuant to the new legislation. I advise that you accept nothing less than an unqualified fee simple title.

The present deed is so conditioned that were the erection of an armory to be commenced and not completed within two years from February 10, 1914, the property would revert to the state. The armory board should not restrict itself in this manner.

For the foregoing reasons, I advise you not to accept said deed. The abstract and deed are herewith enclosed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

852.

LIQUOR LICENSE COMMISSION—SALOONS—NUMBER OF LIQUOR LICENSES THAT MAY BE GRANTED IN A MUNICIPALITY.

If the liquor licensing board finds that the census of the village filed with them is an official census under the statute, that is, under the terms of section 44 of the licensing act, such official census governs in the determination of the maximum number of licenses that shall be granted in that municipality.

COLUMBUS, OHIO, April 10, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of January 24th, wherein you state:

> "The village of Sharonville, Hamilton county, Ohio, by the latest federal census had a population of 750. On November 18, 1913, the village council by its ordinance, No. 20, authorized the taking of a census which resulted in the population of the village being determined at 1,022, the report of the enumeration having been accepted and authenticated by the village council, which filed its certified copy of the legislation and listed names with the Hamilton county liquor licensing board, requesting it under the provisions of section 44 of the license act to be governed in determining the population of Sharonville by their census so taken as an official census. To this objection has been made by certain citizens of Sharonville, who claim that the population of 1,022, as found by the enumerators over their oath, was grossly inaccurate in that it is largely in excess of the true population.

"We desire, therefore, on behalf of the Hamilton county liquor licensing board, to ask your opinion in writing whether or not said board shall be governed by the census regularly returned by the village authorities of Sharonville, or whether said board has a right to go behind such official returns and enter into an inquiry as to the correctness of said official census."

Section 44 of the Greenlund liquor license act provides:

"In determining the maximum number of licenses which shall be granted in any municipal corporation or township of the state, the license commissioners shall be governed in determining the population of said political subdivision *by any official census* which shall have been taken therein within the year next preceding that for which licenses shall be granted. * * *"

Webster says a census is "an official registration of the number of the people."

The Century dictionary defines census as "an official enumeration of the inhabitants of a state or country with the details of sex, age, etc."

The Standard dictionary defines census "an official numbering of the people of a country or district."

"Official" is defined by Funk & Wagnall's Standard dictionary "derived from the proper office or officer or from the proper authority, as an official report."

The word "govern" is defined "to rule over according to the forms or usages of law, controlled by authority; to control physically or morally, direct influence."

The Standard dictionary defines "govern" "to exercise a directing power over, control or guide; to rule or regulate by right of authority."

Under section 44 supra, the license commissioners shall be guided and controlled by any official census which shall have been taken within the next preceding license year. A board such as the licensing board has only such powers and jurisdiction as are expressly conferred upon it by law, or which are necessarily implied from the powers granted. They have jurisdiction to determine whether the census presented is in reality an official census.

A municipality is authorized by statute (section 3625, General Code) to take and authenticate a census, and it is necessary that in the taking of such census they comply with all statutory requirements. When it appears that all the statutory requirements necessary to the taking of an official census have been complied with, the license board is authorized to accept such census, and this official census governs and controls them in the determination of the maximum number of licenses which will be granted in that subdivision for the tax year.

I cannot bring myself to believe that the board possesses any jurisdiction to go behind the certificate of the municipality of the official census and enter into an inquiry as to whether the enumeration was correct or not. You state that certain citizens of Sharonville claim that the population of 1,022 was grossly inaccurate and largely in excess of the true population. To my mind it was the duty of persons concerned to directly attack the making of the census in the event that they believed it was fraudulent and incorrect in its making. I am not unmindful of the fact that fraud vitiates anything into which it enters, and that if the enumeration complained of was fraudulent there should be a forum in which to right the wrong; but I find no authority, either express or implied, for the license commissioners, in what must be a collateral matter, to engage in an inquiry concerning the making of the enumeration. The work of the enumerators is part of the machinery of the taking of the census, and yet the enumeration rolls are mere data from which the official census is determined.

After the authentication of the enumeration by the proper authorities, and the promulgation of the census, and the filing of such official census with the license board, I do not think there is any power in the said board to enter upon an investigation of any charges of fraud in the making of the enumeration. When the licensing board sees that the statutory requirements necessary are present and finds that the list authenticated is the official census, it is my opinion that their powers in the matter are exhausted.

Under the license law, in the event there is no official census taken in the preceding year, the board shall be governed by the latest estimates of the United States census bureau. I do not think it will be contended that if the board had received the latest estimate of the United States census bureau and announced that the maximum amount of licenses to be granted would be the number allowed by the population as shown by the estimate of the United States bureau, and some person would come in with an offer to prove that the United States census enumerator who made up the census rolls in the first instance had padded same, and would ask the board to institute an inquiry as to whether or not said enumeration was fraudulent, that such person would have any standing before the board. If there was fraud in the taking of the census complained of, there certainly should be a forum in which that might be shown, but it is utterly beyond the jurisdiction of this board to enter into an inquiry of an official census after it has been authoritatively authenticated by the political subdivision authorized by statute to take the census.

In the case of State ex rel. Wirt vs. Cass County Court, 119 S. W. Reporter, 1010, a writ of mandamus against the county court of Cass county was sought requiring it to issue to relator a license to keep a dramshop in Harrisonville, which the court had refused to grant. It was conceded by the pleadings that the relator was a proper party to receive a license, and that every requirement had been met as a prerequisite to a license, and that a license should be issued to him unless the county court was prevented from so doing by an election held in Cass county just prior to relator's application, which resulted in the adoption of what is commonly known as the "local option law" against the sale of intoxicating liquors at any place within the limits of the county. The validity of that election was the matter for decision. The point made against the election related solely to the fact that the city of Pleasant Hill, in Cass county, was included in the order of election. The local option statute of Missouri required that all cities of 2,500 or more inhabitants in any county shall vote separately, and that they shall not be included in a vote by the remainder of the county. Relator claimed that the city was of more than 2,500 inhabitants when the election was ordered and held. It appeared that a proper petition, on its face, had been presented to the county court, asking for the election, that the petition was properly signed and stated therein that there was no town in the county of 2,500 or more inhabitants. The day the petition was presented the court ordered an election in the entire county, and recited in the order that there was no town or city in the county with 2,500 or more inhabitants. On the next day after said order the city council of Pleasant Hill ordered a census to be taken of the inhabitants within its limits. The census was taken and showed the city to contain 2,569 inhabitants, and a copy of the census was filed with the county clerk. Afterwards certain citizens filed a motion in the county court asking it to set aside this order for election and calling the court's attention to the census taken of Pleasant Hill. This motion was overruled and subsequently an election was held in the entire county on the day set by the order of the county court, which resulted in the sale of intoxicating liquors. The court held the election was void for having included Pleasant Hill, whose census showed that it had more than 2,500 inhabitants, and on page 1012 uses the following language:

"Notwithstanding the return of respondents shows the proceedings of the county court and of the city of Pleasant Hill as herein indicated, yet it is insisted that they are not concluded by the census, or the legal results which ordinarily follow it, for the reasons that they allege in the return that the census in point of fact was fraudulently taken—that is, it was padded with names of persons not inhabitants—and that in reality there were not 2,500 inhabitants of the city. The answer made by relator to this position is that the proceeding for taking the census, and the taking thereof, were had in and before a duly constituted body or tribunal especially empowered by law to do so, and that as such, the result is not subject to collateral attack. * * * Indeed it is a fundamental rule of law that the acts of a body intrusted by law with the performance of certain specified proceedings, which on their face are regularly taken, are not subject to attack except in a direct proceeding for that purpose. This rule applies as rigidly to special and inferior bodies as it does to superior courts. In most instances presumptions upholding proceedings in superior courts will not aid omissions in proceedings of those of inferior grade; but where the record of the latter, on its face, is regular, it is not subject to collateral attack. In such instance the matter of power and dignity of the body does not enter into the question (citing a number of authorities). Therefore, respondent's allegation of fraud in the census was the assertion of matter which could not be made an issue in the present case. It was foreign matter, good enough in a case where such charge could be investigated, but which should not find place here where those concerned in such issue are not parties."

I do not see that complainant's position would be any better than that of one who contested such a mandamus proceeding as is found in the Missouri case, and while I am firm in the conviction that if fraud had been perpetrated this fact should be allowed to be shown before the proper tribunal, as I have said before, I am just as firmly convinced that the local liquor licensing board is not the proper forum for the trial of such an issue.

It has been suggested that the granting of a license, when as a fact there is not sufficient population to justify the number granted, would result in the issuance of a certificate which would be void under the constitution. If this be so, it could be shown in a proper case and then the fraud would not prevail.

In view of all the foregoing, it is my opinion that if the licensing board finds that the census of the village of Sharonville filed with them is an official census under the statute, then under the terms of section 44 of the licensing act, such official census governs in the determination of the maximum number of licenses that shall be granted in that municipality.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

853.

STATE BOARD OF HEALTH—PLUMBING REGULATION—KINDS OF PIPE THAT MAY BE USED.

In view of section 12600-176, *General Code, section* 39, *under the rules and regulations of the state board of health, restricting a house drain to be of cast iron pipe only, is not a valid regulation. Such drains may be constructed either of cast iron pipe or of earthenware pipe.*

COLUMBUS, OHIO, April 14, 1914.

HON. E. G. LLOYD, *Member of Ohio State Senate, Columbus, Ohio.*

DEAR SIR:—Under date of March 26, 1914, this department received a communication from you, wherein appeared the following:

> "In the rules and regulations of the Ohio state board of health, relative to plumbing and drainage recently promulgated under authority of the board, but I believe entirely prepared by the state plumbing inspector, a copy of which I am enclosing you, I find that on page 26, sec. 39, 'kind of pipe,' that cast iron pipe only is permitted to be used. This is a discrimination against the use of earthenware pipe, as provided in sec. 12600-176."

You request an official opinion as to the legal authority of the state board of health to make such discrimination.

In reply thereto I desire to say that section 39 of the rules and regulations of the Ohio state board of health, governing the construction, installation and inspection of plumbing and drainage, provides as follows:

> "Section 39. *Kind of pipe.* All house drains shall be of extra heavy cast iron pipe, with well leaded and calked joints."

Section 12600-281, of the General Code, and which is a part of the state Building Code, adopted by the 79th general assembly March 31, 1911 (102 O. L., 586), provides in part that it shall not only be the duty of the health department of municipalities, having building or health departments, but also the duty of the state board of health, to enforce all provisions contained in said code, relative to sanitary plumbing, as follows:

> "It shall be the duty of the state board of health or building inspector or commissioner, or health departments of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

Part 4 of the said state Building Code referred to above, relates entirely to the subject of sanitation. Said part 4 is subdivided into 19 separate titles. Title 6 thereof relates only to house sewage and drains.

Section 12600-176 which you cite in your request, appears in the General Code under title 6 of part 4, of the Ohio Building Code, which as before stated relates solely to the subject of sanitation. Said section 12600-176, General Code, provides as follows:

"All house drains shall be of extra heavy cast iron pipe, with well leaded and calked joints, or of earthenware pipe jointed with mortar composed of one part best Portland cement and one part clean, sharp sand."

From the last section it would seem that it was the legislative intent that two kinds of pipe be used for the construction of house drainage, to wit, either extra heavy iron pipe with well leaded and calked joints or earthenware pipe, jointed with mortar, composed of one part best Portland cement and one part clean, sharp sand. Section 39 of the rules and regulations of the Ohio state board of health, supra, apparently places a limitation upon this statutory provision by providing that only extra heavy cast iron pipe with well leaded and calked joints can be used. Inasmuch as the legislature has provided that two kinds of pipe can be used, as hereinbefore stated, it would seem that this limitation on the part of the state board of health is in contravention of the clear statutory provision contained in said section 12600-176, General Code, supra.

It is, therefore, my opinion that the state board of health is without authority to require that all house drains shall be constructed of extra heavy cast iron pipe with well leaded and calked joints, when the legislature has provided that such house drains may be constructed with either such heavy cast iron pipe or with earthenware pipe jointed with mortar composed of one part best Portland cement and one part clean sharp sand. In other words, such house drains, as I view it, may be constructed of either of the materials specified in said section 12600-176, General Code, supra.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

854.

ABSTRACT OF TITLE.

Proceedings brought by the state to quiet title to lot No. 9k, Bowling Green, Ohio.

COLUMBUS, OHIO, April 17, 1914.

HON. D. C. BROWN, *Secretary Board of Trustees, Bowling Green Normal School, Napoleon, Ohio.*

DEAR SIR:—I have made a careful examination of the proceedings brought by the state of Ohio to quiet title to out-lot No. 91 in the city of Bowling Green, the same being a part of the real estate acquired for the erection of a state normal school. I am of the opinion that as a result of said proceedings, the state of Ohio now has a good and indefeasible estate in fee simple in and to said lot No. 91.

The abstract has been placed in the custody of the auditor of state, as required by law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

855.

BOND ISSUE—ORDINANCE—PROVISIONS THAT SHOULD BE CONTAINED IN SUCH ORDINANCE.

Where a city issues bonds to pay its portion of a street assessment, having been authorized to do so by an ordinance which does not contain the provisions such as required by article XII, section 2 of the constitution, and the bonds have not been issued, the entire legislation relating to such bond issue should be repassed with the necessary provisions incorporated therein.

COLUMBUS, OHIO, April 13, 1914.

HON. HARRY W. KOONS, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—In your letter of February 9th, you request my opinion as to whether, when bonds to pay the city's portion of a street assessment have been authorized by an ordinance, which does not contain a provision such as required by article XII, section 2 of the constitution, as interpreted in the case of Link vs. Karb, 88 O. S., _____, but the bonds have not yet been issued, the defect may be cured by a subsequent ordinance passed and becoming effective prior to the issuance of bonds.

In the opinion of the court in the case cited (Donahue, J.), appears the following:

> "* * * We have reached the conclusion that, in obedience to this amendment to the constitution the taxing officials of any political subdivision of the state must provide in the resolution or ordinance authorizing such issue, or in a resolution or ordinance *in relation to the same subject-matter, passed prior to the issuing of such bonds,* for levying and collecting annually by taxation an amount sufficient to pay the interest thereon, and provide a sinking fund for their final redemption at maturity."

However, the same opinion in the very next sentence contains the following language:

> " * * * It does mean that, *at the time the issue of bonds is authorized,* the taxing authorities proposing to issue such bonds shall provide, etc."

The syllabus of the case contains the following language:

> "Section 11, of article XII of the constitution of Ohio requires the taxing authorities of any political subdivision of the state proposing to issue bonds to provide *at the time the issue of bonds is authorized,* for levying and collecting annually by taxation, etc."

Again, in another branch of the syllabus the following language appears:

> "This provision of the constitution does not require that *at the time the issue of bonds is authorized,* there shall then be levied any specified amount or any specific rate, but it does require that provision shall *then* be made for an annual levy, etc."

I am informed that the common pleas court of Hamilton county has held that where the original ordinance authorizing the issue of bonds fails to contain the requisite provision, it is not possible for the defect to be remedied by subsequent legislation prior to the actual issuance of the bonds. This would seem to be in accord with the syllabus of the above case, and with certain portions of the opinion, though inconsistent with other language used in the opinion.

The constitution itself does not speak of the time of the authorization of the issuance of bonds in so many words. It requires that:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."
>
> (Art. XII, section 11 Ohio Constitution.)

I confess I do not feel like expressing an unequivocal opinion upon the question which you submit. I am clear, however, that it is at least safer, under the circumstances mentioned, by you, to repass the entire legislation relating to the issuance of bonds with the necessary provision incorporated therein.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

856.

BANKS AND BANKING—CUMULATIVE VOTING.

Cumulative voting by stockholders in a state bank is not permissible.

COLUMBUS, OHIO, April 3, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On February 12, 1914, you made the following request for my opinion:

> "Please render to this office an opinion as to whether or not cumulative voting by the stockholders of the state banks is permissible, as defined in section 3245, R. S."

Section 3245, R. S., is now section 8636 of the General Code and is as follows:

> "At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend either in person or by lawful proxies. At such and all other elections of directors, each 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 his shares and give on candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or to distribute them on the same principal among as many candidates as he thinks fit. Such directors shall not be elected in any other manner, a majority of the number of shares shall be necessary for a choice, but no person shall vote on a share on which an installment is due and unpaid."

This section is one of the provisions of chapter 1, division 1, title 9, part second of the General Code governing the organization and powers of private corporations.

Section 8737 is contained in the same chapter of the General Code and is as follows:

> "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provisions shall govern, unless it clearly appears that the provision is cumulative."

Chapter 2 of division 5, title 9 part second of the General Code, provides for the organization and power of banks, and practically all the sections of this chapter were contained in what is known as the "Thomas act," passed in 1908. I quote the following sections of this chapter:

> "Section 9712. At the time and place appointed, directors shall be chosen in the manner provided for other corporations.
>
> "Section 9714. In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations insofar as not inconsistent with the provisions of this chapter.
>
> "Section 9730. In elections of directors, and in deciding questions at meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock held by him. Any stockholder also may vote by proxy duly authorized in writing."

The three last sections which I have quoted, as I have stated above, were all part of the "Thomas act" passed in 1908, and were, therefore, passed subsequent to section 8636, which in its present form was passed April 23, 1898, O. L., 230.

It is needless, however, to have reference to the rule that as between a general statute and a special statute covering part of the subject-matter embraced within the general statute, if the special statute was passed subsequenly to the general statute, the special provision will control for the reason that this rule is carried into the statutes themselves, and as to all corporation laws, the special provision under section 8737, above quoted, governs unless it appears that such special provision is clearly cumulative to the provision contained in the general statute.

There would be no difficulty whatever as to your question were it not for section 9730, for the election of directors of banking corporations under sections 9712 and 9714, above quoted (were it not for section 9730), would clearly be governed by section 8636 of the General Code.

This section provides for the election of directors by the stockholders who attend the meeting provided for by section 8635; it provides that the stockholders may attend either in person or by proxy; it further provides that each stockholder, at this as well as all other elections of directors, 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; and then the section provides for cumulative voting.

Section 9730 is a special provision upon this same subject-matter—that is the election of directors, and it simply provides that in the election of directors, and in deciding questions at meetings of stockholders each stockholder shall be entitled to have one vote for each share of stock held by him. It also provides that each stockholder may vote by proxy, duly authorized in writing, but is entirely silent upon the subject of cumulative voting. We must presume that section 9730 was passed for a definite purpose; that purpose seems to be to define the voting power of stockholders as well as the power to vote by proxy, and this voting power is limited to one vote for each share of stock held by each stockholder. If

it were intended to allow cumulative voting then this section is entirely unnecessary, for as I have before pointed out, were it not for section 9730, then under sections 9712 and 9714 the matter would clearly be controlled by section 8636, and the right for cumulative voting would be given; but as this section speaks upon the subject of the voting power of stockholders and is silent as to cumulative voting, it seems to me that the only construction which can be given it, is that this power is denied.

This construction, I think, is strengthened by the rule that in the absence of specific statutory authority cumulative voting is not authorized. State ex rel. vs. Stockley, 45 O. S., 304.

My attention has been called to an opinion of my predecessor, Hon. U. G. Denman, rendered on November 18, 1908, to Hon. B. B. Seymour, superintendent of banks, in which the conclusion is expressed that as no special provision is incorporated in the Thomas act with reference to cumulative voting, then that the general provision now embodied in section 8636 would apply, and such practice would be permissible in the election of directors of banks.

For the reasons stated above, viz., that in my view of section 9730 it is a provision covering the voting power of stockholders in banking corporations, and limiting such power to one vote for each share of stock, without authorizing cumulative voting, I am unable to agree with the above opinion, and am forced to the conclusion that cumulative voting by stockholders of state banks is not permissible.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

857.

BANKS AND BANKING—PRIVATE BANK CHANGING TO A NATIONAL BANK.

When a private bank becomes a national bank, in taking out a national charter, it is not necessary for the state banking department to have any guarantee of statement whereby it knows that the depositors of the old bank are paid in full by liquidation.

COLUMBUS, OHIO, April 14, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of February 5, 1914, you wrote asking my opinion as follows:

> "When a private bank becomes a national bank through taking out a national charter, is it necessary for this department to have any guarantee or statement whereby it knows that the depositors of the old bank are paid in full by liquidation?"

As to a state bank, that is a bank incorporated under any special or general law of the state, provision is made for the organization of such bank into a national bank by conversion; that is, by the execution by the directors of the bank or a majority thereof, to the comptroller of currency, of a certificate to the effect that the owners of two-thirds of the stock have authorized the directors to make such certificate and to change and convert the bank into a national association. (U. S., Revised Statutes, 5154.)

In the conversion of a state bank, there is not a dissolution of the state corporation, but merely a change of title and governmental supervision; the bank is liable for all obligations and may enforce all contracts made with it while a state corporation. (Metropolitan National Bank vs. Claggett, 141 U. S., 520.)

Although, as just noted, a state bank may become a national bank by conversion in the manner just noted, it may, if preferred, be placed in voluntary liquidation in conformity to said law, and a national bank organized, in conformity to the general provisions with respect to the organization of such banks, which when chartered may acquire the purchasable assets of the former bank. In the latter case a specific contract is necessary for the purchasing of assets and assumption of liabilities to depositors and other creditors of the state bank. In such case bills receivable and other assets should be listed and properly endorsed over to the new bank; the banking house, if purchased, should be deeded to the new bank and the deed recorded; all general and individual accounts should be closed or transferred and new accounts opened; and old pass books called in and new books issued. The capital of the newly organized bank must be paid by the share holders in cash and not in the assets of the closed and liquidated state bank. No provision is made in the law for the organization of a private bank into a national bank by conversion and it follows that the only way in which the individuals composing such private bank can become a national bank, is by the process of liquidation, whereby the affairs of the private bank are closed up and a national bank charter received and taken by such persons in conformity with the provisions with reference to the organization of national banks. In such case a specific contract is necessary for the purchase of the assets of the private bank and the assumption of its liabilities to depositors and other creditors. In such case I know of no provision requiring the private bank to give to your department any statement showing that the depositors of the old bank are paid in full by the liquidation, nor is there any provision requiring the newly organized national bank to make any statement of this kind. The relation of debtor and creditor exists between the persons composing a private bank and its depositors, and this relation exists until their claims are fully paid, unless, of course, they consent to the transfer of their accounts to the new bank in pursuance of agreement between such banks. Nothing in the views here expressed is inconsistent with the right of your department to examine private banks according to the authority given in the private banking act of April 19, 1913 (103 O. L., 379), and it would undoubtedly be the right of your department to know before a private bank is liquidated for the purpose of becoming a national bank, that such private bank was in condition to meet all of the claims of its depositors, and if not, to cause liquidation of the same to be made under the supervision of your department as described by statute.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

841.

STATE CASE—EXPENSES OF POLICE DEPARTMENT INCURRED IN STATE CASES—TO BE PAID BY COUNTY—FEES TO BE RECEIVED BY CHIEF OF POLICE—SERVING OF WARRANT BY PATROLMAN—FEES FOR SAME.

1. *Expenses incurred in the prosecution of an offense against the state law are in Ohio intended to be charged upon the county and not upon the city, consequently, no portion of the expense of a police department incurred in the prosecution of a party charged with the commission of a felony who has fled a county is charged to the city.*

2. *In a state case the chief of police is entitled to receive only such fees as are paid for services by him personally performed, and the same rule applies to any other municipal officer performing services in a state case.*

3. *When a patrolman is sent to a neighboring city to return a person charged with the commission of a felony or a misdemeanor, a warrant must be issued not to the chief of police, but to the patrolman himself, in which case the patrolman is entitled to receive and retain the fee allowed for such service under section* 4581, *General Code.*

COLUMBUS, OHIO, April 4, 1914.

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

GENTLEMEN:—Under date of March 3, 1913, you request my opinion as follows:

"1. What portion of the expense of a police department incurred in the pursuit of a party charged with the commission of a felony who has fled the county, is chargeable to the city?

"2. What, if any, fees may be taxed in the name of the chief of police upon the warrant of arrest issued by the police court in a felony case to be paid by the state if convicted and sentenced to the penitentiary?

"3. If a patrolman is detailed by the chief of police to go to a neighboring city to return a person charged with the commission of a felony or misdemeanor, what, if any, fees for such service in the name of the chief of police may be taxed in the case and recovered from the state or the defendant, as the case may be?"

Answering your first question, the conduct of the police department in reality belongs to the state. The duties pertaining thereto are state functions and administered in behalf of the state and when such duties are in whole, or in part, authorized to be performed by the officers of the municipal corporation they are so performed by such officers as agents of the state executing governmental functions. 1 Dillon on Municipal Corporations, section 103 and section 390; City of Cleveland vs. Paine, 72 O. S., 347; State ex rel. vs. Stobey, 194 Mo. page 19 (6th syl.); Everill vs. Swan, 17 Utah, 114 (2 par. syl.); Hopewell vs. State, 22 Ind. Appellate Court Reports 489.

And on in various prosecutions the methods of compensating officers for the performance of such duties and for the reimbursement of expenses incurred by them in the performance of the same are varied, according as the legislature has seen fit to impose the burden upon either the state or the municipality, or by dividing the obligation of making recompense between both the state and the

municipality. In some states the police officials of the municipality receive a stated salary and the fees earned in both state and city cases are required to be paid into the city treasury. This method has been upheld in Labour vs. Polk county, 70 Iowa, 568. On page 570 of this case the court says:

> "The statute authorizing the city council to fix the salary for the police judge expressly provides that it was not intended to abolish fees then allowed by law, but to require the same to be paid into the treasury. It is the policy of the state to provide for the expense of enforcing its criminal laws. To some extent it does so by making provision for the payment of fees to justices and police judges aiding in the enforcement of such laws. If the cities provide for salaries for the payment of its officers for duties performed in the enforcement of criminal laws of the state, it is competent for the legislature to make provision for the reimbursement of the cities. This is just what the statute provides."

To the same effect the city of Des Moines vs. Polk county, 107 Iowa, 527.

In other states it has been held that a fixed salary paid by a city to a city marshal was a proper charge upon the city, and that such officers would be considered fully reimbursed thereby for their services in both city and state criminal cases, the county being relieved from the payment of any expenses or fees incurred in the performance of all such duties by city officials so compensated.

Under section 536 of the General Code the marshal of a city is not entitled to recover from the county in which the city is located for services rendered in the administration of the criminal law. (Syl. Christ vs. Polk county, 48 Iowa, 502.)

On page 304, the court said:

> "In support of the plaintiff's view, it may be said that the services were rendered in the administration of the criminal laws of the state, the expenses of which administration are certainly for the most part made by law chargeable upon the counties. But no one will deny that it is competent for the legislature to impose such expenses in part upon cities. We think it virtually so provided in providing the duty of city marshals. And, to our mind, the provision is not unreasonable. The citizens of a city are a part of the general public, and as such they have a general interest in the suppression of crime. * * *."

Also see Guanella vs. Pottawattamie county, 84 Iowa, page 36.

"The salaried recorder and policeman of a city, invested by law with the jurisdiction and power of justice and constable respectively, are not entitled to receive in addition to their salary the fees fixed by law for justices and constables for similar services." Johnson vs. State, 94 Tenn., page 499 (2 par. syl.). "The marshal of a city incorporated under the general law is not entitled to any fees in city or other cases * * *" (2 par. syl.) City of Brazil vs. McBride, 69 Ind., 245.

In other jurisdictions methods of dividing expenses and fees incurred in such criminal and police prosecutions have been upheld. Thus in the case of Norwich vs. Hyde, 7 Conn., 529, example is afforded of a method of making the town in which conviction was had liable for the costs of prosecutions before justices of the peace, and making the county liable for such cost when the prosecution was conducted in a county or superior court, and in the case of People vs. Board of Auditors, 53 N. Y. supplement, page 740, example is afforded of a method of making the fees of officers in criminal cases tried before a magistrate in the town where the offense was committed a charge upon that town. In Kentucky and in Michigan the plan is followed of making the county liable for fees incurred in the prosecu-

tion of state offenses no matter where tried and without regard to the official character of the officer executing the process, and making the fees incurred in the prosecution of violation of ordinances and municipal police measures a charge upon the municipality. In these statutes even though city officers are paid a stipulated salary by the city, they are permitted to receive and retain for their own use fees from the county for services in state criminal prosecutions, and they receive reimbursement for expenses incurred under a like method of separated liability as to county and city. Thus the syllabus in the case of Burke on Petition, 101 Ky., 175, is as follows:

> "1. The provision of section 3064, of the Kentucky statutes, which is a part of the charter of cities of the second class, that 'all officers, deputies and employes of the city * * * shall be paid a fixed salary and not otherwise, and all fees and commissions authorized by law shall revert to and be for the use and benefit of the city' has reference alone to fees, costs and commissions arising out of their performance of duties to the city, and does not authorize the city to convert to its use the fees allowed by the state to such officers for the arrest of felons under the provisions of section 354, of the Kentucky statutes."

And in the case of White vs. Board of Supervisors, 105 Michigan, 608, the third and fifth paragraph of the syllabus are as follows:

> "3. A provision of a city charter which makes it the duty of policemen to serve and execute all process directed or delivered to them for service, and for that purpose given to them all powers of constables and which further provides that they may serve and execute, within the limits of the city, any other process which by law a constable may serve, is within the power of the legislature to enact.
>
> "5. The fact that the policeman has received his full pay from the city for such services, without reporting on oath to the council the amount of all moneys and fees received by him for services as policeman, as required by the city charter, is no defense to a valid claim against the county for such services, the compensation for which is prescribed by law."

I am of the opinion that the plan intended to operate within the state of Ohio as regards the liability for such costs and expenses is one substantially similar to that endorsed in the states of Kentucky and Michigan, as above exemplified. Throughout the statutes the intention is manifest to keep separate and apart all matters relating to the prosecution of city ordinances and police measures as opposed to prosecutions of state criminal cases. Thus in police and mayor's court prosecutions of state offenses must be brought in the name of the state, and those of municipal ordinances in the name of the city, and the officials of these courts must keep separate and render separate account of fees and costs taxed and received in these cases. This distinction is everywhere clearly marked with respect to the payment of such fees and costs; thus in section 4534, General Code, it is provided that the fees of mayor in all cases *excepting those arising out of violation of ordinances* shall be the same as those allowed justices of the peace for similar services, and the fees of the chief of police and his deputies in all cases (with the same exception) shall be the same as those allowed sheriffs and constables in similar cases. And in police court, under section 4581, General Code, fees in cases for violation of ordinances are fixed by council, while fees for services in state cases are the same as those allowed in the probate court or before justices of the peace.

Sections 3016, 13436 and 13439 of the General Code points definitely and clearly

to liability on the part of the county to municipal officers for fees and expenses incurred by them in the prosecution of state offenses. The case of City of Portsmouth vs. Milstead and Baucus, 8 O. C. C. Reports, N. S. page 114, maintains its ground on this theory as to the division of responsibility as between city and county in this connection. The syllabus of this case is as follows:

> "1. The provisions of section 1536-633, R. S. (4213 General Code), requiring 'that all fees pertaining to any office shall be paid into the city treasury' has reference to municipal fees solely, or such fees as may be fixed by municipal authority. Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, Quaere?"

I am, therefore, of the opinion that expenses incurred in the prosecution of an offense against a state law are in Ohio intended to be charged upon the county and not upon the city. My answer to your first question, therefore, is to the effect that no portion of the expense of a police department incurred in the pursuit of a party charged with the commission of a felony, who has fled the county, is chargeable to the city.

Answering your second question, fees in the police court are fixed by section 4581, General Code. This statute is as follows:

> "Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

This is the only statute which I am able to find which would in any way authorize the payment of any fees to the chief of police for services in the police court, and I am of the opinion that the fees allowed to whatever officer is authorized to perform police services in the probate court or before justices of the peace, are authorized by section 4581 to be paid to the officer authorized to perform these services in the police court. The fees of a chief of police, therefore, or any other municipal officer who executes process or performs service in the prosecution of state offenses in a police court, are the same as those allowed in the probate court or before justices of the peace in like cases. Fees in the probate court for such services are fixed by section 11204 of the General Code. This section is as follows:

> "The fees of witnesses, jurors, sheriffs, coroners and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law, for like services in the court of common pleas."

Under this statute, therefore, the fees of any police officer serving in the police court are the same as those allowed for like services in the court of common pleas, and inasmuch as the sheriff is the only officer for whom such fees are fixed in the common pleas court, we must conclude that a municipal police officer for services in police court is entitled to the same fees as are permitted to sheriffs for services in the common pleas court in similar cases.

Fees authorized to be paid before justices of the peace are those fixed for constables by section 3347, General Code.

A municipal police officer, therefore, is authorized by section 4581, General Code, to receive the same fees that are allowed to sheriffs and constables in similar cases. This is specifically provided by section 5434 of the General Code for service

in a mayor's court, and in construing this section in an opinion to the bureau of inspection and supervision of public offices under date of August 30, 1911, I held that under this authorization a chief of police for all services which he is called upon to perform, and which if performed a constable fee is provided by the sections relating to constables, that fee should control, but that where a chief of police is called upon to perform a service for which no fee is provided in the case of constables, and for the same service a fee is provided in the case of a sheriff, the latter measure should control. I believe that the sections are substantially *in pari materia,* and that the same construction should be accorded section 4581, General Code.

A chief of police, therefore, for services in the police court is to be allowed the fees for sheriffs and constables in similar cases. This holding is in accordance with the mind of the court in the same case of Delaware vs. Matthews, 15 C. C. n. s. wherein, on page 40, the court said:

> "The chiefs of police in cities having a police court are to receive like fees as constables and sheriffs in the probate court and before justices of the peace."

Your question asks, however, what fees may be paid by the state in the name of the chief of police upon conviction and sentence to the penitentiary of a felon. Section 3016 of the General Code is the only section which authorizes payment of fees upon conviction of a felon prior to issuance of execution. This section is as follows:

> "In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witness, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

The question in issue, therefore, is whether or not a chief of police under this section is authorized to be paid fees from the county treasury upon conviction of a felony for services which are performed by patrolmen or other officers of the municipality, as I think it is clear there will be no dispute that this section does authorize the chief of police to receive fees in this manner for services which he himself performed.

The chief of police or municipal police officers are authorized to act in the execution of process or to perform any services in criminal cases only in municipal courts. I do not pass upon any of the provisions of special municipal or police courts, but refer only to the general provisions applying to mayors' courts and police courts. The sections authorizing service in these courts are as follows:

> "Section 4535. In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power throughout the county, concurrent with justices of the peace. *The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court,* to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-

extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances shall be the same as those allowed justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violation of ordinances shall be the same as those allowed sheriffs and constables in similar cases.

"Section 13500. The warrant shall be directed to the sheriff or to any constable of the county, or *when it is* issued by an officer of a municipal corporation, to the marshal or other police officer thereof, and, by a copy of the affidavit inserted therein or amended and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law."

Section 4534 authorizes the chief of police to execute and return all writs of process to him directed by the mayor's court, and he is also authorized by this section to perform these services by deputy, and this statute further fixes the fees of both the chief of police and of his deputy.

In the case of Delaware vs. Matthews, 13 O. C. C., N. S., p. 114, this statute as it formerly existed was construed as not authorizing any fees whatever to chiefs of police. Since this decision, the provision therein authorizing fees to the chief of police and his deputy was incorporated. Now since this provision, as it now stands, only authorizes fees to the chief of police or to his deputy, I am of the opinion that only the chief of police or such deputy is authorized to receive any fees under this section, and if a warrant is issued or services performed by any other municipal court officer he would not be entitled to fees therefor under the ruling of Delaware vs. Matthews. The statutes do not recognize any such position as deputy chief of police. Whether or not council could create such a position I believe is a close question, but I am of the opinion that under this statute the chief of police is authorized to specially deputize any police officer in his department to perform services in the mayor's court. When an officer is so deputized, or if there exists a legally constituted deputy chief of police, either of these officers would be entitled to fees under this section. *In no sense does this statute authorize the chief of police to receive fees earned by a deputy or to have them taxed in his name.* The fees authorized by this statute are taxed in the name of the deputy and not in the name of the chief of police for services performed by such deputy. I base this conclusion upon the language of the statute which provides that the fees of a chief of police *or of his deputy* shall be the same as those allowed to sheriffs or constables in similar cases.

Answering your question as to mayors' courts, therefore, as regards section 3016 of the General Code, the chief of police is authorized to be paid by this statute for services in *mayors' courts* only, such fees as are allowed for compensation for services performed by himself.

Section 13500, General Code, above quoted, must be pointed to as the section authorizing a municipal court officer to perform services in a police court. I am of the opinion that the words "or other officer," as used therein, extends to all members of a city police force, and can by no means be restricted so as to apply to the chief of police alone. This language, therefore, authorizes the warrant to be issued to any member of a city police force. There can be no doubt that the words "police officer" is a generic term and includes all patrolmen and other inferiors of the police department as well as the chief executive thereof. There is nothing in these sections either, therefore, which authorizes an inferior police officer in a city to act in the name of the chief of police, and I am of the opinion that

when a warrant is issued to such an officer he acts in his own name, and whatever fees are authorized to be taxed for the services are taxed also in the name of such officer executing the process or performing the service.

I can find no authority in the statutes, therefore, pertaining to mayors' or police courts (where alone a chief of police is authorized to perform services) which would permit any fees to be taxed in the name of the chief of police, except where that official himself performs the service or executes the process. Since the chief of police alone is mentioned in section 3016, General Code, and no mention is made of other police officers of a municipality, section 3016, General Code, cannot be construed as authorizing any fees whatever for police services to be paid from the county treasury on conviction of a felony where a municipal officer other than the chief of police performs the service or executes the process.

There is seemingly an inconsistency in authorizing fees to be paid chiefs of police under such circumstances, and not extending the same benefit to inferior officers of the municipality who perform the same services. The language of section 3016, General Code, however, will not permit of any other holding, and when we consider the effect of the case of Portsmouth vs. Milstead, above quoted, wherein it was held that chiefs of police were entitled to retain in their own name fees earned by them in state cases, a decision to the effect that the chief of police is not entitled to fees earned by his subordinates appears to be supported in logic.

The only other instance in which fees may be paid by the state, is provided by section 13727, General Code, authorizing payment of fees, when a writ of execution against a convict fails to produce an amount of money sufficient for the payment of costs of conviction. This statute, of course, extends to all fees which are authorized to be taxed in behalf of any police officer, and when any fees are paid in accordance therewith, the answer to your question is that the chief of police would be entitled to receive only such fees as are to be paid for services by him personally performed, and the same rule applies to any other municipal officer performing services in a state case.

Answering your third question; the answer to this question is afforded by the answer to your second question, as regards the mayor's court under section 3534, General Code. A patrolman might be specially deputized by the chief of police to act in the manner contemplated by your question, but in that case, the fees for such service would be taxed in the name of the special deputy, and not in the name of the chief of police. In the case of such deputation by the chief of police for services in the mayor's court, however, I am of the opinion that the warrant must be issued not to the chief of police but to the deputy himself, as that statute only authorizes the chief of police to attend on the sittings of such court by deputy for the purpose of executing process thereof and to preserve order therein, and I am unable to see how this language would justify the chief of police in deputizing a patrolman to serve a warrant which had been issued to the chief of police in his own name.

As regards service in the police court, which as aforesaid is authorized by section 13500, General Code, I am of the opinion that this statute contemplates that the warrant be issued to the officer who is to serve the same, and if the same is issued to the chief of police he must himself perform the service, and when so doing would be entitled to have taxed in his name the fees for such services. When, however, it is desired to have a patrolman execute such warrant, the warrant must be issued directly to that official, in which case, the patrolman would be entitled to receive and retain the fees allowed for such service under section 4581, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

858.

BOND ISSUE—STREET IMPROVEMENT—DIRECTOR OF PUBLIC SERVICE—COUNCIL.

Where at a general election the city is authorized to issue bonds to defray the city's portion of the expense of the elimination of the grades of streets where they intersect railroads of the city, the director of public service is authorized to organize this work by the appointment of a suitable representative and assistant, subject to the supervision of council as to fixing salary and compensation.

COLUMBUS, OHIO, April 20, 1914.

HON. GEORGE J. CAREW, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—Under date of February 2, 1914, you inquire:

> "At the general election held on November 4, 1913, the city of Youngstown authorized the sale of $800,000 worth of bonds to defray the city's portion of the expense of the elimination of the grades of a large number of streets where they intersect the various railroads of the city, and a number of questions have arisen as to the authority of council and other city officials growing out of this matter. None of these bonds have been issued.
>
> "First. Has the director of public service authority to organize this work by the appointment of a suitable representative and assistants, independent of any action of council authorizing him to do so?
>
> "Second. If he has such authority, does such authority include power to fix salaries of such representative and such assistants or to fix the salaries of any of them?
>
> "Third. In case an ordinance is passed by council authorizing the service director, generally to organize the work of eliminating the grade crossings and to appoint necessary assistants, does such ordinance carry with it the power to fix salaries?"

Answering your first question, section 4327 of the General Code provides as follows:

> "The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons necessary for the execution of the work and the performance of the duties of this department."

It has always been the holding of this department that the director of public service, under this statute, is permitted to determine finally the necessary representatives and assistants for any work properly within the department, and there is no requirement of any statute making it necessary for council to authorize him to appoint such representatives and assistants for any particular work.

Under section 4327, General Code, the director of public service is given primary control over his department, and it is within his province to determine the personnel of that department.

Section 4214 of the General Code, is as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, *shall determine the number of officers, clerks and employes*

in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

It is well settled that this section gives the exclusive right to council to fix salaries of representatives, assistants and all regular employes in the department of public service. Under this section council is given the power of supervising, to a certain extent, the number of positions in other departments.

While I have held that it is mandatory upon council to fix some salary or some compensation for officers, assistants or employes, sanctioned for the department by the director, nevertheless, determination of the amount of such compensation is solely within the province of council, and council may fix the same in accordance with its own judgment of the duties which the person compensated is obliged to perform.

The work at the present stage of the proceedings is not yet definitely fixed and determined. Bonds have been authorized to provide funds for the same, but the bonds have not yet been sold. No contract has been authorized by council and the duties at the time, which may reasonably be deemed to rest upon the department of the director of public service with respect to the contemplated improvements can, at the most, be of a mere preliminary or preparatory nature. Just what employes are necessary for this work is a matter entirely within the discretion of the director of public service, subject, of course, to supervision of council through its power aforesaid—of fixing salary and compensation.

The foregoing would seem to render unnecessary any answer to your second and third question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

859.

ABSTRACT OF TITLE AND DEED.

Abstract of title and deed to armory site, Marietta, Ohio.

COLUMBUS, OHIO, April 24, 1914.

COL. BYRON L. BARGAR, *Secretary, State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of April 2nd, enclosing a deed from the city of Marietta to the state of Ohio, for certain premises upon which it is proposed to erect an armory, together with abstract of title therefor.

I have carefully examined said deed and it is my opinion that the same conveys to the state of Ohio a sufficient title to warrant your board in erecting an armory thereon, pursuant to the provisions of house bill No. 35, passed February 4, 1914, approved February 17, 1914, and filed in the office of the secretary of state February 20, 1914.

The abstract should be extended so as to include the ordinance of the city of

Marietta, donating this land to the state of Ohio, also the order of the county commissioners of Washington county, authorizing the making, execution and delivery of said deed.

The abstract and deed are herewith returned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

860.

VOLUNTEER FIREMEN NOT PROHIBITED FROM MAKING CERTAIN CONTRACTS.

A volunteer firemen is not within the provision of section 12910 *and section* 12911, *General Code, prohibiting firemen from being interested in contracts on the ground that said statutes do not contemplate such a casual employment.*

COLUMBUS, OHIO, April 24, 1914.

HON. CLARE CALDWELL, *City Solicitor, Niles, Ohio.*

DEAR SIR:—Under favor of March 7th, you inquire as follows:

> "Please advise if in your opinion members of a volunteer fire department receiving pay from the city for each fire which they attend, would fall under the sections of the General Code, 12910, 12911 or any other section of the Code so that they would be prohibited from being interested in contracts made with the city or from doing any kind of work requiring pay from the city.
>
> "If in your opinion they are prohibited from having an interest in such a contract, would the fact that they were serving on said fire department without pay, make may difference?"

Sections 12910 and 12911 of the General Code, are as follows:

> "(12910) Whoever, holding an office of trust or profit by election or appointment, or as *agent servant or employe* of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the uses of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.
>
> "(12911) Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

To come within the prohibition of these statutes, a volunteer fireman must hold an office of trust or profit by election or appointment, or, he must be an agent,

servant or employe of such officer or of a board of such officers, as these latter terms are intended by these statutes. In an opinion addressed to the bureau of inspection and supervision of public offices, under date of October 1, 1913, I have held that the words "agent," "servant" or "employe" as used in these statutes refer solely to persons serving in such positions in a public capacity.

In State ex rel. vs. Jennings, 57 O. S., 415, it was held that a fireman employed by the council to perform the usual duties of a fireman, was not a public officer. *A fortiori,* a volunteer firemen, whose duties are transient and indefinite, even though he exercises them in a somewhat more independent capacity, may not be deemed the holder of an office of trust or profit.

We are therefore called upon to decide whether a volunteer firemen is an agent, servant, or employe within the contemplation of these statutes. Since a volunteer fireman cannot be said to act in any way as a deputy or in a representative capacity, it is clear that he may not be deemed an agent within the meaning of these statutes.

In Louisville, etc., Railway Co. vs. Wilson, 138, U. S., p. 501, at page 505, Justice Brewer says:

> "The terms 'officer' and 'employes' both alike refer to those in regular or continual service. Within the ordinary expectation of the terms, one who is engaged to render services in a particular transaction is either an officer or employe. They imply continuity of service and exclude those employed for a special and single transaction."

This language is quoted in the cases of Clark vs. Benninger, 42 Atlanta, 928, and Lein vs. Fisher, 30 Atlanta, 609. Under these holdings the conclusion is surely justified that a volunteer fireman is not such an employe as is contemplated by this statute.

The word "servant" has various applications, the term being given a broad and restricted significance in the decisions, in accordance with the connection in which it is used. It is readily manifest that all statutes must be construed within the bounds of reason and any attempt to discern a legislative intent must be governed by this evident restriction. The statute is manifestly aimed at such individuals connected with city government as have a definite and substantial identification with an officer holding a position of trust or profit, or of a board of officers in like capacity. It will not be denied that these statutes must be given some limitation and it cannot be asserted that the word "servant" used therein must be given its broadest interpretation. Thus the term will surely not be construed to include a messenger, temporarily required for a minor and transient purpose; nor an expressman in the same manner; nor a plumber required for a few hours to make repairs for a minor construction for such officer; nor an electrician needed for a similar purpose—and clearly the term would not include an independent contractor working for such officer or board of officers. Indeed, the term servant, as it is most frequently comprehended, implies permanency, continuity of service and a more or less continual subjection to the will of the superior. This in Hand vs. Kale, 12 S. W., 923, it is said:

> "Indeed, it may in most cases be said to be synonymous with employe."

In Campfield vs. Long, et al., 25 Fed., 128, on page 131, Justice Dwyer says:

> "A servant is one who is engaged not merely in doing work or service for another, but who is in his service, usually upon or about the premises

or property of his employer, and subject to his direction and control therein, and who is generally liable to be dismissed."

Haygood vs. State, 59 Ala., 51.

It is not necessary for the purpose of answering your question to determine the intended distinction between employe and servant as used in this statute, but it is necessary to define and it indeed seems manifest, that a volunteer fireman is not such a servant or employe as is contemplated by the language of these statutes, for the reason that the duties of such a position are of such transient, temporary, undefined and independent a nature as not to bring the individuals performing them within the comprehension of the statute.

Under this holding it is of course immaterial whether the volunteer fireman in question does or does not receive pay for the services he performs.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

861.

CORRECT WORDING OF ORDINANCE OR RESOLUTION UNDER ARTICLE XII, SECTION 11 OF THE CONSTITUTION OF OHIO.

The following is the correct wording of an ordinance or resolution under article XII, section 11 *of the constitution on an issuing of bonds:*

"There shall be levied and collected, by taxation, annually, during the period for which said bonds are to run, an amount sufficient to pay the interest on said bonds as herein provided for, and to provide a sinking fund for their final redemption at maturity."

COLUMBUS, OHIO, April 24, 1914.

HON. BEN H. DEWEY, *Village Solicitor, Clyde, Ohio.*

DEAR SIR:—You request me to advise you as to the correct wording of an ordinance or resolution providing for levying and collecting annually by taxation an amount sufficient to pay interest on bonds and to provide a sinking fund for their final redemption at maturity in conformity to the specific requirements of article XII, section 11 of the constitution as interpreted in Link vs. Karb, 89 O. S., 326.

The proper interpretation of the constitutional provision in question was not necessarily involved in the case cited, but the court, in its opinion, and in the syllabus, undertook to determine it. The branches of the syllabus dealing with this subject are as follows:

"2. Section 11 of article XII of the constitution of Ohio requires the taxing authority of any political subdivision of the state proposing to issue bonds to provide at the time the issue of bonds is authorized, for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final

redemption at maturity. This provision made at the time the issue of bonds is authorized is mandatory on all subsequent taxing officials of that political subdivision during the term of the bonds.

"3. This provision of the constitution does not require that at the time the issue of bonds is authorized there shall then be levied any specified amount or any specific rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same. The amount necessary to be levied for the purposes specified is to be determined by the taxing officials at the time the levy is made."

In the opinion, per Donahue J., appears the following:

"This, of course, does not require the immediate levying of a tax certain, either in amount or rate, for the provision of this amendment is that this tax shall be levied annually and collected annually, but it does mean that, at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds, and such provision so made at the time the bonds are authorized, shall be binding and obligatory upon these taxing officers of that political subdivision and their successors in office until the purpose of such levy shall have been fully accomplished by the retirement of the bonds so issued. Such a provision fills the full purposes of this amendment to the constitution and is not subject to the objection that it is impossible at the time of issue to determine either the amount that must be raised for that purpose or the rate that must be levied for raising such an amount. The amount may be determined from year to year, and levied annually, for that is the command of the amendment itself; but having declared at the time of the issue of such bonds that a levy shall be made in an amount sufficient, there then remains for the taxing officials the mere matter of calculation as to the amount. The levy must be made at all events in pursuance to the original provisions therefor, and subsequent taxing authorities must make such annual levy, regardless of what exigencies may arise in the future."

In my judgment this decision, insofar as it is an adjudication of the question with which it deals, has the effect of reducing the constitutional requirement to the exaction of a mere form of words substantially equivalent to the language of the constitution itseslf. It not being required that the borrowing authorities shall specify either the rate or the amount which shall be annually levied for its purpose, it would be, in my judgment, sufficient for the section of the borrowing ordinance to provide merely that,

"There shall be levied and collected, by taxation, annually, during the period for which said bonds are to run, an amount sufficient to pay the interest on said bonds as herein provided for, and to provide a sinking fund for their final redemption at maturity."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

862.

OFFICES COMPATIBLE—VILLAGE TREASURER AND MEMBER OF THE BOARD OF EDUCATION—OFFICES INCOMPATIBLE—TREASURER OF THE SCHOOL BOARD AND MEMBER OF THE BOARD OF EDUCATION.

A village treasurer is by law treasurer of the board of education and cannot at the same time be a member of the board of education.

Under a decision of the supreme court, by refusing to qualify as treasurer of the village board of education, such person can still retain his position as village treasurer, consequently, if such village treasurer fails to qualify as treasurer of the board of education, he can at the same time be village treasurer and a member of the board of education. There is no incompatibility between the office of village treasurer and that of member of the board of education.

COLUMBUS, OHIO, April 24, 1914.

HON. HARLEY M. WHITCRAFT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Under date of January 10, 1914, you submitted for an opinion, the following request:

> "Murray City of Hocking county, Ohio, is an incorporated village under the laws of the state of Ohio. Murray City school district comprehends all the territory within the corporate limits of Murray City village, with certain other territory attached for school purposes. No part of Murray City village is detached for school purposes.
>
> "On Nov. 5, 1913, Adam Anderson, an elector of Murray City village, was elected village treasurer of Murray City village. At the same election he was elected as member of the board of education of Murray City village school district.
>
> "(Question No. 1.) Can Mr. Anderson serve in the capacity of village treasurer of Murray City village and at the same time be a member of the board of education of Murray City village school district?
>
> "(Question No. 2.) Should Mr. Anderson fail to qualify as treasurer of the school funds of Murray City village school district, can he then serve as treasurer of the village and at the same time be a member of the board of education of said Murray City village school district."

In reply to your first question, I desire to say that under date of January 29, 1912, in an opinion which this department rendered to Hon. Hugh R. Gilmore, prosecuting attorney of Preble county, Ohio, it was held that the office of member of the board of education and the office of treasurer of the board of education are incompatible and cannot be held by the same person at the same time. This opinion was rendered in answer to the question as to whether or not the treasurer of the school board could also be a member of such board. This department having passed upon this question in the opinion above referred to, I am therefore, without comment, enclosing herewith a copy of said opinion.

Coming now to your second question, I desire to say that this department in an opinion which was rendered to the bureau of inspection and supervision of public offices, under date of July 31, 1911, held that a person elected to the office of city, village or township treasurer, may refuse to qualify as the treasurer of the city, village or township school funds respectively. In commenting upon this particular question, I quote as follows from said opinion:

"In connection with these several questions, I have examined the case of State ex rel. Stolzenbacher vs. Feltz, Auditor, No. 9372, decided by the supreme court of this state in 1905, but not reported. I have read the record and briefs of opposing counsel therein and find that the facts in that case were as follows:

"A city treasurer upon the taking effect of the school code of 1904, in which the language above quoted from section 4763, General Code, first appeared, filed with the board of education of the city school district a bond, but made such filing conditional upon his salary as custodian of the school moneys being fixed at a certain sum. The board refused to accept the bond so filed, and having declared that the city treasurer had failed to qualify as treasurer of the school funds, and that a vacancy in such office therefore existed, proceeded to elect another treasurer of the school funds. To this treasurer so elected, the county auditor refused to pay over funds due from the county to the school district, and the action which originated in the supreme court was in mandamus to compel such delivery.

"The judgment of the court was that a pre-emptory writ issued commanding the county auditor to pay over to the treasurer elected by the school the funds due the district from the county. Upon analysis of the decision in this case the following I think will appear clear:

"1. If the board of education had no authority to elect a treasurer of its own in any case then the court would not have decided the case as it did.

"2. If the effect of the failure of the city treasurer to qualify was to disqualify him from holding the office of city treasurer as well as from acting as treasurer of the school fund, then there would have been a vacancy in the office of city treasurer which should have been filled in the manner prescribed in the Municipal Code, and the person thus appointed would have been the local custodian of the school funds, so that if the court had taken this view of the law, it could not well have decided the case as it did.

"I think, therefore, that the only propositions of law consistent with the court's decree in the case above cited are as follows: And they are those put forth by counsel for the relator.

"1. The offices of city, village and township treasurer on the one hand and treasurer of the city, village and township school funds on the other hand are separate and distinct.

"2. Each successive treasurer of the city, village or township, as the case may be, must in the first instance qualify as treasurer of the school funds of the appropriate district. If, however, he fails to do so, then the board of education has the right, and it is its duty to secure another treasurer.

"3. The failure of the treasurer of the city, village or township, as the case may be, to qualify as treasurer of the school funds of the appropriate district does not create a vacancy in the first office.

"I am further of the opinion that there is no essential difference between the provisions of section 4747 as amended in 1910, and which relates to the clerk, and the above created provisions of section 4763 relating to the treasurer of the school funds. The same principles of law apply to both cases.

"Answering now the particular questions which you submit, I beg to state in answer to your first question that in my opinion the treasurer of a city, village or township may by failing to qualify as treasurer of the school funds refuse to serve as such treasurer.

"In answer to your second question I beg to state that in my opinion if

a township clerk fails to qualify as clerk of the township board of education, such failure does not in any respect affect his status as township clerk.

"Answering your third question I beg to state that if a township treasurer resigns as treasurer of the school funds, the board of education has the right, if it chooses, to accept his resignation, and in such case may elect a successor to him as treasurer of the school fund."

In accordance with the foregoing holdings, it is apparent that a village treasurer may refuse to qualify as treasurer of the village school district funds and continue to retain his office as treasurer of the village.

The remaining question then involved in your inquiry, is as follows, to wit:

"If the village treasurer of the village of Murray City refuses to qualify as treasurer of the school funds of the school district of Murray City village, can he then serve as treasurer of the village and at the same time be a member of the board of education of said Murray City village school district."

In order to determine this question, it is necessary to determine whether or not the two offices in this situation are incompatible. In this regard I cite the following:

Throop on public offices, section 33, says:

"In order to render two offices incompatible there must be some such relation between them as that of master and servant. That one must have 'controlment' of the other, or that one must be charged with the duty of auditing or supervising the accounts of the other, or that one must be chosen by or have the power of removal of the other."

Mecham on public offices and officers, section 522, says:

"The force of the word, in its application to this matter is, that from the nature and relation to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other."

Dillon on municipal corporations, section 166 (note) says:

"Incompatibility in office exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

Anderson's dictionary of law says:

"Offices are said to be incompatible and inconsistent when their being subordinate and interfering with each other induces a presumption that they cannot be both executed with impartiality and honesty."

As measured by the above rules defining incompatibility, it is my opinion that the office of treasurer of the village of Murray City, when such treasurer fails to qualify as the treasurer of the school funds of the Murray City village school district, is not incompatible with the office of a member of the board of education of such school district.

Section 4764 of the General Code provides that each school district treasurer shall execute a bond before entering upon his duties of his office, as follows:

> "Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of sections 7604-7608, inclusive, the bond shall be in such amount as the board of education may require."

Section 4765 provides that such treasurer may be required to give additional sureties or to execute a new bond to the approval of the board of education, as follows:

> "Thereafter such treasurer may be required to give additional sureties on his accepted bond, or to execute a new bond with sufficient sureties to the approval of the board of education when such board deems it necessary. If he fails for ten days after service of notice in writing of such requisition, to give such bond or additional sureties, as so required, the office shall be declared vacant and filled as in other cases."

If, however, such village treasurer refuses to qualify as treasurer of such school funds, then the provisions of said sections do not apply. A bond of the village treasurer, as such, is given in accordance with section 4294 of the General Code, which provides as follows:

> "Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all 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, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn. All profits arising from such deposit or deposits shall inure to the benefit of the funds. Such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby."

It is apparent that such village treasurer, as a member of such board of education, would not have to pass upon his own bond given as such treasurer, inasmuch as he fails to qualify as treasurer of the village district school funds. Furthermore, as treasurer of the village only, he would therefore have no control or supervision over the school funds of said school district.

Therefore, answering your last question directly, I am of the opinion that if Mr. Anderson should fail to qualify as treasurer of the school funds of the Murray City village school district, he can then serve as treasurer of the village and at the same time be a member of the board of education of said Murray City village school district.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

863.

COMPENSATION—EFFECT OF ABOLITION OF TWO DAYS' LABOR ON THE HIGHWAYS.

A man who has performed two days' labor on the public highway after the constitutional amendment went into effect, and before the statute repealing sections 3375 to 3384, General Code, went into effect, is not entitled to compensation for the two days' labor from the township treasury.

COLUMBUS, OHIO, April 24, 1914.

HON. JAS. A. TOBIN, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—In your letter of February 20th, you state:

> "In an opinion rendered by you January 10, 1913, you held that by virtue of the adoption of proposal No. 32 of the constitutional amendments, sections Nos. 3375 to 3384 of the General Code were repealed (by implication).
>
> "The legislature passed an act repealing said sections Nos. 3375 et seq., which applied to the two days' labor upon the public highway. This act was filed with the secretary of state May 10, 1913, and not being an emergency act, did not become effective until August 8, 1913.
>
> "Upon this state of the law I desire your opinion as to whether or not the men who performed their two days' labor on the public highways between January 1, 1913, and August 8, 1913, are entitled to compensation therefor from the township treasury? I have held that they are not, but don't feel very certain of being correct."

The effect of the adoption of proposal No. 32, as held in my former opinion to which you refer, was to render inoperative sections 3375 to 3384, General Code, which provided for two days' labor on the highways, or, in lieu thereof, payment of the sum of $3.00. This constitutional amendment was self-executing and therefore needed no legislation to carry it into effect. Township trustees and other officers have been without any authority whatever to require the performance of labor on the highways since January 1, 1913, when proposal No. 32 went into effect. This is true notwithstanding the act of the legislature repealing the statute providing for such labor, did not go into effect until August 1, 1913. The purpose of this act was to get sections 3375 et seq., off the books; it did not operate to keep these sections in force until 90 days after the act was filed in the office of the secretary of state, as would have been the case had not the constitution been amended so as to render them invalid.

As there is no provision of law therefor, I am of the opinion that those who performed such labor on the highways after January 1, 1913, are not entitled to compensation from the township treasury.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

864.

MEMBER OF COUNCIL—REMOVAL FROM WARD—FORFEITURE OF OFFICE.

Where a councilman changes his residence from the ward in which he has been elected to an adjoining ward, he forfeits his office under the provision of section 4207, General Code, and his subsequent return to his former ward would not reinstate him.

COLUMBUS, OHIO, April 24, 1914.

HON. EDWARD A. BINYON, *Solicitor of the City of East Cleveland, Society for Savings Bldg, Cleveland, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of April 13th, wherein you request an opinion upon the following:

> "At the last November election, Albert T. Wagner was elected councilman from the *fourth* ward of the city of East Cleveland. On or about the first day of April, he made a verbal lease with one Alfred Wonderlich for one year for a dwelling situated in the *third* ward of East Cleveland and at about the same time removed his family together with all his furniture and personal effects to the residence in the *third* ward. He made written application to the East Ohio Gas Company and the gas was turned on and charged to him. He has been living there with his family ever since and sleeps there also. A number of friends have called upon him and have found him there with his family. The property he formerly occupied in the third ward has been rented to another tenant. He maintains no home or residence at the present time in the *fourth* ward. However, upon learning that some of his constitutents in the *fourth* ward are raising the question of his removal from the *fourth* ward as forming the foundation for the forfeiture of his office as councilman, he thereupon leased in writing a partly finished dwelling house in the fourth ward but has not and will not be able to take possession of it for about a month to come. In the meantime a petition has been filed with the council of the city of East Cleveland calling the council's attention to Mr. Wagner's removal and asking the council to fill the vacancy."

The qualifications of a city councilman are set forth in section 4207 of the General Code, as follows:

> "Councilmen-at-large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

It will be noted that the removal of a ward councilman from the ward from which he was elected, works a forfeiture of his office forthwith.

Upon the facts detailed in your letter, I am clearly of the opinion that Mr. Wagner forfeited his office as councilman when he removed from the fourth ward, from which he was elected, to the third ward. His subsequent lease of property in the fourth ward did not operate to restore him to the office he had forfeited. A vacancy exists which should be filled in the manner prescribed by section 4236 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

865.

VILLAGE COUNCIL—ORDINANCE—FRANCHISE—CONTRACT—LEGAL CONTRACT.

1st. Where a village council granted to a certain electric light company a franchise in the village streets for municipal lighting purposes and the ordinance was silent as to the duration of the franchise rights of the company, and did not fix any rates for private or commercial lighting, but did fix the rates for municipal lighting for a period of ten years, the said ordinance was accepted and acted upon by the company. At three different times the village council without mentioning the franchise rights of the company, fixed rates for both municipal and private lighting for stated periods of five years each. The lighting company by the ordinance granting a franchise did not get a perpetual franchise in the streets, but its franchise rights were co-extensive with its contract rights and obligations under the several ordinances fixing rates accepted by the company, and the question whether the company now has valid franchise rights in the village depends upon whether they have valid contractual relations with the village under the ordinance fixing the rates for public and private lighting.

2nd. Section 4221, General Code, has no application to contracts of this kind, the last ordinance under which the company was operated granted that the same should go into effect at a date which was subsequent to the expiration of the terms of members of council, as passed by ordinance.

3rd. The village council paying for a time the price stipulated for municipal lighting, under an invalid and illegal contract, is not estopped to question the validity of such contract.

COLUMBUS, OHIO, April 24, 1914.

HON. CLYDE MERCHANT, *Village Solicitor, Orrville, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of November 13, 1913, in which you ask my opinion on certain questions therein stated as follows:

> "(1) Under an ordinance granting the right to a company to use the streets of a village for the purpose of conveying electricity for light and power purposes, in which ordinance no time is specified as to the duration of such right, can the village council refuse to establish rates for private lighting, refuse to contract for street lighting with said company and compel the said company to remove its poles and vacate the street under the law as laid down in the case of the East Ohio Gas Company vs. Akron, 81 O. S., 33.
>
> "(2) Is it mandatory upon a village council to comply with the provisions of General Code, section 4221 in making expenditures for street lighting purposes?

"(3) Is a contract entered into by a village council with a light company valid and legal, which contract does not go into effect until six months after the expiration of the terms of the members of council that made the contract?

"(4) Will a village council, by paying the price for street lights stipulated in an invalid and illegal contract between the village and the light company, ratify and affirm and thereby make legal and valid such lighting contract?"

With the formal questions above stated upon which my opinion is asked, you submit a brief and copies of ordinances passed from time to time by the village council making provision for municipal lighting, from which it appears that the electric light plant in Orrville was constructed in 1892, after the passage of an ordinance the same year purporting to grant to the owners of the plant a franchise in the use of the streets and other public places of the village for the erection of poles, wires and other appliances for the transmission of electricity for lighting purposes; that in this ordinance lamp rates were fixed for public lighting, and the same has been done in subsequent ordinances, which, unlike the first ordinance, also fix rates for private lighting. It also appears that the ownership of the plant has changed from time to time, and that at no time has the village made any contracts with the owners of the plant for electricity for either public or private use, other than the contracts or obligations to be inferred from the passage of said ordinances and the acceptance thereof by the company.

At the time the first ordinance above noted was passed, the following pertinent statutory provisions were in force:

"Section 3471-3 R. S. (9195, G. C.). A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutment necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe."

Section 2491, R. S. (3994, G. C.):

"A municipal corporation may contract with such company for supplying with electric light, natural or artificial gas for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corporation limits; but this section shall be subject to the restrictions in the last clause of section thirty-five hundred and fifty-one."

The last clause of section 3551, R. S., referred to in section 2491 provided that no such company shall go into operation in any city or village where such a corporation has been already formed, until the question of authorizing such operation has been submitted to the qualified voters. This statutory provision has since been dropped from our statute laws.

Section 8753 Giauque (83 O. L., 143, Section 2):

"The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, squares, alleys, lands, lanes and public places in such village, city or town."

Section 2478, R. S. (3982, G. C.):

"The council of any city or village in which electric lighting companies * * * may be established, or into which their wires * * * may be conducted, are hereby empowered to regulate, from time to time, the price which said electric lighting * * * companies may charge for electric light furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places; and such electric lighting, * * * companies shall in no event charge more for any electric light * * * than the price specified by ordinance of such council."

In 1902, the legislature enacted what is now section 3809, G. C., which provides:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation * * * for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract."

In 1904 (97 O. L., 263), section 2479, R. S. (3983, G. C.), was amended so as to apply for the first time to electric light companies as follows:

"If council fixes the price at which it shall require a company to furnish electricity * * * to the citizens or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity * * * assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity * * * at a less price during the period of time agreed on, not exceeding ten years."

I take it that the first question submitted has reference solely to the ordinance of 1892, purporting to grant a franchise in the use of the village streets for electric light and power purposes, and to the proceedings under the same; as the subsequent ordinances all fix rates for both public and private lighting for fixed periods of time.

It does not, on the facts presented, affirmatively appear that this ordinance was accepted in writing as contemplated by its provisions. But no formal written acceptance of the provisions of a franchise ordinance is necessary, if the facts show an actual practical acceptance by the company, and the use of the franchise will be considered such acceptance; while the acquiescence by the municipality in the use of such franchise is a waiver of a provision in the ordinance requiring a written acceptance.

U. S. Telephone Co. vs. Hopkins, 160 Cal., 106.
Superior vs. Douglas Co. Tel. Co., 122 N. W., 106.
Postal Tel Co. vs. Newport, 25 Ky. Law Rep., 635.

One of the syllabi in the case of Lima Gas Company vs. Lima, 4 C. C., 22, seems opposed to the authorities just noted. But the syllabus in question is hardly supported by the text of the opinion of the court, nor at all by the statue upon which the opinion of the court and the syllabus as well are based.

The statute referred to, to wit: section 1693, R. S., since repealed, expended its force in prescribing the manner in which contracts were to be executed on behalf of the municipality; it made no direction as to the manner in which such contracts should be executed or accepted by the other contracting party.

Your question assumes that the village in granting the franchise refused to contract for public lighting. As to this, I am not advised with respect to municipal lighting, any contract is contemplated as necessary other than an ordinance fixing rates therefor, and its acceptance by the company, whether such rates be fixed in an ordinance granting a franchise in the first instance, or in an ordinance regulating the rates of an established company under the legislative powers granted by section 3982, General Code (2478, R. S.).

East Ohio Gas Co. vs. Akron, 81 O. S., 33.
State ex rel. vs. Ironton Gas Co., 37 O. S., 45, 48.
Van Wert vs. Van Wert Pub. Service Co. (21 O. D., 526).

The circumstances that no provision was made in the ordinance in question as to rates for private lighting is not of vital importance on any question here presented; for in the absence of accepted ordinance rates, if the company furnished electricity for private lighting at all, it would have to do so at reasonable rates.

Ry. Co. vs. Bowling Green, (57 O. S., 336, 345).

It appears that no specific period of time was mentioned in the ordinance of 1892 as to the duration of the franchise rights of the company, and, as I see it, the practical query is whether under this ordinance the company, in erecting and constructing its polls and wires in the streets, obtained any rights therein other than those of a mere licensee which might be revoked at will by the municipality.

In the case of the City of Wellston vs. Morgan (59 O. S., 147), is was held:

> "Where a statute gives power to a municipal corporation to contract for the lighting of its streets and other public grounds for a period not exceeding ten years, the conclusive implication is that such corporation is forbidden to contract for a longer period. And where such corporation undertakes, by the passage of an ordinance, to contract with an electric light company for an exclusive privilege to such company for the use of its streets, and stipulating for the lighting of the street, *et cetera*, for ninety-nine years, at a given price per month, such ordinance is *ultra vires* and void, and the contractual stipulations contained therein are equally void, and neither party can enforce them."

Under the facts of the case just cited, the court, in its opinion, held "that the action of the city in permitting the company to place its polls, etc., in the streets, gave to the company the position of a licensee as to the occupancy of the streets, but that its rights would not be based upon contract, but would result from the conduct of the city in giving consent to the erection of the same."

In the case of State ex rel. vs. Ironton Gas Co., supra, the statute fixed the contract term at ten years. The contract between the city and the company was for a period of twenty years. The agreement was performed for a period of ten

years without question, and it was held that after this period the company had no right under the agreement which could prevent the city fixing the price at which gas should thereafter be furnished.

In Cincinnati Gas Light and Coke Company vs. Avondale (43 O. S., 257), where the contract term for lighting was fixed by statute at ten years, it was held "that a contract which was to continue indefinitely at the option of the company was *ultra vires.*"

In the case of Boise Water Company vs. Boise City (230 U. S., 84), the court held:

> "When there is a limitation in the law of the state of the duration for which easements in streets can be granted by municipalities, an easement granted for an indefinite period continues for the period specified. There is a distinction between a definite grant for a period longer than the laws of the state permit and an indefinite grant; while the former may be altogether void as an effort to obtain that which is illegal, the latter is simply limited in duration to the period established by law."

With respect to the ordinance in question, however, it does not appear that at the time of its passage there was any statute which limited the term for which the village might contract for electric lighting. Aside from the provisions of section 2491-1, R, S., applying only to cities of the fourth grade of the second class, I know of no statutory provision in force in 1892 limiting the term of municipal electric lighting contracts. This being the situation, the village could have contracted for any length of time, free from fraudulent purpose upon the part of the council in protecting the rights of the people (4 C. C., 22, 26). However, the ordinance is silent as to the term of duration of the franchise.

Meeting this situation, the authorities are in conflict. Some hold that the franchise granted is perpetual (111 N. Y., 1; 151 Fed. Rep., 854). Other authorities limit the time of the franchise to the corporate life of the grantee when that is limited by law (124 Mich., 43; 179 Fed. Rep., 455). Again it is held that the grantee takes the franchise granted for a reasonable period of time, the same to be determined by a consideration of the investment of the company and the other facts and circumstances of the case. (Barre vs. Perry, 82 Vt., 301).

In the case of East Ohio Gas Company vs. Akron (81 O. S., 33), the ordinance like that here presented was silent as to the duration of the franchise, but expressed a contract between the parties regulating the rates to be charged for a period of ten years. The court held that the city had the power to regulate rates for gas after the lapse of the period contracted for, but that the city could not compel the company to accept such rates if it chose to voluntarily forfeit its right to exercise its franchise privileges and withdraw from the municipality. On this point the court in its opinion (p. 53) says:

> "It comes to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto. Or, to state it concretely, the contract being silent as to the duration of the franchise and the ten-year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price and the gas company may accept or reject these. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city; but on the other hand, there being no provision to that effect in the original

contract, the city cannot directly or indirectly deprive the gas company of its property without due process of law, when the latter withdraws from the further exercise of its franchise."

With respect to the question presented by your inquiry, it cannot be held that under the ordinance in question, the company took a perpetual franchise. (81 O. S., 52.) Neither am I prepared to hold that the company, after establishing its plant and erecting its polls and wires on the faith of this ordinance fixing rates for municipal lighting for a period of ten years, possessed only the rights of a licensee. It had rights which it took by grant under the ordinance; such rights being absolute for the period of time during which it was obligated to furnish municipal lighting at the rates fixed in the ordinance. After this, its franchise rights were indefinite as to duration, depending upon mutual agreement of the parties; but while it exercised the franchise granted, it did so as a matter of right. (Barre vs. Perry, supra.)

As far as I am able to see, however, from the facts submitted, the consideration arising from the circumstance that this ordinance of 1892 was silent as to the duration of the company's franchise is immaterial as far as the present situation is concerned, only in case it is determined that there are no valid contractual rights existing between the parties under the ordinance last passed and accepted. When this ordinance of 1892 was passed, the sole authority of the village to stipulate as to rates for electric lighting was by contract, but as soon as the company established its plant and commenced furnishing electricity for public or private lighting, or both, it became a public utility subject to the legislative power of the council of the village to regulate rates granted to it by section 2478, R. S., (3982 G. C.); and the village could, after the lapse of the contract period, regulate rates for electricity thereafter furnished for lighting purposes as its council saw fit, aside from constitutional limitations and aside from fraud or bad faith. These rates so fixed, the company at its option, could either accept or reject. If these rates were rejected by the company, that act would terminate its franchise rights in the streets. In this connection, I note that the company was permitted to exercise its franchise rights under the ordinance of 1892 until 1902, when the council of the village passed an ordinance fixing rates for public and private or commercial lighting for a period of five years from July 15, 1902. This ordinance was duly accepted in writing, and the rights of the parties became thereby fixed for the period named in the ordinance. Thereafter, in 1906, an ordinance was passed fixing rates for five years from July 15, 1907, as to both public and private lighting under which, I infer, the company was permitted to exercise its franchise and furnish electricity at the rates specified until July 15, 1912. Since this time, I take it, that the company has been exercising its franchise and operating under the ordinance of March, 1910, fixing rates for public and private service for a period of five years from July 15, 1912. Though the original ordinance of 1892 was silent as to the duration of the company's franchise, and the subsequent ordinance have not referred in terms to the matter of the company's franchise at all, yet the company all this time has been permitted to exercise this franchise under accepted ordinances fixing rates for limited periods of time. These accepted ordinances whether they constituted a contract, or rested only on the mutual obligation imposed by statute, carried with them a right in the company to exercise its franchise for the purpose of discharging the obligation imposed. This brings the whole question down to the question of the validity of the last ordinance with respect to which the remaining questions submitted by you are pertinent.

It cannot be said that the company now has any franchise rights by way of express grant. If the relation sought to be established between the city and the company by the ordinance of March, 1910, and the written acceptance of its terms, is in all respects effective, valid and enforcible, such relation would carry with it a

franchise right for the company to use the village streets, etc., for the purpose of carrying out its obligation with respect to municipal and private lighting. If, on the other hand, the company has no valid and enforcible rights under this ordinance, it has no franchise rights in the city streets, and the village may terminate its relation with the company.

Wellston vs. Morgan, 59 O. S., 147.
Akron Gas Co. vs. Akron, 81 O. S., 33.

Pertinent to this consideration the second formal question made in your inquiry is with reference to the application of section 4221, General Code, which reads as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

An examination of the provisions of this section and those of sections 4222 and 4223, General Code, read in connection with the provisions of sections 3809 and 3994, General Code, convinces me that section 4221 has no application to the contracts for municipal lighting authorized by the two sections last named.

Sections 4222 and 4223 by appropriate reference were enacted with section 4221 (96 O. L., 83, section 198).

An examination of the provisions of previous sections shows that they were intended to apply to contracts altogether different from those for municipal lighting extending over a period of years. Again, section 3809 provides that a council of a village may make a contract for lighting with *any* person, firm or company; while section 3994 authorizes a municipal corporation to make a contract for municipal lighting with *any* company. The general provisions of section 4221 that contracts shall be made with the lowest and best bidder is hardly compatible with the provisions of sections 3809 and 3994, authorizing contracts for municipal lighting with *any* person, firm or company.

Sections 3809 and 3994 being special statutes on a particular subject and being incompatible in their provisions with the provisions of section 4221, they are to be read as excepted from the operation of section 4221.

Cincinnati vs. Holmes, 56 O S., 104, 114.
State ex rel. vs. McGregor, 44 O. S., 628, 631.

Decisions holding the Burns law (section 2702, R. S., 3806, G. C.) to apply to contracts of this kind have been cited as applying by analogy to the question here presented. Without admitting the analogy, I am constrained to the opinion that the better reason is with the decisions holding the Burns law had no application to such contracts.

Definance City vs. Council, 23 C. C., 96, 99.
Defiance Water Co. vs. Defiance, 12 O. F. D., 299, 300.

Clark vs. Columbus, 23 W. L. B., 289.
Lima Gas Co. vs. Lima, 4. C. C., 22, 28.

Moreover, as I see it, section 4221 is without necessary application to the situation of facts here presented for the reason that it is not apparent that the present rates were fixed in the exercise by the village of its power to contract, but rather that such rates were fixed by council in pursuance of its legislative power under section 3982, General Code, to regulate rates, the acceptance of which bound the company to observe the rates so fixed. (3983, G. C.)

In villages the council has both contractual and legislative powers, and it is certain that however section 4221 may be otherwise construed, it is to be construed only as a limitation on the contractual powers of the council. By section 4221, General Code, it is provided that all contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and the clerk. As I understand it, under the usual and accepted procedure under this section, council by resolution determines the terms of the contract, which is formally reduced to writing, and signed by the mayor and clerk on behalf of the village, and by the other contracting parties. The procedure manifested in the enactment of this ordinance and its written acceptance bears little or no analogy to the usual and accepted procedure as to contracts under section 4221. Though the terms of this ordinance with respect to its provisions as to municipal lighting are stated to some extent in contractual terms, yet the whole bears strong indication of legislative action by council and statutory acceptance as provided for under sections 3982 and 3983, General Code.

With reference to the provisions of the ordinance as to private or commercial lighting, it is clearly legislative in character, and on the whole, such seems to be the character of the ordinance with respect to municipal lighting as well.

The third question made in your inquiry is with respect to the application of section 4241, General Code, which reads as follows:

> "The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected."

In the case of Logan Natural Gas & Fuel Company vs. City of Chillicothe, 65 O. S., 186, it was held:

> "When an ordinance regulating the price of gas under Revised Statutes, sections 2478 and 2479, provides that it shall be in force and take effect from and after its passage and legal promulgation, and also provides that the gas company shall be entitled to charge at a certain rate for ten years from a date later than the date of the passage and legal promulgation of the ordinance, such provision when accepted in writing by the gas company, is valid and binding for the period of ten years from the date so named. Such ordinance is not restricted by section 1691."

This decision seems to foreclose the question submitted by you. It is suggested that since this decision, the statute in question has been given a different relative position in the General Code from that occupied by it in the Revised Statutes. I do not see that the relative position of this particular statue in the two revisions is substantially different; and if it were, such circumstances would not in conformity to established rules of construction be persuasive of legislative intention to change the force and effect of the statute as construed by this decision * * * but, section

4241, like section 4221 is to be construed in any event only as a limitation on contractual power, and if I am right in the conclusion to which I have been constrained, that the ordinance in question is to be construed as an exercise of the legislative power of council to fix the rates of a company already established in the village, it is apparent that the provisions of section 4241 pass out of view in the consideration of the ultimate question whether the company now sustains valid and enforcible relations to the village with respect to municipal or private lighting, carrying with it franchise rights in the use of the city streets.

In other words, with reference to the suggested application of section 4241 to the situation here presented in the enactment and acceptance of this ordinance of March, 1910, it may be stated, pariphrasing the language of the court (65 O. S., 207), it is apparent that in regard to contracts with electric light companies, or rather ordinances regulating the price of electricity, it is otherwise provided as to such contracts or ordinances in section 2479, Revised Statutes (section 3983, G. C.).

With respect to the question here presented, I do not want to be understood as commending or approving this ordinance of 1910 in respect to its provisions as to the time when it should go into effect, but I am constrained to uphold the ordinance and the written acceptance thereof as establishing valid and enforcible legal relations between the village and the company, only by force of the decision of the supreme court before noted.

With respect to the last question submitted by you, it is to be observed that the doctrine of estoppel at best has very limited operation against municipal corporations in this state and none at all with respect to acts that are ultra vires or in opposition to or in conflict with statutes regulating such acts.

Lancaster vs. Miller, 58 O. S., 575.
Wellston vs. Morgan, 59 O. S., 147.
Wellston vs. Morgan, 65 O. S., 219.

The two cases last cited are full authority to the point that payment by a municipality under an illegal and invalid contract does not constitute a ratification of such contract, or estop it from voiding the same.

I note that in your brief you suggest the possible invalidity of the ordinance of 1892, before mentioned, under the provisions of section 4226, General Code (R. S., 1694) which provides that no ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. This ordinance in granting a franchise and making a contract for street lighting does not, I think, offend the statute. The village cannot effectually procure lighting by a contract without granting to the company a franchise for the use of the streets and other public ways for its poles, wires and other appliances. The ordinance in question does not come within either the letter of the statute or the reasons for the same as noted in the case of Heffner vs. Toledo, 75 O. S., 413, 424, 425.

In conclusion I am constrained to the opinion on the foregoing considerations that valid and enforcible relations do exist between the company and the village by reason of the enactment of this ordinance of March, 1910, and its acceptance by the company, and that the company has franchise rights which must be taken into account in any subsequent procedure by the village.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

866.

COUNTY DITCHES—INTER-COUNTY DITCHES—ASSESSMENTS—PROCEDURE.

1st. In the improvement of ditches in a county the compensation to be assessed against the property holders benefited in the upper county in behalf of the lower county may be agreed upon by the commissioners. In the absence of such agreement the commissioners of the lower county may compel the commissioners of the upper county to assess and pay so much through proceedings in the probate court.

2nd. In reference to investigation of property holders who are assessed due process of law is satisfied if the property holder has an opportunity by a hearing in court, to object to the assessment, and this opportunity is satisfied by the right to present valid objections, such as excess of benefits, etc.

In an injunction proceeding, or in a suit to collect the taxes, however, the property holder must somewhere along the line of the proceeding have sufficient notice to enable him to be apprised of the fact that the assessment is made, and to enable him to set in motion the machinery of his objections.

This assessment must be made on the property holders in the upper county in the same proportion that they were assessed when the ditch was first located, these assessments placed upon the duplicate and collected as other taxes.

Under the provision of sections 6499 and 6500, General Code, the property holder is given an opporunity to object to assessments by injunction proceedings.

3rd. Under the provisions of the General Code the names of such property holders in the upper county must appear on the petition for ditch improvements of the lower county, and all such property holders must be notified by the county auditor.

COLUMBUS, OHIO, April 24, 1914.

HON. CHARLES S. HALL, *Prosecuting Attorney, Sidney,Ohio.*

DEAR SIR:—I have at hand your favor of February 7th, wherein you state:

> "I would like to have an opinion as to proper procedure under an act of the general assembly, found in 103 O. L., 836; and to know whether, in a case where an improvement of a stream is located entirely in Shelby county, and where Miami county, being an upper county, would be benefited by its being furnished a better outlet, and under said act an agreement would be reached between the joint boards of commissioners of Shelby and Miami counties, it would be necessary for the property owners, against whose land the amount agreed upon between the joint boards to be paid by the upper county is to be assessed, to be notified prior to the granting of said improvement. Or, would it be a compliance with the statute if the agreement between the two counties were made after the granting of the improvement, but before the sale of the improvement, without any notice to the people who would be benefited in the upper county until after the amount was agreed upon by the two boards?
>
> "We have a case of that kind pending in our county and the prosecuting attorney of Miami county and myself are unable to agree upon the proper step to be taken; and as this improvement will be held up until this phase of the matter is settled I would greatly appreciate an answer as soon as convenient to you."

The statutes material to the questions presented are designated in the General Code as sections 6540 to 6558. Several of the sections comprised therein have been amended, and these sections appear on pages 838 et seq., 103 Ohio Laws. The amendments therein, so far as they affect the law in question, seem to be made with the purpose of bringing within the application of these statutes not only watercourses, but also natural watercourses or living streams. The amendments, therefore, do not affect your inquiries.

Section 6540, General Code, provides a means whereby, when an improvement is contemplated, either in an upper or a lower county, which, by reason of work done or made necessary in the lower county, provides benefits for the upper county, by reason of supplying a more ample outlet for the waters of the upper county or otherwise, the commissioners of the upper county may be required to pay the commissioners of the lower county the amount required to be expended for the lower county for the benefit of the upper county.

In brief, section 6540 and the following sections of the law under consideration provide a method whereby an upper county may be compelled to pay for benefits accruing by reason of work done in a lower county, when the county commissioners fail to agree to construct a joint county ditch, in accordance with the statutory provisions having application to such work.

This law appeared in 86 Ohio Laws, 123, and was passed as a supplement to the then existing joint county ditch laws, no doubt for the reason that the existing laws provided no means whereby the ditches in contemplation of the new law could be constructed in the absence of harmonious action on the part of the commissioners of each county, since the then existing law required agreement on the part of both counties with respect to the policy of constructing the ditch, as to the route of its construction and as to practically all matters except the question of the amount of expense which was to be borne by each county.

Under section 6540, when the county commissioners come to an agreement, and the upper county pays to the lower county, in accordance with such agreement, *the commissioners of the upper county shall apportion such sum to the lands of the county for whose benefit such ditch was or is constructed.* Or, under section 6550, when the county commissioners have failed to agree and the court, through the appointment of freeholders, has fixed the compensation which is to be paid by the upper county, *the commissioners of such upper county are required to apportion and assess the amount provided, together with the entire expense of the proceedings, to the land in said county, in a like ratio as the expense of constructing said ditch or ditches, for the improving of the channels of said river, creek or run, or part thereof, in the upper county was apportioned and assessed; and cause the sum so apportioned to the respective tracts of land in the upper county to be placed upon the special duplicate thereof against such lands for collection.*

There is nothing in the statutes in question expressly requiring the commissioners of the upper county to give any notice whatsoever to the land owners who are required to bear the burden of the expense assessed against the upper county.

Sections 6556, 6557 and 6558 of the General Code are as follows:

> Section 6556. Proceedings for the construction, cleaning, repairing or enlarging, either of said ditches, or the improving of the channel of any river, creek or run or part thereof, in either the upper or lower counties, whether or not the improvement was originally made as a joint improvement by the joint board of commissioners of two or more counties, or whether or not the improvement to be made or constructed might be a joint improvement, may be commenced and conducted in the manner provided in this chapter and the laws relating to single county ditches.
>
> "Section 6557. In addition to the procedure provided by law for the

construction enlarging, cleaning out or repairing of a ditch; or the improving of the channel of a river, creek or run or any part thereof, which furnishes or may furnish drainage in more than one county, proceeding shall be commenced and conducted in the manner provided by law for the construction of joint county ditches or the improvement of a channel of a river, creek or run or any part thereof, which is located in more than one county, when a majority of each board of commissioners of such county so agree.

"Section 6558. When the county commissioners do not agree or determine to proceed under the laws for the construction of joint county ditches and the improvement of channels, rivers, creeks, or runs or parts thereof located in more than one county, and the board of commissioners of the lower county unanimously agree that such improvement is necessary or will be conducive to the public health, convenience or welfare, and the line described is the best route, the proceedings in reference thereto shall be conducted as provided in this chapter and the laws for single county ditches. The proceedings shall be conducted by the commissioners of the lower county."

In sections 6556 and 6558 the words "in this chapter" read "in this act" when the statutes were first enacted in 86 Ohio laws. They refer to sections 6540 et seq., General Code. The language in section 6557, providing for procedure as provided by law for the construction of joint ditches, when a majority of each board of county commissioners agree, referred to the law existing with reference to the construction of joint ditches when sections 6540 et seq., were passed in 86 O. L. The words "in this chapter," as they now appear, therefore, clearly have reference to those provisions in this chapter which had their origin in 86 O. L., and which now appear as sections 6540 et seq.

Since your letter does not state that the county commissioners of each county have agreed to proceed in the manner provided for the construction of joint county ditches, it is surely correct to assume that the procedure contemplated is in accordance with sections 6540 et seq. The action therefore is under section 6556, General Code, above quoted.

This section incorporates the provisions pertaining to the construction of single county ditches, and the question arises whether or not such incorporation requires notice to be served upon those charged with the assessment in the upper county. The necessity of providing notice for the validity of assessment statutes is of interest. The constitutional provisions bearing upon this question are as follows:

"Article 1, Section 19. Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

"Article 1, section 16. All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by *due course of law,* and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

"Article 5. (Amendments to the United States constitution) * * * nor be deprived of life, liberty or property without due process of law, nor shall property be taken for public use without just compensation."

It is well settled that private property may not be taken without notice and an opportunity for hearing, by force of section 19 of the bill of rights.

> "Due course of law means that such course of law shall be enacted as will require that he whose property is about to be taken, shall have notice of the time and place of hearing, what is sought to be appropriated, and an opportunity to be heard in his own behalf. Any law which seeks to deprive him of his property without such proceedings is in direct opposition to the letter and spirit of the constitution. McArthur vs. Kelly, 5 Ohio, 140; Foote vs. Cincinnati, 11 Ohio 408; Lamb & McKee vs. Lane, 4 O. S., 167; Watson vs. Trustees of Pleasant Township, 21 O. S., 667."
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> Harrison vs. Sabina, 1 O. C. C., 49-52.

Under the statutes in question, however, a taking of property is in no wise contemplated, as is the case in the actual construction or widening or otherwise improving of a ditch in a county. The difference between a taking of property, such as requires as a condition precedent the deposit of compensation under article I, section 19, of the constitution, and as assessment for the purpose of improvement without a taking of property is well settled. The latter is in the nature of a local tax, and summary procedure for the collection thereof is justified by the decisions. The question which arises, therefore, with reference to the necessity of notice in the levying of such assessments is one which involves a construction of the constitutional provisions requiring due process of law. Upon this principle the following is of interest:

> "The objections urged to the validity of the assessment on federal grounds are substantially these: that the law under which the assessment was made and levied conflicts with the clause of the fourteenth amendment of the constitution declaring that no state shall deprive any person of life, liberty or property without due process of law; and impairs the obligation of the contract between California and the United States, that the proceeds of the swamp and overflowed lands ceded by the Arkansas act should be expended in reclaiming them.
>
> "That clause of the fourteenth amendment is found, in almost identical language, in the several state constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in Davidson vs. New Orleans, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 97, 104. It is sufficient to observe here, that by 'due process' is meant one which, following the forms, of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. Hurtado vs. California, 110 U. S. 516, 536.
>
> "The appellant contends this fundamental principle was violated in the as-

sessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it contains no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson vs. New Orleans; 'In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law." The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the constitution of the United States.' As said by this court: 'It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its uses, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state, as to the mode, form and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction.' *State tax on foreign held bonds,* 15 Wall. 300, 319.

"Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per year or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing.

So. also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"*But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different* principle comes in. The officers in estimating the value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.

"In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amout of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In *Davidson vs. New Orleans* this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms 'due process of law,' and that it would be difficult to give a definition that would be at once perspicuous and satisfactory the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case, *'That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his propery, without due process of law, however, obnoxious it may be to other objections.'* (96 U. S. 97.)"

Hagar vs. Reclamation District, 111 U. S. 701-707.

The fifth paragraph of the syllabus in this case is as follows:

"A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the constitution, which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection."

And so it has been well settled that where the legislature sees fit to authorize

assessment according to the lineal foot or upon the general duplicate, instead of upon the particular property, or partly upon one and party upon the other, or upon both, notice is not necessary; though it is clearly certain that the right of the property holder to be heard in some manner upon his right not to be assessed in excess of benefits must be safeguarded.

French vs. Barber Asphalt Paving Co., 181 U. S. 325.
Cooley on Taxation, p. 447.
Dillon on Municipal Corporations, Sec. 752.
Norwood vs. Baker, 172 U. S. 269.
Shumate vs. Heman, 181 U. S. 402.

The second paragraph of the syllabus in the case of Gillette vs. City of Denver, 21 Federal Reporter, 822, is as follows:

"2. Sewer Assessments—Notice—When assessment is determined by a mere mathematical computation notice is unnecessary—Due process of law.

"Act of the legislature, Colorado, of February 19, 1879, amending the charter of the city of Denver, provides for the construction of sewers and the levy of assessments therefor *according to area* and regardless of improvements, on the petition of a majority of the property holders resident in any sewer district, or upon the recommendation of the board of health. The act also provides that, during the progress of the work, all persons interested shall have an opportunity to object to the materials used, the manner in which the work is done, or any supposed violation of the contract. *Held*, that the levy of the assessment being a mere *mathematical computation*, and as to all prior proceedings full notice is provided for, it is unnecessary that the act should provide an opportunity for lot owners to be heard on the assessments after they are levied, and that making such assessments a fixed charge against the lots, without notice or an opportunity to be heard, is not depriving the lot owners of their property without 'due process of law.'"

The following decisions are in accord, holding that where the making of an assessment is a mere matter of mathematical calculation notice is not necessary:

Armory vs. City of Keokuk, 72 Iowa, 701.
Cleveland vs. Freeble, 13 R. I., 50.
Mayor of Baltimore vs. Johns-Hopkins Hospital 56 Md., 701.
Bumont vs. Wilkesbarre 142 Pa. St., 198-216.
Adams vs. Fisher, 63 Texas, 651-658.

In Ohio these principles are summed up in the following cases:
In Adler vs. Whitbeck, 44 O. S., 539-570, the court says:

"The result of the decisions of the supreme federal tribunal in giving a construction to this amendment, so far as it affects the revenue laws of a state, is summed up by the learned author from whom we have before quoted, in his work on taxation, at page 51. By these decisions such laws may be in harmony with that amendment, though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be there heard, *if they give him the right to be heard afterward in a suit to enjoin the collection in which both the validity of the tax,*

and the amount of it, may be contested; and it is immaterial to this question that the party to the suit is required, as in other injunction cases, to give security when instituting the suit."

In Caldwell vs. Carthage, 49 O. S. 349, the court per Dickman, J., says:

"The inquiry is suggested, what is the remedy by which, in Ohio, the property owner may test the illegality of an assessment? By section 5848 of the Revised Statutes, 'courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments.' *An opportunity is here afforded to establish the invalidity of the tax or assessment; and with such privilege, if judgment is rendered against the property owner in the suit, it cannot be properly said that his rights of property have been determined without due process of law or judicial investigation.* Tone vs. Columbus, 39 O. S., 301, 302; Stephan vs. Daniels, 27 O. S., 536; Stesse vs. Oviatt, 24 O. S., 253. Between the passage of the condemnation and assessment ordinances and an advertisement of a tax sale, ample time elapses, and ample notice of the proceedings to appropriate and assess is provided for to enable the owner to go into court, and contest the assessment by application for injunction.

"If special assessments are not paid by the time stipulated in the ordinance providing for the same, they may be recovered by suit, or the lien therefor may be enforced in the name of the corporation against the property owners. Revised Statutes, sections 2285, 2286, 2294. And in a suit to recover the assessment or to enforce the lien therefor, the owner of the property assessed may set up in defense the illegality of the assessment. In Murdock vs. Cincinnati, 25 W. L. B. 26, U. S. Circuit, S. D. O., it was said by Jackson, J., 'It appears that the city of Cincinnati is now proceeding by civil suit in the state courts, against complainant, to collect the assessment in question. To that suit complainant may interpose any and all defenses going either to the validity or regularity of such assessments. Such suit gives him a full opportunity to be heard, and affords him the privilege of presenting every objection that can possibly be made, either under the constitution of the United States, or under the constitution and laws of Ohio, to the validity of the assessment. It cannot be questioned that the judgment which may be rendered against complainant in said suit, will constitute 'due process of law.' If the owner of assessed property may have the benefit of the law of the land or due process of law, in a suit against him by the corporation making the assessment, he may also have the benefit in a suit by himself against the corporation, wherein the same questions can be determined."

The second paragraph of the syllabus in this case is as follows:

"Where land is appropriated for a street improvement, an assessment by the foot front of the property bounding and abutting upon the improvement, to pay the cost thereof, without the passage, notice and publication of such preliminary resolution, as thus provided, will not thereby be a taking of property without due process of law, in violation of section 1 of the 14th amendment of the constitution of the United States."

To the same effect, see: Finnell vs. Kates, 19 O. S., 405; and Cuff vs. Board of Commissioners of Seneca County, 19 O. S., 181-183.

In the case of Railroad Co. vs. Keith, 67 O. S., 279, however, the third paragraph of the syllabus is as follows:

"It is necessary to the validity of an assessment on real estate, other than general taxes, that somewhere along the line of the proceedings, notice be given to the owner, and an opportunity afforded him to be heard in opposition or defense."

In this case the railroad company, by the statute, after failure to build a ditch within ten days after receipt of notice, could be compelled, by the probate judge of the county, to either build the ditch or to pay the cost of building the same, without any right to be heard during the proceedings. In short, the judgment of a court for the expenses incurred in building the ditch could be entered up against a railroad without any right whatever to be heard on the part of the defendant.

The situation in this case is to be distinguished from the statutes in question, which provide for collection of taxes through tax authorities, and in no wise allows an uncontested judgment of court to be entered against the property holders. The authorities above set out will establish that notice may be dispensed with when the making of assessments is a matter of mere mathematical calculation, *provided opportunity is given the property holder to be heard and to defend in a suit for collection of the taxes, or by injunction against encroachments which are clearly contrary to due process of law.* The proviso is clearly laid down everywhere, that the right to defend against an assessment in excess of benefits or otherwise in violation of state constitutional provisions, or other provisions of the law of the land entitling the property holder to protection. Such a right to be heard necessarily involves sufficient notice to enable the property holder to set in motion the machinery for his defense.

Under the statutes in question, in view of section 6550, the county commissioners of the upper county, in the making of an assessment, have merely to make a mathematical calculation; that is, they must apportion the amount assessed against the upper county to the land in the upper county in the same manner that the expense of constructing the ditch or ditches was apportioned. These statutes furthermore, under section 6499 and section 6500 of the General Code, provide a means to the property holder of defending against undue process of law. These statutes are as follows:

"Sec. 6499. The collection of taxes or assessments levied or ordered to be levied, to pay for the location or construction of a ditch, shall not be perpetually enjoined, nor declared void, in consequence of an error committed by the surveyor or engineer, the county auditor, or the county commissioners, in the location or establishment thereof; nor by reason of an error or informality appearing on the record of the proceedings to locate or establish it; nor by reason of an error committed by the surveyor or engineer, the county auditor, or county commissioners, in respect to the letting of uncompleted work, or the levy of a tax or assessment for the labor and expense of construction of an uncompleted portion, section, or allotment of such ditch.

"Sec. 6500. The court, in which a proceeding is brought to recover a tax or assessment paid, or to declare void the proceedings to locate or establish a ditch, or to enjoin a tax or assessment levied or ordered to be levied to pay for the labor and expense therefor, if there is manifest error in the proceedings, shall allow the plaintiff in the action to show that he has been injured thereby, and, on application of either party, may appoint such person or persons to examine or survey the premises, or both. The court shall allow parol testimony that said improvement is necessary and will be conducive to the public health, convenience, or welfare, and that any acts required by law for an improvement have been substantially

complied with, notwithstanding the record required to be kept by any board or officer; and, without finding error, the court may correct a gross injustice in the apportionment made by the commissioners. On final hearing, the court shall make such order in the premises as is just and equitable, and may order that such tax or assessment remain on the duplicate for collection, or order it to be levied, or perpetually enjoin it, or part thereof, or, if it has been paid under protest, order the whole, or such part thereof, as is just and equitable, to be refunded. The cost of such proceeding shall be apportioned among the parties, or paid out of the county treasury, as justice requires."

The one question presented, therefore, is whether or not these statutes in any way afford sufficient notice to the property holder to enable him to take advantage of the matters provided for by sections 6499 and 6500. In these statutes there is no provision for collection of the assessments, otherwise than by placing upon the duplicate and collecting the same as other taxes are collected. There is no provision for notice to the property holder and opportunity to pay, as in the provisions relating to improvements in a municipality; nor is there any provision for suit against the property holder, wherein defenses may be set up.

That the assessments are to be placed upon the duplicate, to be collected as other taxes, is made clear from a review of the following sections of the General Code:

"Sec. 6465. The county commissioners shall direct the auditor to issue an order on the county treasurer to each of the several claimants to whom compensation or damages was allowed for the amount due, and enter on the ditch duplicate the amounts assessed against the several benefited land owners, for the payment of such compensation and damages, payable in the ratio and manner as other assessments, and to be collected as other taxes.

"Sec. 6478. If the jury finds that the improvement is necessary, and will be conducive to the public health, convenience or welfare, and is practicable, the county commissioners shall apportion the compensation and damages as provided by law in cases where no appeal is taken. They shall also assess and apportion the costs as directed by the probate court, and order the auditor to place them on the duplicate to be collected as other taxes. In addition thereto, they may sue upon the bond given for the payment of costs, and execution may be sued out of the probate court for the collection of costs taxed against any person, as provided in the next preceding section. Costs taxed against the commissioners shall be paid out of the general county ditch funds.

"Section 6490. When the county commissioners make an assessment they shall cause an entry to be made, directing the auditor to make and furnish to the treasurer of the county a special duplicate with the assessment arranged thereon, as required by their order. The auditor shall retain a copy thereof in his office, and all assessments shall be collected and accounted for by the treasurer as taxes. When an assessment remains unpaid for one year after it is placed upon the special duplicate, unless otherwise ordered by the commissioners, it shall be placed on the general duplicate for collection, together with a penalty of not less than six per cent. annually, as county ditch taxes, and the amount of delinquent tax thus placed on the general duplicate shall be charged respectively to the several ditches on account of which such assessment has been made as a transfer from the county ditch fund.

"Sec. 6512. The commissioners of a county wherein a ditch improve-

ment is ordered, whether the construction of a new ditch or the deepening, widening, straightening, or alteration of an old ditch, shall provide a suitable book in which to keep the ditch accounts of the county. The auditor shall open therein an account with each improvement, in the name by which it is known, and charge all assessments and credit all payments made in the case. The money collected on each improvement shall constitute a special fund; and the provisions of this section shall apply in cases of ditches located by the commissioners of more than one county in joint session."

Keeping in view this situation, the opinion of Justice Jackson, in Scott vs. Toledo, 6 O. F. D., 192, has a very definite bearing. The second paragraph of the syllabus is as follows:

"The fact that two modes for the collecton of an assessment, made without notice or opportunity to be heard, provide for proceedings in court in which defense may be made is not sufficient to make an assessment valid as imposed by due process of law, if the statute allows a third mode of collection by placing the amount upon the tax list and collecting it in the same manner as state and county taxes."

The following excerpts are taken from the opinion, pages 206-209:

"Nor is it any longer an open question that the provision of the federal constitution prohibiting the states from depriving any person of his property 'without due process of law' applies to taxation by the state or its subordinate agencies, and that, in respect to all such taxation based on values and apportionment, and involving judicial or quasi judicial ascertainment and determination as to the amount to be imposed upon the citizen or made a charge upon his property, 'due process of law demands and requires that, at some stage in the proceeding before the tax charge or assessment is fixed and made final and collected, he shall have notice, or an opportunity to be heard in reference thereto. This subject has been so ably and exhaustively discussed and considered in numerous recent decisions of the federal and state courts that little or nothing remains to be added; nor is it deemed necessary to extend this opinion by quoting at length from those authorities which establish the general proposition that it is essential to the validity of state taxation other than that of a personal character, such as licenses for privileges, or the exercise of franchises, that the taxpayer shall, at some stage in the proceeding, have notice or an opportunity to be heard; that if such notice is not given, or opportunity afforded to be heard, either in levying or collecting the tax, the proceeding will be wanting in that 'due process of law' necessary to give it validity under the federal constitution. The legislature may prescribe the kind of notice and the mode in which it shall be given, *'but it cannot dispense with all notice.'* The owner must in *some form*, in *some tribunal* or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burden, before the tax or assessment becomes final and effectual, in order to constitute such procedure 'due process of law.' If the tax or assessment can, under the state law, be enforced or collected only by legal proceedings, in which any and all defenses, going either to the validity or amount of such tax or assessment, may be made, that will afford the opportunity to be heard, and in such cases the proceeding cannot be

said to deprive the owner of his property 'without due process of law,' however objectionable or unjust it may be otherwise. In the application of these principles there is no distinction between taxation upon values for general purposes and special assessments based upon benefits. The authorities supporting these proposition are the following: Kennard vs. Louisiana, 92 U. S., 482; McMillen vs. Anderson, 95 U. S., 40-42; Davidson vs. New Orleans, 96 U. S. 104, 105; Hagar vs. Reclamation Dist., 111 U. S. 707-711, 4 Sup. Ct. Rep., 663; Kentucky Railroad Tax Cases, 115 U. S. 335 336, 6 Sup. Ct. Rep., 57; Williams vs. County of Albany, 122 U. S., 164, 165, 7 Sup. Ct. Rep., 1244; Spencer vs. Mercant, 125 U. S., 354, 355, 358, 361, 8 Sup. Ct. Rep., 921; Stuart vs. Palmer, 74 N. Y., 183; Railroad Tax Cases, 13 Fed. Rep., 751-753, 762-766; County of Santa Clara vs. Railroad Co., 18 Fed. Rep., 410-412, 416-424; Cooley, Taxation, 266; Welty, Assessment, sections 250 253, and cases cited. In the cases of Hagar vs. Reclamation Dist., 111 U. S., 701, 4 Sup. Ct. Rep. 663, and County of Santa Clara vs. Railroad Co., 18 Fed. Rep. 409, the distinction between a tax or assessment which calls for no inquiry, nor for anything in the nature of judicial examination before levy and collection, and a tax or assessment imposed upon property according to its value or special benefits resulting thereto, to be ascertained by assessors or other officials upon inquiry or evidence, is pointed out and considered with reference to the necessity for notice or opportunity for hearing. In the former class of cases it is suggested that, as notice *would be of no service to the individual, and no hearing could change the result, as in taxes for licenses and the exercise of franchises, such notice or an opportunity to be heard may be dispensed* with; but that in the latter class of taxes and assessments, based upon values or benefits which involve inquiry, notice or an opportunity for hearing is essential, to render the proceeding valid. Counsel for defendant claims the benefit of this distinction in the present case, and insists that, as notice would have been of no service to complainants, and no hearing could have changed the results, they were therefore not entitled to such notice or hearing. But this position ignores the fact that the assessment in question falls within the latter class of cases, in which inquiry as to benefits is involved; section 2283 directing in express terms that, 'so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed.' This requirement of the statute, that regard should be had 'to the probable benefits to the property assessed' in making these special assessments necessarily involved inquiry or consideration of benefits, which rested upon facts or evidence, and called for the exercise of a quasi judicial determination, like taxation based upon values to be ascertained by assessors.

"It admits, therefore, of little or no question, that the assessment under consideration was of that character which entitled complainants to notice, or an opportunity to be heard in respect thereto, in order to give it validity, or make the proceeding conform to due process of law. * * * An assessment so made is wanting in 'due process of law' *if its collection can be enforced otherwise than by suit or legal proceedings in which all defenses to its validity or amount could* be raised. * * * or, thirdly, the common council may certify any unpaid assessment to the auditor of the county in which the corporation is situated, and the amount so certified is to be placed upon the tax list, with ten per cent. penalty, and to be collected with and in the same manner as state and county taxes (section 2295), which are collected either by suit, by forfeiture and sale of the land, or by distraint of sufficient goods and chattels belonging to the person charged with such

taxes or assessments. In the first two methods of collection to which the common council could or might resort, the notice provided for or required would constitute 'due process of law' under the authorities above cited; but if, instead of resorting to these methods of collection, the corporation selected, as it might, the third remedy for the enforcement of the assessment, then the owners would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, and this would violate the requirements of 'due process of law.' In this respect the present case is distinguishable from that of Hagar vs. Reclamation Dist., 111 U. S., 711, 4 Sup. Ct. Rep. 663, and other like cases, relied upon by counsel for defendant, in which the assessment complained of was enforceable only by legal proceedings in which any defense either to the validity or amount could be pleaded. The common council of Toledo having made the assessment in question without notice to, or an opportunity for hearing by, complainants, and having the right to enforce its collection by distraining and selling their property, without resorting to any suit which would give them an opportunity to interpose any defense either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving the citizen of his property."

It is clear, therefore, that for the validity of the statutes in question, it is absolutely essential, under the authorities, that such notice be given the property holder as will entitle him to be advised of the assessment against him prior to the sale of his propery for the payment of the tax. If such notice cannot be found in these statutes they must be deemed invalid.

In Cuff vs. State, 52 O. S., 361, the per curiam opinion is as follows:

"The act entitled an act, supplementary to chapter one, title six of the Revised Statutes of Ohio, 86 Ohio Laws, 123, and the amendments of sections one, two, three and ten, 90 Ohio Laws, 81, providing for the payment by the upper county to the lower county of the cost of outlet ditches, *are in every respect valid enactments;* and upon failure on the part of the probate judge of the upper county, on notice from the probate judge of the lower county, to appoint freeholders, as provided in said act, such probate judge of such upper county may be compelled by mandamus to make such appointment."

In view of these decisions, we must conclude that these statutes do provide notice somewhere enabling the property holder to defend against matters threatening his rights guaranteed under due process of law. A liberal construction is therefore justified having for its effect the provision of such notice.

Under section 6556 of the General Code, above quoted, and under which statute your board proceeded, the laws relating to single county ditches are incorporated into the statutes providing compensation by the upper county to the lower county.

The provisions for notice in single county ditch proceedings are as follows:

"Section 6447. A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and describing the beginning, route and termini thereof. It shall also contain the names of the persons and corporations, public or private, *who, in the opinion of the petitioner or petitioners, are in any way affected or benefited thereby.*

* * * If the name of a person or corporation, either public or private, in any way affected by the proposed improvement, is omitted from the petition, the county commissioners, upon discovering that such omission has been made, shall supply such name, and cause notice to be served as herein provided.

"Section 6448. The county auditor shall thereupon give notice to the commissioners of the filing of such petition, together with a copy thereof. He shall fix a day for the hearing thereon not more than thirty days from the date of such notice. The auditor shall prepare and deliver to the petitioners, or any one of them, a written notice directed to the lot or land owners and to the corporations, either public or private, affected by the improvement, setting forth the substance, pendency and prayer of the petition.

"Section 6449. The county auditor shall also prepare copies of the notice, for which he shall receive six cents per one hundred words, but not more than twenty-five cents for any one notice. One copy of the notice shall be served upon each lot or land owner or left at his usual place of residence and upon an officer or agent of each public or private corporation having its place of business in the county, at least fifteen days before the day set for hearing. The person who serves such copies shall make return on the notice, under oath, of time and manner of service, and file it with the auditor on or before such day, and shall receive two dollars for each day actually employed in said service.

"Section 6450. The county auditor, at the same time shall give a like notice to each lot or land owner who is a non-resident of the county, by publication in a newspaper printed and of general circulation in the county, at least two weeks before the day set for hearing. Such notice shall be verified by affidavit of the printer, or other person, knowing the fact, and filed with the auditor on or before such day, and no further notice of the petition or the proceedings had thereupon shall thereafter be required."

I am of the opinion that, under these provisions, when the improvement is first inaugurated, the same being necessarily done by petition, the auditor with whom the petitions are filed must notify all persons and corporations, public or private, who will be affected by the improvement, including those of the upper county, to be charged with assessment, whose names must appear on the petition, in accordance with the terms of section 6447; the same being placed thereon either by the petitioner or by the county commissioners, upon their omission. Such notice being given, all parties notified, by the terms of section 6468, General Code, are entitled to make the same objections to the proceedings which are permitted to residents of the county in which the improvement is inaugurated and constructed.

Answering your specific questions, therefore, I am of the opinion that it is necessary for the property owners in the upper county, against whose land the amount apportioned to the upper county is to be assessed, to be notified prior to the granting of said improvement.

This conclusion, I think, answers both of your questions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

867.

ROADS—POWERS OF DRAGGING SUPERINTENDENT.

Under the provisions of section 7060-2, General Code, in reference to the powers of a dragging superintendent the statute must be construed to apply to all graveled or unimproved roads within a township and not to township roads exclusively.

COLUMBUS, OHIO, April 24, 1914.

HON. THEO H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your letter of January 19th, wherein you state:

> "I would be pleased to have your opinion as to section 7060-2, as found in 103 Ohio Laws, page 402, on the question of what roads are included in this section."

Section 7060-2, provides in part as follows:

> "The dragging superintendent shall divide the graveled or the unimproved public roads of the township into road dragging districts, which must include all mail routes and main traveled roads within the township which are graveled or unimproved."

The foregoing is part of an act "to provide for dragging the public roads of the state." While the roads meant to be included within its terms are not as accurately described as they might have been, yet it seems to me, from the context, that the intention was to include all graveled or unimproved public roads and not merely township roads. That this is the true meaning of this statute is evidenced not only by the broad general purposes expressed in the title to which attention has been heretofor called, but also by reason of the inclusion of mail routes and main traveled roads *within* the township in the class of roads to be dragged. If township roads alone were meant, the purpose of the statute would be defeated because in a great many counties the public roads have been laid out as county roads instead of as township roads.

I am of the opinion that this statute must be construed to apply to all graveled or unimproved roads within a township and not to township roads exclusively.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

868.

OFFICES INCOMPATIBLE—DISTRICT ASSESSOR—VILLAGE HEALTH OFFICER.

When the health officer of a village accepts the office of district tax assessor, he forfeits the office of health officer, and in forfeiting the office of health officer he also forfeits the right to any further compensation in connection with that office.

COLUMBUS, OHIO, April 24, 1914.

HON. HARRY W. VORDENBERG, *Solicitor of the Village of Newtown, Union Central Building, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of March 24, 1914, as follows:

"Hon. T. B. Mulloy, mayor of Newtown, and the council of said village, called my attention to the fact that Charles R. Campbell, M. D., is holding the offices of health officer in Newtown, and also district assessor, at the same time.

"There is a question and some doubt in their minds as to which office he holds illegally, he having been first appointed and qualified as the health officer of said village under a law which does not prohibit the holding of another office; and afterwards appointed as a district assessor under the Warnes law, which prohibits the incumbent from holding an office of profit.

"The question arises especially upon the point whether they can legally pay the salary of the health officer, and thus avoid any criticism from the state auditing and accounting department.

"In order to feel assured that they are acting within their legal rights, they have asked that I, on their behalf, present the matter to you for your opinion and direction as to what course they shall follow in the premises."

Section 4404 of the General Code, reads in part:

"* * * But in villages, council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon the board of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Section 5617 of the General Code, as amended 103 O. L., page 796, reads:

"A district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or other employe of a district assessor or district board of complaints, shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public."

Is a health officer, appointed by virtue of section 4404, holding an office of profit within the meaning of section 5617?

In the case of State vs. Cregg, 69 O. S., 236, it was held that:

"A health officer is not an employe, as that word is used in section 187 of the Municipal Code."

Section 189 of the Municipal Code provided:

"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, etc."

In this case the court said:

"In the case of a health officer, by virtue of the powers conferred upon him by the statute, he is an independent, executive officer, with large discretion as to the methods to be pursued by him regarding the public health, and especially in those cities or villages where there is no board of health, he is not subject to the control or discretion of any one else."

This department has held on page 851 of volume 1, Attorney General's Report, 1911-12, that:

"A health officer appointed under the provisions of section 4404, General Code, is distinguished from a mere employment, for he has independent duties which are part of the sovereignty of the state, acting as a board of health might, had council appointed a board of health."

Concluding then, that the health officer of the village is an officer and not an employe, it follows that he holds an office of profit, since he is paid a salary by the municipality. What, then, was the effect of his appointment to the office of district tax assessor?

In the case of State ex rel. vs. Kearns, 47 O. S., 566, it was held:

"The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void."

This case is clearly distinguishable from the case under consideration for the reason that the councilman in the Kearns case was ineligible to appointment to the other office. This distinction is emphasized by Mechem in his work on public offices and officers, section 428, as follows:

"As has been seen in the earlier part of the work, it is frequently declared that persons holding one office shall be ineligible to election to another, either generally or of a certain kind. These provisions being held to incompacitate an incumbent of the first office to *election* to the second, it follows that any attempt of election to a second is void, and that if, by color of it, he attempts to hold the second office, he will be removed from it. It is thus the second office which is vacated instead of the first."

It is said by Dillon in his work on municipal corporations, page 725, section 417:

"An office may be impliedly resigned or vacated by the incumbent being elected to and accepting an incompatible office. The rule, says, Parke, J.,

in a leading English case on this subject, that where two offices are incompatible, they cannot be held together, is founded on the plainest principles of public policy, and has obtained from very early times. The principle applies not only where the second office is the superior and more important one, but also where it is not. The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever, the appointment or election might be made, absolutely determines the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary."

In a note to this section, the author adds:

"The rule that the acceptance of the second vacates the first of two offices that are incompatible, is not only the rule of the common law, but is held to apply to incompatibility growing out of the constitutional and statutory provisions prohibiting the holding of two offices in specific cases."

Attorney General vs. Detroit Common Council, 112 Mich. 145, 174.
People vs. Sanderson, 30 Cal., 160, 167.
People vs. Provines, 24 Cal., 520, 541.
Foltz vs. Kerlin, 105 Ind., 221.
Daily vs. State, 8 Black (Ind), 322.
Shell vs. Cousins, 77 Va., 328.

Section 418 of the same work reads:

"The doctrine just stated is undoubtedly true where the acceptance of the second office is made by, or with the privity of that authority which has the power to accept the surrender of the first, or to amove from it; but 'such acceptance does not operate as an absolute avoidance in cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.'"

The doctrine laid down by Judge Dillon and the exceptions to the rule are both supported by Throup on Public Officers and Meechem on Public Offices and Officers.

In the light of these authorities, it is clear that when the health officer in question was appointed district tax assessor, he forfeited the office of health officer, *providing it was in his power to divest himself of the office of health officer by his own mere act.* In other words, in order that the doctrine, that the acceptance of the second incompatible office vacates the first, applies, it is essential that no acceptance of the health officer's resignation was necessary.

At common law, acceptance is necessary to a consummation of the resignation, but in many of our states it is held that the resignation of an officer takes effect at once without acceptance by any one and that the holding of office is not compulsory. This is said to be the modern doctrine on this subject.

U. S. vs. Wright, 1 McLean, 509.
McCrary on Elections, Section 270.
People vs. Porter, 6 Cal., 26.

State vs. Clark, 3 Nev., 566.
Olmstead vs. Dennison, 77 N. Y., 378.
State vs. Lincoln, 4 Neb., 260.
Buting vs. Willis, 27 Gratt., 144.
State vs. Hauss, 43 Ind., 105.
Gibson vs. Lece, 11 Barb., 191.
Leech vs. State, 78 Ind., 570.

In our own state, in the case of Reiter vs. State, 51 O. S., p. 74, it was held:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here resignation without acceptance creates a vacancy to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

These authorities are sufficient, I think, to support the view that the health officer of a village can divest himself of his office by his resignation, regardless of its acceptance, and this conclusion brings him within the rule that the acceptance of a second incompatible office vacates the first.

It is, therefore, my opinion that when your village health officer accepted the office of district tax assessor, he forfeited the office of health officer and it of course follows that in forfeiting the office of health officer he forfeits the right to any further compensation in connection with that office.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

869.

TEACHERS' PENSIONS—WHO ENTITLED TO SUCH PENSIONS.

1st. If a teacher is forced to retire by virtue of the provisions contained in section 7880, General Code, and comes within the provision of said section as to the length of time such teacher has taught, then such teacher can teach in other public schools of the state than the one from which such teacher has retired, or in the public institutions of the state, and continue to draw her pension. The same rule applies when a teacher voluntarily retires.

2nd. If a teacher requests to be retired under section 7880, General Code, and after drawing one month's pension, she may marry and still continue to draw her pension the remainder of her natural life.

COLUMBUS, OHIO, April 24, 1914.

HON. GEO. M. HOAGLIN, *Member of House of Representatives, Payne, Ohio.*

DEAR SIR:—Under date of January 30, 1914, you submitted a request for an opinion upon the following questions:

> "1. If a teacher is *forced* to retire by either section 7880 or 7882, may she teach in the public schools, or in the public institutions, and draw her pension?
>
> "2. If a teacher *requests* to be retired by section 7880 or 7882, may she teach in public schools, or in public institutions and draw her pension?
>
> "3. If a teacher requests to be retired under section 7880, and after drawing one month's pension, may she marry and still draw her pension?
>
> "4. Since so many different opinions have been given as to the interpretation of section 7883, should not some definite legislation be made?

Your request calls for the interpretation of sections 7880, 7882 and 7883 of the General Code, which said sections constitute a part of chapter 9 of title 5 of the General Code of Ohio, and relate to the subject of teachers' pensions. The general assembly on April 27, 1896, passed an act entitled, "An act to create a school teacher's pension fund." Section 1 thereof provides as follows:

> "Be it enacted by the general assembly of the state of Ohio that in order to create a fund to be known as the school teachers' pension fund, one per cent. of the salaries paid to all teachers of city districts of the third grade of the first class, shall be deducted by the proper officers and paid into the city treasury to the credit of said fund, to be used exclusively for pensions for teachers as hereinafter provided. All moneys received from donations, legacies, gifts, bequests or from any other source, shall also be paid into said fund; but no tax shall be levied or any public moneys be appropriated for said fund, except as herein provided."

The court in the case of State ex rel. Ward vs. Hubbard, et al., 22 O. C. C., 253, besides holding that said enactment violated the constitutional provision that all laws of a general nature shall have a uniform operation throughout the state, further held that said act also violated section 2, article 12 of the constitution of Ohio providing for uniform taxation of property and also the bill of rights in the taking of private property from one citizen for the benefit of another, without his consent and against his will, as disclosed in the fourth syllabus thereof, which reads as follows:

"Such act in providing that one per cent. of the salaries paid to teachers shall be deducted therefrom and applied to create a school teachers' pension fund, also violates section 2, article XII, constitution of Ohio, providing for a uniform taxation of property, and also the bill of rights in the taking of the private property from one citizen for the benefit of another without his consent, and against his will."

In construing the act of April 10, 1900 (94 O. L., 539), to create a pension fund to provide for the pension of teachers in city districts of the second grade of the first class, the court in the case of State ex rel. vs. Kurtz, Treasurer, 21 O. C. C., 261, says:

"The act of April 10, 1900 (94 O. L., 539), to create a pension fund to provide for the pensioning of teachers in city districts of the second grade of the first class, and by which it is made the duty of the treasurer of the board of education in cities of the second grade of the first class to reserve at each payment of teachers' salaries a certain per cent. thereof for the purpose of creating a fund to be used in pensioning teachers who shall have pursued their professional employment a certain length of time, is an act of general nature which cannot have a uniform operation throughout the state, and is unconstitutional as in violation of section 26, article 2 of the constitution of Ohio."

The court in the case of Venable vs. Shafer, et al., 7 O. C. C. (n. s.) Rep. p. 337, in commenting upon and citing with approval the case of State ex rel. Ward vs. Hubbard, supra, at page 339 of the opinion says:

"We are further of the opinion that the act of April 16, 1900, was unconstitutional and void, as being in contravention of section 2, article XII of the bill of rights."

The court in support of its opinion in this regard, cites the fourth syllabus in the case of State ex rel. Ward vs. Hubbard, which is hereinbefore quoted. The court in the case of Venable vs. Shafer, supra, in its opinion at page 340 continuing says:

"It appears that this defect in the act of 1900 was removed by a provision in section 3897c, of the act of 1902, which reads:

"'All teachers hereafter appointed in said public schools, or high schools, if any, in said school district, shall be notified within thirty days after their appointment by the clerk of such board of education of the election of said board of trustees of said school teachers' pension fund, and they shall be required to notify said board of education within six months thereafter whether they consent or decline to accept the provisions of this act.'"

Section 7877 of the General Code, formerly 3897c of Bates Revised Statutes, as amended, 102 O. L., p. 445, contains substantially the same provisions as those contained in the act of 1902 (95 O. L., 610), as quoted in the case of Venable vs. Schafer, et al., supra.

In view of the opinion of the court in the case of Venable vs. Schafer, et al., supra, it therefore follows that the provision for the creation of school teachers' pension fund, as the same now exists, is not in contravention of section 2, article XII of the constitution of Ohio, providing for uniform taxation of property and

is not in contravention of the bill of rights in the taking of private property from one citizen for the benefit of another, without his consent and against his will.

Section 7880 of the General Code, which is embraced in the chapter of the General Code providing for the establishment of teachers' pensions, provides as follows:

> "Such board of education of such school district and a union, or other separate board, if any, having the control and management of the high schools of such district, may each by a majority vote of all the members composing the board on account of physical or mental disability retire any teacher under such booard who has taught for a period aggregating twenty years. One-half of such period of service must have been rendered by such beneficiary in the public schools or high schools of such school district, or in the public schools or high schools of the county in which they are located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7882 of the General Code provides as follows:

> "Any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7883 of the General Code, provides as follows:

> "Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, annually, twelve dollars and fifty cents for each year of service as teacher, except that in no event shall the pension paid to a teacher exceed four hundrd and fifty dollars in any one year. Such pensions shall be paid monthly during the school year."

It is to be noted that section 7880 of the General Code, supra, provides that the board of education of a school district, on account of physical or mental disability of a teacher under such board, may retire such teacher without such teacher's consent. In this section nothing is said in regard to such teacher becoming a beneficiary under said act. However, this omission is cured by section 7883, G. C., supra, as will be hereinafter pointed out. Under the provisions of section 7882, such teacher may voluntarily retire and become a beneficiary under this chapter, providing that such teacher has taught for a period aggregating thirty years, one-half of such term of service having been rendered in the public schools or in the high school of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining half in the public schools of this state or elsewhere.

If such teacher is forced or compelled to retire under the provision of section 7880, supra, then to be a beneficiary under said act providing for teachers' pension funds, such teacher must have taught for a period aggregating twenty years, one-half of such period having been rendered by such beneficiary in the public schools or high schools of such school district or in the public schools or high schools of the county in which they are located, and the remaining one-half in the public schools of this state or elsewhere.

It is to be noted that section 7883, supra, contains the specific provision that each teacher so retired or retiring shall be entitled during the remainder of his or her natural life, to receive as pension annually, the amount provided therein. The terms "retired" or "retiring," as contained in said section 7883, refer to the methods of retirement conditioned in said sections 7880 and 7882, so that it seems to follow that if a teacher is retired in accordance with section 7880, or voluntarily retires in accordance with section 7882, supra, then such teacher is legally entitled to the pension provided by said section 7883 for and during the remainder of his or her natural life, provided, of course, that such teacher or teachers have taught the specified time enumerated in said section 7880 and said section 7882 above quoted. If such teachers have taught for the required length of time and are retired either by action of the board under section 7880, or voluntarily retire under section 7882, there is no statutory provision to prevent such teachers from teaching in the public schools or in public institutions other than those from which they are so compelled to retire or from which they voluntarily retire from teaching, and at the same time deprive them of the benefits of this act. This follows by reason of the provision of section 7883 as heretofore pointed out, that each teacher so compelled to retire or so voluntarily retiring, shall be entitled during the remainder of her natural life to receive such pension and there is no statutory limitation preventing or prohibiting her from teaching in other schools of the state, other than that from which she has so retired.

Coming now to answer your respective questions specifically, I am of the opinion, in answer to your first question, that if a teacher is forced to retire by virtue of the provisions contained in section 7880, supra, and also comes within the provisions of said section as to the length of time such teacher has taught, then such teacher can teach in other public schools of the state than the one from which such teacher has retired, or in the public institutions of the state and continue to draw her pension.

Likewise, in answer to your second question, it is my opinion that if a teacher requests to voluntarily retire from teaching in accordance with the provisions contained in section 7882, and provided further that such teacher comes within the requirement as to the length of time taught in such school from which such teacher so voluntarily retires, then such teacher may teach in other public schools of the state than the one from which such teacher so voluntarily retires, or in public institutions of the state, and continue to draw her pension.

Likewise, in answer to your third question, I am of the opinion that if a teacher is forced to retire under the provisions of section 7880, supra, or if such teacher voluntarily retires from teaching under the provisions of section 7882, supra, and has taught for the period of time specified in said respective sections, then such teacher, even after drawing one month's pension may marry and still continue to draw such pension upon the same reasoning as hereinbefore stated, to wit, if such teacher is so compelled to retire or so voluntarily retires, then such teacher is entitled to such pension during the remainder of his or her natural life, as provided by section 7883 of the General Code, supra, provided such teacher has taught the specified time as enumerated in said sections 7880 and 7882, G. C., supra.

Answering your fourth question, it is my opinion that the provisions of said sections are ambiguous and that they could be greatly clarified by the enactment of more definite legislation in relation thereto.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

870.

VILLAGE BOARD OF HEALTH—HEALTH OFFICER—RIGHT OF HEALTH OFFICER TO CARRY PROVISIONS TO QUARANTINED PERSONS.

Where a village has no board of health, but has a health officer, employment by the board of health of a man to carry provisions to quarantined persons in order to avoid the necessity of other people going to the quarantined place, is a measure strictly for the protection of the public, under section 4436 of the General Code, and one chargeable to the municipality.

COLUMBUS, OHIO, April 24, 1914.

HON. P. A. SAYLOR, *Solicitor of the Village of West Alexandria, Eaton, Ohio.*

DEAR SIR:—I have your letter of March 4, 1914, as follows:

"We have no board of health in the village, but have a board of health officer. Several families in the town contracted scarlet fever and one family the small pox. Our board of health officer hired a man to carry provisions, etc., to the scarlet fever people and another man to carry provisions to the small pox family. The parties hired made out their bills and the health officer put his O. K. on said bills. It was presented to council for payment. The bill was held up. The code provides, among other things, that the expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the persons so quarantined, when able to make such payment, etc.

"Is the bill of the party who carried the food, etc., to the sick people such as would come under the clause 'other measures strictly for the protection of the public.' * * * In the opinion of council both bills are excessive. Council has directed me to write you in reference to those matters and will hold up the bills until they hear from your office.

"Hoping that we have stated the facts clearly enough for you to give us an opinion thereon, we remain."

Section 4436 of the General Code reads:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel and all other necessaries of life, including medical attendance, medicine and nurses when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

You state in your letter that your board of health officer hired a man to carry provisions to the scarlet fever people and another to carry provisions to the small pox family. I presume that the board of health selected these men to carry

the provisions in order that there would be no necessity for other people to go to these houses, thereby lessening the possibility of the disease spreading. This action on the part of the board seems to me clearly a "measure for the protection of the public" and in my opinion, one properly chargeable to the municipality.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

871.

CANAL FUNDS—CREDITING BACK OF FUNDS—SHARP-DOLLISON LEASE.

The superintendent of public works is entitled to credit back to the canal fund the sum of $5,000, being the first payment on the Sharp-Dollison lease, but there being no appropriation out of such funds, the money cannot be used and requires a specific appropriation to draw money from the treasury.

COLUMBUS, OHIO, April 24, 1914.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of March 3, 1914, you inquire:

"Under date of November 6, 1913, we addressed a communication to you asking for an opinion as to whether or not the canal land department was entitled to a repayment for certain funds expended in making surveys of the abandoned Hocking Canal. Your opinion was rendered December 17, 1913, and your decision was as follows:

"'I am of the opinion that the auditor of state would be authorized to credit said sum of $5,000.00 back to the funds from which such payments have been made.'

"The funds expended cover a period commencing in July, 1912, and extending down to the present time. The original opinion was requested in anticipation of the execution of a certain proposed lease to Messrs. Sharp and Dollison for a portion of the abandoned Hocking Canal.

"It was expected that the lease would be executed prior to February 15, and that advance rental would be appropriated as an unexpended balance. Unfortunately for the department, the lease was not executed as was expected. We believe, however, that the act may be considered as an asset and that the department is as much entitled to have the amounts credited back as though the payments had been made prior to February 15, 1914. Our budget was made up and appropriations asked with the expectation that this amount would be reappropriated.

"Cannot these expenses be repaid the same as if the funds had been returned before February 15th?

"In case you find that this money should be returned to the funds from which it was taken we would be pleased to have you determine how far back we can go. In other words, can we go back to July, 1912, or only for the year 1913?

"For statement of facts see your opinion of December 17, 1913."

The opinion of December 17, 1913, was rendered by virtue of the provisions of section 5 of the act of 102 Ohio Laws, 491, which reads:

> "All accounts of expenses, incident to surveying, platting and monumenting said abandoned canal lands, together with the necessary expenses of advertising, selling or leasing the same, shall be verified and approved by the chief engineer and the board of public works, and paid out of the canal funds, or other funds provided for the survey of canal lands, and the auditor of state is hereby directed to credit back to the fund or funds from which such payments are made, a like amount in any sum not to exceed five thousand dollars ($5,000.00) from the receipts derived from the sales and leases of said lands."

This act was passed May 31, 1911. This section does not limit the time when such refund may be made. It is to be refunded from the receipts derived from the sales and leases of said lands.

Section 2 of the general appropriation bill for 1914, house bill No. 47 of the recent session of the general assembly, provides:

> "All unexpended balances remaining in the funds appropriated in the act entitled 'an act to make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1913, and the first quarter of the fiscal year ending February 15, 1914' (103 O. L., 43), except as herein otherwise expressly provided, are hereby reappropriated for the various purposes for which such appropriations were made in such act."

It will be observed that by section 5 of the act of 102 Ohio Laws 491, the auditor of state is authorized to "credit back to the fund or funds from which such payments are made" a like amount not to exceed five thousand dollars.

This is a credit back to the fund. It is not an appropriation of the money.

The appropriation bill for 1914 appropriates certain sums and balances. The balances referred to are of moneys previously appropriated.

Section 433, General Code, prior to its amendment in 103 Ohio Laws 122, contained this provision:

> "Moneys received from water rents, tolls, fines, leases, sales of canal lands and other sources shall be paid into the state treasury to the credit of the canal fund."

This provision was amended in 103 Ohio Laws 122, to read:

> "Moneys received from water rents, land rents, tolls, fines, leases, pipe permits, boat licenses, sale of canal lands and from all other sources shall be paid monthly into the state treasury to the credit of the general fund of the state."

The canal fund has not been abolished. But in order to use the money in this fund it must be appropriated by the legislature.

By virtue of section 5 of act of 102 Ohio Laws 491, the fund is to be credited for such expenditures. In order to draw money from the fund an appropriation is necessary. No appropriation has been made of this sum.

As held in the opinion of December 17, 1913, the "auditor of state would be authorized to credit said sum of five thousand dollars back to the funds from which such payments have been made."

This is not an appropriation of the sum credited back and it is not available as an appropriation for your department.

The act of 102 Ohio Laws 491, does not limit the time as to when the expenditures may be made. In determining the amount expended you may go back to the beginning of the expenditures.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

872.

REMOVAL OF HUMANE SOCIETY AGENT FROM OFFICE—PROCEDURE NECESSARY.

In order to discharge a humane agent united action of the humane society and of the probate judge is necessary. The humane agent being in the employ of the humane society, a corporation, is not within the civil service.

COLUMBUS, OHIO, April 24, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Hon. Thomas H. Moore, prosecuting attorney of Ashland, Ohio, has submitted, under date of January 31, 1914, the following inquiry:

> "The probate judge and the board of county commissioners of Ashland county, are desirous of removing the present county humane officer, and want to know what steps are necessary. There is some doubt as to whether this office is included in the civil service law.
>
> "I find that his appointment has been regular in all respects, and in accordance with section 10071 was duly approved by the probate judge at that time."

Humane societies are organized and are governed by the provisions of sections 10062 to 10084 inclusive, of the General Code.

Section 10062, General Code, provides for the state society as follows:

> "The Ohio state society for the prevention of cruelty to animals, shall remain a body corporate, under the name of 'the Ohio humane society,' with the powers, privileges, immunities, and duties heretofore possessed by such society, hereinafter specified as to county societies, and may appoint any person, in a county where there is no such active society, to represent the state society, and to receive and account for all funds coming to that society, from fines or otherwise."

The method of organizing county humane societies is prescribed in sections 10067 and 10068, General Code.

Section 10067, General Code, provides:

> "Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons. The members thereof, at a meeting called for the purpose, shall elect not less than three of their members directors, who shall continue in office until their successors are duly chosen."

Section 10068, General Code, provides:

"The secretary or clerk of the meeting must make a true record of the proceedings thereat, and certify and forward it to the secretary of state, who shall record it. This record shall contain the name by which such association is to be known, and from and after its filing, the directors and associates, and their successors, will be invested with the powers, privileges, and immunities incident to incorporated companies. A copy of such record, duly certified by the secretary of state, shall be taken in all courts and places in this state, as evidence that such society is a duly organized and incorporated body."

Section 10069, General Code, authorizes such society to make rules, regulations and by-laws, as follows:

"Such societies may elect such officers, and make such rules, regulations, and by-laws, as are deemed expedient by their members for their own government, and the proper management of their affairs."

It will be observed that by these sections the humane society is a corporation organized by volunteers. It is engaged in a public work but it is nevertheless a private corporation, in the sense that it is controlled by private individuals. Such a society is "invested with the powers, privileges and immunities incident to incorporated companies." They may select their own officers and make rules, regulations and by-laws.

These societies have all the incidents of a private corporation.

Sections 10070, 10071 and 10072, General Code, provide for the appointment of an agent of such society; prescribe his duties and the manner in which the county or municipality may compensate such agent.

Section 10070, General Code, provides:

"Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

Section 10071, General Code, provides:

"All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they were made. The mayor or probate judge shall keep a record of such appointments."

Section 10072, General Code, provides:

"Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such

agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

By virtue of section 10070, General Code, the society appoints such agents. Such appointments must have the approval in accordance with the provisions of section 10071, General Code, of the mayor of the city or village for which made, or of the probate judge if the society exists outside of a municipality.

In an opinion given to Hon. George D. Klein, prosecuting attorney of Coshocton county, Ohio, this department has held that in order to remove the agent of a humane society the concurrence of the humane society and of the officer having the power of approving the appointment of such agent is necessary. This conclusion is adhered to in the case submitted.

Therefore, the concurrence of the humane society and of the probate judge would be necessary to remove the agent in question.

Section 1 of the civil service act, section 486-1, General Code, reads in part:

"1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof.

"2. The 'state service' shall include all such offices in the service of the state or the counties thereof, except the cities and city school districts.

The humane agent is in the employe of the humane society, a corporation. He is engaged in a public duty and for performing this duty, the county or municipality is authorized to pay him a compensation. He is not, in my opinion, in the service of the state, the county, or of the city, within the meaning of section one of the civil service act. Humane agents, therefore, are not subject to civil service regulations.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

873.

OFFICERS AND EMPLOYES OF THE ARCHAEOLOGICAL AND HISTORICAL SOCIETY NOT UNDER CIVIL SERVICE.

Officers and employes of the archaeological and historical society are not subject to the provisions of the civil service law. They are not in the service of the state within the meaning of section 1 of the civil service act.

COLUMBUS, OHIO, April 24, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of March 17, 1914, Hon. E. O. Randall, secretary of the Ohio state archaeological and historical society; inquires as follows:

> "Will you kindly have your department render the archaeological and historical society an opinion, whether the officials and employes of said society are subject to the provisions of the state civil service law?"

The Ohio state archaeological and historical society was incorporated under the general corporation laws of Ohio and articles of incorporation filed with the secretary of state on March 12, 1885, as shown by volume 32, page 193, of records of incorporation.

On April 16, 1891, the general assembly of Ohio, passed a joint resolution reading as follows:

> "Be it enacted by the general assembly of the state of Ohio, that the governor is hereby authorized and directed to appoint as member of the board of trustees of the Ohio archaeological and historical society, six (6) persons to serve without compensation as follows: two for the term of one year, two for the term of two years, and two for the term of three years from the 9th day of February, 1891, and annually thereafter to appoint two persons on said board for the term of three years, but said appointments shall not bind the state to make annual appropriations for said society."

This resolution is found in 88 Ohio Laws 932.

By section 1, article III of the constitution of this society, it has fifteen trustees, nine elected by the society and six appointed by the governor of Ohio.

The legislature has from time to time made appropriations for the use of this society. It has recently made an appropriation to erect a building for said society and the same has been erected upon the campus of the Ohio state university. In fact its employes are paid from funds appropriated by the state.

Section 1 of the civil service act, section 486-1, General Code, reads in part:

> "1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof.
>
> "2. The 'state service' shall include all such offices in the service of the state or the counties thereof, except the cities and city school districts."

While it is true that the compensation of these employes is paid from appropriations made by the state, they are in fact in the employ of a private corporation,

organized under the general laws of Ohio. These persons are not in the service of the state within the meaning of section one of the civil service act. The laws of Ohio do not provide a method of appointing these employes or of fixing their compensation.

The officers and employes of the Ohio state archaeological and historical society do not therefore come within the provisions of the civil service act.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

874.

OHIO STATE UNIVERSITY PROFESSORS MAY BE EMPLOYED AT EXPERIMENT STATION DURING VACATION.

Professors of the Ohio State University may be employed during the two months' vacation for research work of the experiment station, there being no incompatibility in their work at the university and the work at the experiment station.

COLUMBUS, OHIO, April 24, 1914.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of March 16, 1914, your secretary, Hon. Benjamin F. Gayman, submitted the following to this department:

> "It has been the custom of the experiment station to employ during two months of summer vacation certain professors of Ohio State University for research work, payment for such work being made by the station, in addition to the pay received by such professors for ten months' work by Ohio State University.
>
> "The commission will thank you for a prompt opinion concerning the propriety of paying said professors for such services rendered to the experiment station during the summer vacation."

This question involves the right of these professors to hold two positions under the state and to receive compensation for each position. The same person may hold two offices or employments under the state, provided the two positions are not incompatible.

The rule of incompatibility of office is stated by Dustin, J., in case of State ex rel. vs. Gebert, 12 Cir. Ct. N. S., 274, wherein he says on page 275:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

It appears from your letter that these professors are employed at the Ohio State University, but ten months of the year. For the other two months they are under no obligation to give their time to service of the state university.

Whether it is physically possible for the same person to perform the duties of the two proposed employments is a question of fact to be determined from the

circumstances of each particular case. But from your statement it appears that the two services are performed at different times of the year, and it would be physically possible for the professors to perform the services of both positions.

The other grounds of incompatibility must be determined from the duties of the two positions.

Section 1172, General Code, as amended in 103 Ohio Laws, 324, authorizes the appointment of employes for the experiment station, as follows:

> "The director shall have control of the affairs of the station, and be responsible to the agricultural commission for the management of all its departments. With the approval of the agricultural commission he shall appoint chiefs of departments, assistants and other employes necessary for the proper management of the station and shall assign them to their respective duties. He may suspend an officer or employe of the station for cause, which suspension with the reason therefor he shall immediately report to the agricultural commission for its final action."

Section 1170, General Code, 103 Ohio Laws, 323, states the purpose of the experimental station, as follows:

> "The agricultural commission shall maintain a state agricultural experiment station for the prosecution of practical and scientific research in agriculture and forestry and the development of the agricultural resources of the state. It shall be known as the 'Ohio Agricultural Experiment Station.'"

The duties of the employes of the experiment station are not prescribed by statute but they would be employed to carry out the purpose of the station as expressed in section 1170, General Code.

Section 7949, General Code, provides for the employment of the professors at the Ohio State University and reads:

> "The board of trustees shall elect, and fix the compensation of and remove, the president and such number of professors, teachers and other employes as may be deemed necessary; but no trustee, or his relation by blood or marriage, shall be eligible to a professorship or position in the university, the compensation for which is payable out of the state treasury or a university fund. The board shall fix and regulate the course of instruction and prescribe the extent and character of experiments to be made at the university."

The duties of the respective positions are not prescribed by statute, but from the usual duties pertaining to these positions they are not in any way a check upon the other, and they are not subordinate one to the other.

Therefore, if one person can physically perform the duties of the two positions, he may be employed in both capacities, and draw the compensation fixed for each position.

I am informed that these appointments are to be made subject to the rules and regulations of the civil service commission. I do not therefore pass upon the civil service feature of the appointments.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

875.

CLASSIFIED CIVIL SERVICE—PERSONS IN THE CLASSIFIED SERVICE MAY NOT BECOME CANDIDATES FOR OFFICE.

Persons in the classified service cannot be candidates for nomination at the coming primaries and cannot be candidates for election without resigning their respective positions in the classified service.

COLUMBUS, OHIO, April 24, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 11, 1914, you inquire:

> "Many inquiries are coming to the state civil service commission, asking whether or not persons in the classified service can be candidates for nomination at the coming primaries or can be candidates for election without resigning their respective positions in the classified service."

Section 23 of the civil service act, section 486-23, General Code, to which you call my attention reads:

> "Political assessments. No officer or employe in the classified service of the state, the counties and cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution or payment from any officer or employe in the classified service of the state, the counties or the cities or city school districts thereof; *nor shall any officer or employe in the classified service of the state and the counties, cities and city school districts thereof be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.*"

This section provides that no officer or employe in the classified service shall "take part in the politics other than to vote as he pleases, and to express freely his political opinions."

This provision prescribes the extent to which an officer or employe may take part in politics. He may vote as he pleases. He may express freely his political opinions. He is not given the right to become a candidate at a primary or at an election for officers.

The word "politics" is defined at page 909 of volume 31 of Cyc. as follows:

> "Politics. In its true original meaning, a term which comprehends everything that concerns the government of the country."

Primaries and elections are necessary in order to secure officers to carry on the government, and a person who is a candidate at a primary or at an election would be taking part in politics within the meaning of section 23 of the civil service act.

In the common acceptance of the meaning of the term "politics" it means activity in government and activity in selecting candidates for office and the election of officers.

Therefore, a person in the classified service under the civil service law cannot be a candidate for office either at a primary or at an election and at the same time retain his position. If he becomes such a candidate it would be cause for removal from the position he holds as he accepts such position upon condition that he will not take part in politics.

If the person in the classified service desires to be a candidate for office or nomination, he should resign his position in the classified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

876.

CONTRACT—MINE OWNER—EMPLOYES—MINERS RIDING (TRIPS).

A contract made between mine owners and their employes under section 961, *General Code, should be signed by the employes individually and not by their representatives or agents. A separate agreement would not have to be made for each trip, provided the contract or agreement specifically provided for the trip upon which the employes were to be carried in the empty cars.*

COLUMBUS, OHIO, April 24, 1914.

Industrial Commission of Ohio, Department of Inspector, Columbus, Ohio.

GENTLEMEN:—Under date of March 10, 1914, you inquire as follows:

> "Will you please be kind enough to give me written opinion as to whether contract made between mine owners and their employes under section 961 of the General Code is to be signed by the employes individually, rather than by their representatives or agents."

That part of section 961 of the General Code which bears upon this question reads as follows:

> "No person or persons except those in charge of trips, superintendents, mine-foremen, electricians, machinists and blacksmiths, when required by their duty, shall ride on haulage trips, except where by mutual agreement in writing, between the owner, lessee or agent, and the employes, a special trip of empty cars is run for the purpose of taking employes into and out of the mine, or empty cars are attached to loaded trips, which shall not be run at a speed exceeding eight miles per hour. No person except a trip-rider shall ride on loaded car or cars, and he shall ride only the front or rear end of the trip."

The express purpose of this statute is to preclude employes generally from riding on loaded car or cars, and the evident design of the law was to make special provision for the carrying of employes into and out of the mines, in empty cars. I think that under this section an agreement could be entered into providing for this special trip, and that a separate agreement would not have to be made for each trip, provided that the contract or agreement specifically provided for the trip upon

which the employes were to be carried in the empty cars. That is to say that if the contract stipulated that a certain trip or trips would be made each day for this purpose, at designated times, then the agreement could be so drafted as to permit the employes to ride on the empty cars at the time therein specified, but this fact should be made clear in the contract, which should stipulate that the cars upon which the miners should ride were to be empty and were to be provided for the express purpose of taking the employes into and out of the mines.

The main object of your inquiry, however, as I understand it, is with reference to the manner in which the contract should be signed. Upon this point I am of the opinion that the owner, lessee or agent of the mine would have the right to sign on behalf of the mine owner, but that the employes' representatives or agents could not sign for such employes unless they had express authority from each employe who was to ride upon the cars so to do. Any other course would result in representatives who had not been authorized to represent the miners in this matter, signing an agreement which had not been sanctioned by the employes. As a consequence, the employes who had no knowledge of the agreement would see their coworkers getting upon the cars, and they would do likewise. In case injury then resulted, those who had not authorized the use of the cars for this purpose would have just cause for criticism not only of the mine owner, but of their representatives who had, without authority, signed the agreement.

In order that the spirit of the act may be subserved, and for the protection of both operator and miner, this statute should be so construed as only to authorize the carrying of miners in cars, when the agreement was signed by the owner, his lessee or agent, and the employes desiring to ride upon the cars. Of course, if the miners would, in writing, authorize some person to sign for them, this would be the same as giving power of attorney to their agent so to act, and those who had given him such authority would be bound thereby.

In order to obviate any question of this character, I would suggest that your department rule that the miners be required individually to sign the agreement. You will observe that the statute authorizes an agent to represent the mine owner, but that it does not authorize the employes to have a representative to act for them under this statute. This would seem to make clear the fact that the statute contemplated individual action by the employes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

877.

VILLAGE COUNCIL WITHOUT RIGHT TO PROVIDE PENSIONS FOR VOLUNTEER FIREMEN.

The power of a city council to provide pensions for ex-volunteer firemen must rest upon the authority of a valid act of the general assembly, authorizing the payment of such benefits, and as there is now no such legislation in this state, the power of municipalities and the council thereof in this respect must be denied.

COLUMBUS, OHIO, April 24, 1914.

HON. W. F. COLTER AND JAMES NYE, *Members, House of Representatives, Toledo, Ohio.*

GENTLEMEN:—As previously acknowledged, I have your favor of March 6, 1914, in which you ask my opinion on questions stated by you as follows:

"1. Under existing laws, has a city council the right and the power

to provide a pension fund for ex-volunteer firemen such as contemplated in senate bill No. 4, Senator Hillencamp, eightieth general assembly, regular session?

"2. Under existing laws, has a city council the right and the power to provide any kind of a pension **for volunteer firemen, who have in the past** served the city without compensation?"

Section 4383, General Code, provides as follows:

"Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

Sections 4600-4615, inclusive, General Code, authorize and provide for the maintenance and administration of a firemen's pension fund in municipal corporations having a fire department supported in whole or in part at public expense. The sections just noted are a part of a chapter in the General Code which is an embodiment of an act of the legislature passed April 23, 1904 (97 O. L., 241), amendatory of an act entitled "an act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension relief funds, and to create and perpetuate boards of trustees for the administration of such funds," passed April 23, 1902 (95 O. L., 223).

Prior to the passage of the general acts just noted, authority with reference to the creation, maintenance and administration of firemen's pension funds had been conferred upon a number of the larger cities of the state by acts applying only to said several cities. The last of said special acts applying to the city of Toledo were two passed respectively on February 9th, and April 7, 1893 (90 O. L., 31, 155).

Section 4600, General Code, provides as follows:

"If any municipal corporation, having a fire department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a firemen's pension fund. Thereupon a board of trustees, who shall be known as 'trustees of the firemen's pension fund' shall be created which shall consist of the director of public safety, and in villages of the fire chief, and five other persons, members of such department. But upon petition of a majority of the members of the fire department, such director or fire chief may designate a less number than five to be elected trustees."

Sections 4601, et seq., provide for the election by the members of the fire department of the board of trustees who shall have charge of the fund, and to administer the same.

Section 4605 provides that the council in municipalities, availing themselves of the provisions with reference to the maintenance of firemen's pension funds, shall have authority to levy a tax on all the real and personal property in such municipalities for the maintenance of such funds.

Section 4610 provides that the treasurer of a municipality shall be the custodian of the firemen's pension fund, and that he shall pay it out upon the proper orders of the trustees of such fund.

Section 4612, General Code, provides:

> "Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the director of public safety or the fire chief of the municipality, as the case may be."

The declared purpose and intent of Senator Hillencamp's senate bill No. 4 (eightieth general assembly, regular session, 1913), was to extend the benefits of the firemen's pension fund authorized and provided for by sections 4600, et seq., to living members of former volunteer fire departments of municipal corporations. This bill was defeated in the senate, and the question here presented is whether under existing laws the city council has the right and power to extend the benefits of firemen's pension funds to ex-volunteer firemen, or otherwise to provide any kind of a pension for volunteer firemen who have in the past served the municipality without compensation.

After careful investigation and consideration of the questions presented by you, I am constrained to the opinion that in the present state of legislation, the council of municipalities have no power to extend to ex-volunteer firemen the benefit of firemen's pension funds in municipalities where such funds are not maintained, nor power to provide in any manner pensions for such ex-volunteer firemen. Authority with reference to the creation and administration of such funds, as well as the levy of taxes for the maintenance thereof, is distinctly a legislative power, and with respect to this it is an established principle that the legislative power of the state is vested in the general assembly, and a municipal corporation has only such legislative power as is expressly granted or clearly implied.

Ohio Electric Ry. vs. Ottawa, 85 O. S., 229, 237.
Bloom vs. Xenia, 32 O. S., 461.
Ravenna vs Penna. Co., 45 O. S., 118.
Townsend vs. Circleville, 78 O. S., 133.

It follows that the power of a city council to provide pensions for ex-volunteer firemen must rest upon the authority of a valid act of the general assembly authorizing the payment of such benefits, and as there is now no such legislation in this state, the power of municipalities and the council thereof in this behalf must be denied.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

878.

WARNES TAX LAW—DISTRICT ASSESSORS—BOARD OF COMPLAINT—TRAVELING EXPENSES—CONTINGENT EXPENSES—AUTOMOBILE HIRE.

1. *Such expenses of district assessors, deputy assessors, members of district boards of complaints, deputies, assistants, which are allowed as other claims against the county can become a charge against the county.*

2. *Under section 35 of the Warnes tax law, the words "contingent expenses" must be given a narrow meaning, except that they would include postage, express charges and actual and necessary traveling expenses as therein stated, and further that such additional expenses mentioned in such section are intended to be included within contingent expenses.*

Automobile hire cannot be considered as additional expenses, but might under certain circumstances be considered as contingent expenses, but can only be allowed to district assessors and boards of complaint, but not to their deputies. Traveling expenses outside of the state cannot be allowed under any circumstances.

COLUMBUS, OHIO, April 24, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 25, 1914, requesting my opinion upon the following questions:

> "(1) What expenses of district assessors and deputy assessors, members of district boards of complaints, deputies, assistants, experts, clerks and employes are a proper charge against the taxing district?
>
> "(2) Does 'contingent expenses' include such expenses as automobile hire, car fare and the like for these various officers while in the exercise of their duties within their respective jurisdictions?
>
> "(3) Can these respective officers, when ordered by the tax commission or with the approval of the tax commission, traveling outside of their territory and outside of the state of Ohio, receive their actual and necessary expenses therefor?"

These questions, and each of them require consideration of section 35 of the "Warnes" law, so-called, 103 O. L., 786-795, therein designated as section 5614, General Code. The section in part provides as follows:

> "* * * The contingent expenses of the district assessor and district board of complaints, including postage and express charges, their actual and necessary traveling expenses and those of their deputies, assistants, experts, clerks or employes on official business outside of the district when required by orders issued by the tax commission of Ohio shall be allowed and paid as claims against the county; provided, however, that such salaries and compensation and such expenses when allowed shall constitute a charge against the county, regardless of the amount of money in the county treasury appropriated for such purposes and notwithstanding any failure of the county commissioners to levy or appropriate funds therefor."

Your first question is generally phrased, and will be generally answered. In the first place, it is only those expenses of district assessors and deputy assessors,

etc., which are allowed as other claims against the county, i. e., upon the approval of the county commissioners, which can become a charge against the county.

In the second place, it is inaccurate to speak of any such expenses being a claim "against the taxing district," as the section plainly provides such expenses are a claim against the county, and not against the subordinate taxing districts, such as the townships, municipalities, school districts, etc.

In the third place, the nature of the expenses for which the officers mentioned may be reimbursed under favor of the statute, is generally indicated by the use of the word "contingent." The term "contingent expenses" has a well understood, technical meaning, viz.: those expenses, miscellaneous in character, which the legislative body presumes will be incurred in the natural course of official business, but the exact character of which cannot be so definitely ascertained in advance as to permit specific enumeration of them.

People vs. Yonkers, 39 Barb., 236, 272.
Dunwoody vs. U. S., 22 Ct. Cl., 269, 280.

Ordinarily, therefore, the phrase would not include such classes of expenses as might reasonably be foreseen and provided for by express mention. On the other hand, it would include all miscellaneous expenses which would naturally and necessarily be incurred by the public officer in the ordinary discharge of his duties.

That the general assembly supposed that the phrase "contingent expenses" would not necessarily include all expenditures is reasonably apparent from consideration of that part of the above quoted sentence which begins with the word "including." By specifically enacting that postage and express charges and certain traveling expenses shall be included within the purview of "contingent expenses" of which the sentence speaks, the general assembly has made it plain, I think, that such charges and expenses would not, without the provision, have been contemplated within the meaning of the phrase, being expenses the incurring of which is a certainty and which are, therefore, not of the miscellaneous and unascertainable character ordinarily contemplated by the term "contingent expenses."

As an instance of one kind of expense which cannot be deemed "contingent" I refer to the provision of section 41 of the "Warnes" law, which requires the district assessor to furnish for his own office and apparently for the district board of complaints, (although the section is very ambiguous) "all maps, plats, stationery, blank forms, books, supplies, furniture, and other equipment" necessary for the proper discharge of their duties. It so happens that this section apparently provides another method of reimbursing the assessor for an expenditure on this behalf; but if it did not I would be of the opinion that the district assessor would have to furnish these articles at his own expense without reimbursement, as clearly the duty to do so being specifically provided for, an expenditure on this behalf could not be regarded as "contingent" within the meaning of section 35.

In response to so general a question as your first one, I cannot more specifically indicate the nature of the class of expenditures which can be regarded as "contingent" within the meaning of section 35 of the "Warnes" law, than I may have already done by the previous discussion. Contingent expenses are such casual and miscellaneous expenditures which may naturally be incurred in the discharge of the duties of the office for which no special provision is made; save that in the case of the contingent expenses mentioned in section 35 the term is to include postage and express charges and the traveling expenses of which the section speaks.

There is still another general proposition which must be mentioned in connection with your first question, viz.: save with respect to the traveling expenses which the sentence mentions, no expenses of deputy assessors, assistants, experts,

clerks and employes of the district assessor and district board of complaints are chargeable to the county. It is the contingent expenses of the district assessor and the district board of complaints which are to be paid out of the county treasury on allowance. These contingent expenses are to include certain traveling expenses of "their deputies, assistants, experts, clerks or employes." Manifestly expenses of the deputies, assistants, experts, clerks and other employes, other than the traveling expenses, are not payable in the manner provided by section 35. As no other section of the Warnes law affords reimbursement to deputy assessors, assistants, experts, clerks and other employes of the district assessor and board of complaints, it follows there is no provision in the law for payment of such expenses other than those mentioned in section 35, out of the county treasury or the treasury of any taxing district.

There is what appeared to be an academic question as to whether or not that part of the sentence in question which begins with the words "their actual and necessary traveling expenses," follows the word "including" or constitutes a separate subject or subjects co-ordinate with the words "contingent expenses." The sentence is susceptible of two possible grammatical constructions here, but I am unable to conceive of any practical difference between the two constructions, and am content, therefore, with the assumption which I have already made, viz.: that the traveling expenses mentioned in the section are intended to be included within "contingent expenses" by the force of the word "including."

The general observations above made answer your first question as specifically as the nature of the case permits.

Your second question involves consideration of the entire first part of the sentence above quoted from section 35. The first question encountered is whether or not there is any distinction between the traveling expenses of the district assessor and the district board of complaints on the one hand, and those of their deputies, assistants, experts or employes on the other hand. The doubt as to this feature of the case arises from the possibility of reading the clause in two ways from the grammatical point of view, thus:

> "(1) including * * * their (i. e. those of the district assessor and district board of complaints) actual and necessary traveling expenses, and those (i. e. such of those of their deputies, assessors, experts or employes (as may be incurred by such deputies, etc.) on official business outside of the district when required by the orders issued by the tax commission of Ohio.
>
> "(2) including * * * the actual and necessary traveling expenses of the district assessor, the district board of complaints, their deputies, assistants, experts, clerks or employes, when incurred on official business outside of the district when required, etc."

The difference in meaning between the two possible grammatical constructions here is such as under one of them the district assessor and the members of the district board of complaints would be entitled to their traveling expenses wherever incurred while possibly their deputy assessors, etc., would be entitled to traveling expenses only when incurred outside of their respective districts (by which is meant, of course, the assessment district, i. e. the county); whereas by taking the other construction both the district assessor and the members of the district board of complaints on the one hand, and their deputies, assistants, etc., on the other hand, are in the same category, and the same question respecting the place where the traveling expenses are incurred would arise as to both of them.

As between these two possible interpretations I choose the second, viz.: that one

which makes the phrase "on official business outside of the district, etc.," modify both the noun "expense," and the pronoun "those." This I do because I think it was necessary to have some special provision such as this for the payment of expenses outside of the assessment district when required by order of the tax commission. Unless the language above referred to can be regarded as modifying "their actual and necessary traveling expenses," there would be no authority to pay the traveling expenses of the district assessor or the members of the district board of complaints on official business outside of the district; whereas there would be authority to pay expenses so incurred by the deputies, assistants, etc.

I do not think the general assembly intended to authorize the reimbursement of expenses (if any) incurred by deputies, etc., and not to authorize the reimbursement of district assessors and members of boards of complaint for expenses so incurred, as I think the general assembly must have supposed that it would be much more likely that the tax commission would authorize the district assessor to go outside of his district on official business, than it would be to authorize some deputy of his to do so at the expense of the county.

Insofar then as your second question relates to traveling expenses, I am of the opinion that while in the exercise of their duties within their respective jurisdictions, as you put it, i. e. within the assessment district for which they are appointed, none of the officers mentioned in your question may be reimbursed for such expenses incurred by them. This conclusion follows principles already laid down. Having decided that "contingent expense" includes no traveling expenses except those specifically brought within its purview by what follows the word "including;" and having decided also that the phrase "on official business, etc.," modifies their actual and necessary traveling expenses," as well as "those," it necessarily follows that the only traveling expenses, reimbursement on account of which out of the public treasury is to be afforded any of the officers mentioned in your question, are those specifically mentioned in the sentence as I have interpreted it.

Jones vs. Commissioners, 57 O. S., 189.
Richardson vs. State, 66 O. S., 108.

But it is by no means clear that what you designate as "automobile hire" constitutes "traveling expenses," although it seems reasonably certain that what you designate as "car fare" may constitute traveling expenses. Before your question can be fully answered, it must be determined whether automobile hire does constitute traveling expenses.

There is also another question here as to whether, if automobile hire be not regarded as "traveling expenses" it is within the category of "contingent expenses," as generally defined by my answer to your first question.

If automobile hire constitutes "traveling expenses," then upon the principles already laid down, it cannot be allowed to district assessors, boards of complaints, their deputies, etc., when incurred within the assessment district, i. e. the county. If it is not a traveling expense, then may it be regarded as a contingent expense?

Strong reason appears for holding that automobile hire is not "traveling expense," within the meaning of the phrase as used in the section. In the very nature of things the district assessors and their deputies are required to "travel" in the performance of their duties. Real estate, for example, must be valued "on actual view" (section 5554, G. C.) and personal property lists must be delivered to the taxpayers at their respective places of residence or business. (Section 5368. G. C.) In other words, the assessment of property, which the Warnes law contemplates, cannot be made without going from place to place within the assessment district. This, in my judgment, does not constitute "traveling" any more than the work performed by county commissioners in viewing the line of a proposed road or ditch improvement would constitute such traveling.

Therefore, the question, as it seems to me, is whether or not automobile hire constitutes a "contingent expense" within the meaning of the term as used in the section without reference to the scope of the phrase as determined by the inclusion therein of certain "traveling expenses."

If it is such a contingent expense, then the fact that it is incurred in the county would not prevent its lawful allowance.

In my opinion automobile hire might, under certain circumstances, constitute "contingent expense." I would not undertake to define the exact circumstances under which a lawful charge of this kind might be made. I am satisfied that in the ordinary discharge of the duties of their respective offices, the district assessor and the district board of complaints would not have any right to incur expenses of this character, but circumstances might conceivably arise in which the hire of an automobile or any vehicle might be necessary in order to enable the assessor or the board of complaints to discharge their respective duties; for example, both of these respective public authorities must complete their work within specified periods of time. Should the work devolving upon them, or either of them, at any time be so great in volume as to necessitate the employment of a vehicle in order to permit it to be completed within the prescribed period, a "contingency" would, in my judgment, arise, justifying the incurring of an expense of this character. The determination of the existence of the contingency rests primarily in the discretion of the district assessor or board of complaints, and is subject to the revisionary power of the county commissioners.

I must repeat in this connection that the expense must be that either of the district assessor or the district board of complaints; their respective deputies, assistants, experts, clerks and employes may not be reimbursed for expenses of this character. This does not mean, of course, that an assistant or deputy may not use an automobile or other conveyance procured by the district assessor or the district board of complaints when directed by his superior and when the conveyance is furnished to him by his superior.

I have said in passing that car fare might be regarded as traveling expense. This, however, is subject to qualification. I would not say that under special circumstances an expenditure of this character might not be regarded as a contingent expense rather than as traveling expense.

While I have tried to lay down some general rules in answer to your second question, I am convinced that hard and fast rules cannot with safety be adopted. Matters of this sort call for the application of a considerable degree of judgment and discretion, and the official conscience of the officer constitutes a more effective safeguard than the provision of the law itself.

I understand your third question to relate to the payment of expenses incurred by the officers mentioned when traveling outside of the state of Ohio under orders of the tax commission, or with the approval of the tax commission.

In the first place, I may say in answer thereto, that before such traveling expenses can become a charge upon the county treasury by the approval of the county commissioners, the traveling in question must be *ordered by* the tax commission. It is not sufficient, in my judgment, that the commission approve a journey which has been undertaken without its order. The order must require that official business be transacted outside of the district; so that the officer has no authority to go outside of his district until the commission orders him to do so.

In my judgment your third question must be answered generally in the negative. It is only when traveling on *official business,* as ordered by the tax commission that the expenses of the district assessor, district board of complaints or any of their deputies, assistants, etc., incurred outside of the district can be allowed and paid from the county treasury. Such official business must be business which the com-

mission has authority to order to be transacted; and it must be official. The commission has no authority by any express provision of statute to order a district assessor or district board of complaints or any of their inferiors to go outside of the state of Ohio for any purpose whatever.

The authority of the commission in the premises is found in the following sections of the Warnes law.

> "Section 54. The tax commission of Ohio shall, from time to time, prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with any provision of law, as it may deem necessary respecting the manner of the exercise of the powers and the discharge of the duties of any and all officers, relating to the assessment of real and personal property and the levy and collection of taxes.
>
> "Section 57. The tax commission of Ohio may require district assessors, deputy assessors and members of district boards of complaints to meet and confer with other district assessors, deputy assessors, members of district boards of complaints, or with the commission on any matter relating to the assessment and valuation of property for taxation, at such times and places as may be prescribed from time to time by the commission."

In my judgment the commission's authority under these sections cannot be enlarged by implication so as to permit it to authorize or direct one of the officers, concerning which you inquire, to travel outside of the state of Ohio. Once the state boundary is crossed, such an officer will be shorn of his official power; he would cease to be a district assessor or a member of the district board of complaints, as the case might be.

Therefore, I am of the opinion that your third question must be answered in the negative, first, because the respective officers to which it relates may not be reimbursed for traveling expenses outside of their respective districts save when their business is such as is prescribed by an order of the tax commission; and second, because the tax commission has no authority to order any of its officers to go outside of the state of Ohio for any purpose whatsoever.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

879.

EQUIPMENT—AUTOMOBILE NOT INCLUDED IN EQUIPMENT FOR DISTRICT ASSESSOR.

An automobile for district assessors is not included within the term "equipment necessary for the proper discharge of their duties" as used in section 41-103 *O. L.,* 797; *the words so used apply solely to office equipment.*

COLUMBUS, OHIO, April 24, 1914.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Under favor of March 11, 1914, you request my opinion as follows:

> "The district assessors of this county have requested our board of county commissioners to provide for them as a part of the 'equipment necessary for the proper discharge of their duties,' an automobile, the same to be furnished and maintained by said board of county commissioners under the provisions of section 41 of house bill No. 571 entitled, 'an act to divide the state into assessment districts * * *, as found in 103 Ohio Laws, at page 797.'
>
> "It is contended by the district assessors that the amount and nature of their work under said act make such an expenditure for such purpose absolutely proper and necessary.
>
> "In view of the large amount of road, bridge, and ditch construction in this county, the use of an automobile is imperative. The expenses of our county surveyor's office for automobile hire in connection with such work are such as to justify, from the standpoint of economy, the purchase and maintenance of an automobile for the use of said office.
>
> "Awaiting your earliest advice as to the authority of the county commissioners in the purchase and maintenance of automobiles for the purpose herein stated, etc."

Section 41 of house bill No. 571, appearing in 103 O. L. at page 797, as you state, is as follows:

> "The county commissioners shall furnish for the district assessor and the district board of complaints for their county, and their deputies assistants, experts, clerks and employes suitable *office rooms* at the county seat and the district assessors shall furnish for his own *office* for the district board of complaints all *maps, plats, stationery, blank forms, books, supplies, furniture and other equipment necessary for the proper discharge of their duties* and for the preservation and safe keeping of their *books, records and files.* Provided, however, that the *maps, plats, stationery, blank forms, and other supplies and equipment used* by the district assessor, shall so far as is practicable, be used also by the district board of complaints. In case any board of county commissioners fails or refuses to furnish such *rooms, maps, plats, stationery, blank forms, books, supplies, furniture and other equipment,* the tax commission of Ohio, upon complaint of the district assessor or district board of complaints, may authorize the district assessor or the district board of complaints, as the case may be, to procure such, *rooms, furniture, maps, plats, stationery, blank forms, books, supplies and other equipment,* as may be deemed necessary by the com-

mission, and the amount so authorized to be expended for such purpose shall constitute a charge against the county, regardless of the money in the county treasury appropriated for such purposes and notwithstanding any failure of the county commissioners to levy or appropriate funds therefor."

The expenses authorized by this section are clearly confined under the application of rule of *eiusdem generis* to those expenses necessary for the conduct and equipment of the offices necessary to be maintained by the district assessor and the district board of complaints. The only possible words appearing in this section which might be entertained as an authorization of incurring the expense of purchasing an automobile, are the words "other equipment necessary for the proper discharge of their duties," and I have no hesitancy in concluding that this term cannot extend the authorization to the application of any further subjects of expense than such things as are similar to maps, plats, stationery, blank forms, books, supplies, stationery, and maintenance of office rooms.

Under date of August 4, 1913, I rendered an opinion to Hon. A. H. Henderson, prosecuting attorney, Youngstown, Ohio, in which I held that the county commissioners have no authority to purchase an automobile for the use of the county surveyor under the terms of section 2786 of the General Code, which allows the county surveyor and each assistant and deputy his reasonable and necessary expenses incurred in the performance of his official duties.

I feel that the argument of that opinion has application to your question, and I am enclosing a copy of the same.

I, therefore, conclude that the county commissioners are not authorized by statutes to purchase an automobile either for the district assessors or for the county surveyor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

880.

WORKMEN'S COMPENSATION LAW—DOMESTIC SERVANTS.

The compulsory feature of the workmen's compensation law does not apply to employers of household or domestic servants in and about a private residence not a hotel or boarding house.

COLUMBUS, OHIO, April 24, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of April 7, 1914, your commission submits the following inquiry:

"Do the compulsory features of the compensation law apply to employers of household or domestic servants?"

Preliminary to a discussion of the question I desire to say that I am taking it for granted that you have reference to the application of the act to those employed in private households, rather than to those performing domestic service in hotels and other similar establishments; and, therefore, what is here said will have no reference to those employing domestics in a regular business such as hotel keeping, or by those whose business is that of keeping boarding houses.

The salient sections of the workmen's compensation act (103 O. L., 72), follows:

"Section 13. The following shall constitute employers subject to the provisions of this act. * * *

"2. Every person, firm and private corporation including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written.

"Section 14. The term 'employe,' 'workman' and 'operative,' as used in this act, shall be construed to mean; * * * every person in the service of any person, firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, * * * *but not including any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer.*"

Section 21 provides that every employe mentioned in the foregoing quoted subdivision of section 14, who is injured and the dependents of such as are killed in the course of employment, shall be entitled to receive, either directly from the employer or from the state insurance fund such compensation as is provided in the act in question.

Section 22 provides that every employer mentioned in the foregoing quotation shall pay into the state insurance fund the amount of premium fixed by the board of awards for the employment or occupation of such employer.

Under section 23 those employers who comply with the provisions of the section last referred to shall not be liable to respond in damages for injury or death of any employe, save as subsequently provided in the act.

Section 25 requires the board of awards to disburse the state insurance fund to such employes as have paid the premiums, provided such employes have been injured in the course of their employment.

If the quoted language from section 13 stood alone, it might very well be said that every person employing five or more domestics or household servants in his private household would be compelled to contribute to the state insurance fund. The word "workman" is broad enough to include servants of this character, and while the word "business" as used in this section would not, under the definitions hereafter given, have reference to the maintenance of a private household, nevertheless, the word "establishment" as used in that section may very well be said to include a private household. The dictionary definitions of the word justify this construction, and its use in this sense has been sanctioned by good usage.

Section 14, however, in defining "workman" expressly excludes those whose employment is but casual, or not in the usual course of trade, business, profession or occupation of the employer. Thus it is clear that not only must the workman be employed in the same establishment or business, but he must also be one who is not casually hired, as well as one who is employed in the manner specified in subdivision 2 of section 14.

"Trade" has been defined as a business learned or carried on for procuring subsistence or profit; the buying or selling for gain or as means of livelihood; mercantile traffic; commerce.

Funk & Wagnall's New Standard Dictionary.

Business pursued; occupation; the craft or business which a person has learned and which he carries on as a means of livelihood or for profit; occupation; the

exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange; commerce.

Century Dictionary.

Business may be said to be a pursuit or occupation that employs or requires knowledge, time and thought; trade; profession; calling.

Funk & Wagnall's New Standard Dictionary.

That which busies or occupies one's time, attention and labor as his chief concern; that which one does for a livelihood; occupation; employment; mercantile pursuits collectively; the occupation of conducting trade or monetary transaction of any kind.

Century Dictionary
See also 6 Cyc. 259, 260.

Jessel M. R. has defined business as meaning "anything which occupies the time, attention and labor of a man for the purposes of profit," and this, I think, is the sense in which it is here used.

See also Ruegg's Employers' Liability and Workmen's Compensation, p. 279.

There can be no doubt that the meaning of the word " profession" carries with it the essential qualification that it must be an occupation that involves peculiar educational qualifications and has reference to mental rather than to manual labor. It involves special attainments or discipline.

Occupation is often treated as being synonymous with business or employment, and has been defined as "whatever one follows as a means of making a livelihood."

Funk & Wagnall's New Standard Dictionary.

"The principal business of one's life, vocation, calling, trade; the business which a man follows to procure a living or obtain wealth."

29 Cyc. 1344.

Assume that the employment of domestics is not casual, it surely cannot be contended that one who performs ordinary domestic or household work for a private family is working in the usual course of the employer's trade as the maintenance of a private household has no connection with the profit or commerce; nor is it conducted as a business or profession, as those words have been defined. It cannot successfully be assumed that it is an occupation.

Hence, it is my opinion that the compulsory features of the workmen's compensation act do not apply to domestic servants employed by private families, as they are expressly excluded by the italicized clause of subdivision 2 of section 14. This is a definitive section and must be read with and as modifying the broader language of section 13.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

881.

CITY COUNCIL — MUNICIPAL CIVIL SERVICE — SALARY — EXPENSES.

1st. The council of a municipality has the right to fix the salary of members of the municipal civil service commission after they have been appointed, providing no salary has yet been fixed.

2nd. Where the salary has been fixed by council either under the old municipal law, or under the new act, since the new act did not change the members of the commission, when the commission had been appointed under the old law, any ordinance fixing the salary which would become effective while a member was still in office under the term provided by law would not affect the salary of such member.

3rd. It is the duty of council to fix the salaries and appropriate a sufficient amount for expenses for the municipal civil service commission and the court cannot control the discretion of council as to the amount of salary or as to what is reasonably sufficient for expenses.

COLUMBUS, OHIO, April 24, 1914.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Your favor of March 20, 1914, is received, in which you call my attention to certain provisions of section 19 of the civil service act and ask a ruling upon the following questions:

> "First. Is it within the legal right of a city council to fix the salary of the municipal commissioners appointed under the provisions of section 19, i. e. after such commissioners have been appointed?
>
> "Second. Is the provisions of section 19 mandatory which states, 'the expenses and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city?
>
> "Third. In case the city council failed because of lack of information as to the needs of the commission or by neglect, or otherwise, to appropriate funds in January for the work of this commission, is there any statute prohibiting said council from appropriating funds at a later date to enable the commission to secure supplies, hold examinations, and otherwise put into effect the provisions of the civil service law?
>
> "Fourth. In case the council is permitted by law to make appropriation for the civil service commission must such appropriation be taken out of any unused balances of former appropriations, or may it be taken from other sources?"

The Hon. Jonathan Taylor, city solicitor of Akron, Ohio, under date of March 24, 1914, submits further inquiries upon the same subject. He states and inquires:

> "Mr. Be. and Mr. Ba. were members of the old civil service commission, and of course continued in office automatically. Mr. S. was the new appointee. In the regular semi-annual appropriating ordinance in January, an appropriation was made for salaries for members of the commission at $50.00 a half year, this appropriation being made in pursuance of an ordinance passed March, 1913, by which the salaries of the commissioners were fixed at $100.00 per year. The $50.00, as you will see was for the six months. In the same appropriating ordinance, in January of this

year there were certain other sums, for printing and sundry other expenses which the council considered proper to be made for the commission. In view of these facts. I beg to ask you the following:

"First. Is it lawful for the council to pass an ordinance making the salaries of the commission $600.00 per year, bearing in mind the provision of the statute which forbids the increase of salary of any official during the term for which he was appointed.

"Second. Is it lawful for council, between January and July, the regular appropriating periods, to appropriate funds from the unexpended balances of the general fund, to provide (a) for the added salary, (b) money for printing, stationery, etc., for the commission."

Your first inquiry is as to the right of council to fix the salaries of the members of the municipal civil service commission after they have been appointed.

Section 19 of the civil service act, section 486-19, General Code, provides in part:

"The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district in which such city is located; provided, however, that members of existing municipal civil service commission shall continue in office for the terms for which they have been appointed and that their successors, the first appointees of the mayor or other chief appointing authority of such city, shall be appointed to serve respectively for four years, five years and six years and until their successors are appointed and have qualified. Each alternate year thereafter the mayor or other chief appointing authority shall appoint one person as successor of the member whose term expires to serve six years and until his successor is appointed and has qualified. A vacancy shall be filled by the mayor or other chief appointing authority of a city for the unexpired term. * * * The expense and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city.

"If the appointing authority of any such city fails to appoint a civil service commission or commissioner as provided by law within sixty days after he has the power to so appoint, or after a vacancy exists, the state civil service commission shall make the appointment, and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified."

This section authorizes council to fix the salaries of the commissioners.

Your first inquiry involves at least two state of facts.

a. Where no salary has at any time been fixed by council.

b. Where a salary has been fixed by council either under the old municipal law, or under the new act.

Under the old law council also had the right to fix the salaries.

Section 4486, General Code provided in part:

"The council shall provide for the salaries, if any, of the commission, for such clerical force, examiners, necessary expenses and accommodations as may be necessary for the work of the commission."

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Both under the new law and under the old law the members of the civil service commission have a definite term of office. By virtue of the new act the members appointed under the old law are continued in office until the expiration of their respective terms.

In the case of State ex rel. vs. Carlisle, 16 Ohio Dec. 263, Judge Evans considers the constitutional inhibition as to increasing or diminishing salaries.

On page 266 of the opinion he says:

> "State vs. McDowell, 19 Neb. 442 (27 N. W. Rep. 433), was a case in which at the time of relator's election no salary or compensation had been fixed for the services of that officer. During his incumbency his salary was fixed at $300 per annum.
>
> "The court held that the act was valid—'That as there was no salary fixed, the act providing for such after his election was not an act either increasing or decreasing the salary.'
>
> "The same ruling was held in Purcell vs. Parks, 82 Ill., 346. See Mechem, Public Officers 858.
>
> "The reason for the above holding is, that if there is no salary definitely fixed, or if no salary whatever has heretofore been provided, then there is no salary to increase or diminish by an act providing for a salary during an incumbency.
>
> "As our constitution provided, 'No change therein shall affect the salary of any officer during his existing term.'
>
> "If there is no salary at all, or none definitely fixed then legislation providing a salary during his term could not affect any change, for there is none existing to effect."

This properly states the rule where no salary has been fixed. In such case council may after the appointment and qualification of a civil service commissioner fix his salary. Such salary, however, will only become operative from the time when the ordinance fixing the same becomes effective.

It is contended that where a salary was fixed under the old law and the members of the commission appointed under that law continue to serve out their terms under the new civil service act, that council may change such salary and that it will apply to the time served under the new act.

This contention is based upon the conclusion that the new law created a new commission and that council could therefore fix a new salary under the provisions of the new act

The new law did not change the members of the commission where a commission had been appointed under the old law. It did not change the nature of their duties, nor did it change the method of fixing salaries. It specifically retains the officers in their positions for their full terms. It is not a new term. True, the duties of the commission are greatly increased under the new civil service act. Yet, under the old law the legislature could have extended the classified service and thus increased the duties of the commissioners. If this had been done no contention could have been successfully made that council could then increase the salaries during the terms.

The situation, in effect, is not different by the enactment of a new general civil service act. The ordinance of council fixing the salaries under the old law would still apply to the commissioners under the new law, until legally changed.

Section 4213, General Code, therefore, prohibits council from increasing or diminishing the salary of a member of a municipal civil service commission during the term for which he was appointed. This rule applies where a salary was fixed under the old municipal civil service law and the member of the commission continues to serve out his term under the new act.

In the specific case submitted by Mr. Taylor, an ordinance increasing the salary from $100.00 to $600.00 per year would not apply during the term of the incumbents at the time such change was made.

In your second inquiry you ask:

> "Is the provision of section 19 mandatory which states, 'the expenses and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city?"

In State ex rel. vs. Massillon, 14 Cir. Dec. 249, it is held:

> "The council of a city can be compelled, by mandamus proceedings, to issue its order or make an appropriation for the payment of services of such officer (health officer), in the absence of the certificate from the proper officer, that there were funds on hand for the payment of his services at the time the liability was incurred or increased. Section 2702 Rev. Stat. does not apply to such officer.
>
> "Sections 2115 and 2140, Rev. Stat., the former, providing that boards of health may appoint health officers, etc., and the latter, for payment of expenses of board of health, are mandatory in character; and the establishment of a board of health is a police regulation of the state."

This case involved the board of health and its officers. There are reasons why the provisions of statute pertaining to the health of a community should be mandatory, which will not apply to the civil service act.

The case of State ex rel. vs. Bish, 12 Nisi Prius N. S., 369, involved the right to increase the salaries of firemen and policemen, who were in the classified service.

On page 384, Spriggs, J., says:

> "Thus, 3617 creates the offices of policemen and firemen, and delegates to the city council not the power to create or abolish those offices, but to organize and maintain them. While, on the other hand, section 3616 makes it obligatory upon city councils to so organize and maintain such departments as created by section 3617.
>
> "It is true that section 3616 says, 'and council may provide by ordinance or resolution for the exercise and enforcement of these powers,' but we believe that this language, although permissive in form is peremptory in fact in its relation to section 3617. That is, where power is given to public officers by act of the legislature whenever the public interest or individual rights call for its exercise, the language used, though permissive in form is in fact peremptory and permits no discretion. Supervisors vs. United States, 4 Wall. 435-445-446-447; Mason vs. Fearson, 9 Howard, 249-259; Mayor vs. Furze, 3 Hill, 612; Turnpike Co. vs. Miller, 5 John's Chancery 100.

"Certainly, the establishing and maintaining of a police and fire department involved a great public interest, and we do not believe that under section 3617 the city council would have any right to abolish the police or fire department entirely; * * *."

At section 2192 of McQuillin on Municipal corporations, it is said:

"Mandamus does not lie to compel an appropriation unless there is a clear legal duty. So if the amount of the appropriation rests in the discretion of the council and the appropriation is a quasi-judicial act, the discretion cannot be controlled by this writ. However, some statutes providing that cities 'may' appropriate money and provide for the payment of the debts of the city have been held mandatory so that the duty could be compelled by mandamus."

And at section 516 of the same treatise it is said:

"Where a public office is created, and the compensation to be paid for services rendered by the incumbent thereof is to be fixed by a public body, upon failure of such body to act therein, it may be compelled to do so by mandamus. But in such case the court will not fix the compensation."

Two cases are cited in support of this latter principle.

In Cook vs. City of Springfield, 184 Mass. 247, it is held:

"A city, appointing a license commissioner under St. 1894, c. 428, does not employ him, and incurs no obligation to pay a reasonable compensation for his services. Its only obligation in regard to his compensation is imposed by section 6 of that statute, which requires each city to pay its license commissioners such salaries as the city council shall establish."

On page 247, Loring, J., says:

"By section 6 of that act it is provided that 'each city shall pay its board of license commissioners such salaries as the city council subject to the approval of the mayor may from time to time establish,' and it is conceded that under that act the license commissioners were to be paid and were not to serve gratuitously."

On page 249 he further says:

"If that compensation is not fixed the law would issue its writ of mandamus requiring the city council to perform its duty and fix it. Attorney General vs. Lawrence, 111 Mass. 90; Attorney General vs. Boston, 123 Mass. 460."

The provisions of section 19 of the civil service act now under consideration are mandatory and not permissive in form.

Council is given the power to fix the salaries by the words "the expense and salaries of any such municipal commission shall be determined by the council." It is made the duty of council to fix a salary. The amount of the salary is within the discretion of council. A reasonable compensation for the services need not be paid.

Council is required to make an appropriation of money. The words used are:

"and a sufficient amount of money shall be appropriated each year to carry out the provisions of this act in any such city."

What shall constitute a sufficient amount is left to the discretion of council. When council has acted the expenditures must be kept within such appropriation.

The provisions of section 19 of the civil service act requiring council to fix salaries of the commissioners, and to appropriate sufficient money for the expenses of the commission are mandatory. That is, council may be required to act. The courts cannot control the discretion of council as to the amount of the salary, or as to what is reasonably sufficient for such expenses.

Your third and fourth inquiries, and the second by Mr. Taylor, concern the time when council can make an appropriation.

These questions have been answered in an opinion given to the bureau of inspection and supervision of public offices, under date of November 24, 1913. A copy of this opinion is herewith enclosed.

In that opinion the following principles are established:

That council is not required to make all semi-annual appropriations in one ordinance.

That where council has appropriated a definite sum for a specific purpose, it cannot at a subsequent date, appropriate an additional sum for that purpose, for that period.

That where council has made a detailed appropriation and has failed to make an appropriation for one or more of the objects for which the corporation may lawfully provide, council may at a subsequent date make an appropriation for such object, provided the object is within the purview of the purpose of the fund from which the money is to be set aside.

In the second question submitted by Mr. Taylor, council has made a specific appropriation for salaries and expenses of the commission for the six months ending June 30, 1914. Council cannot now increase this appropriation for that period.

Where council has not made an appropriation for these objects it may subsequently make an appropriation if a fund is available for that purpose.

Several conditions are to be considered in determining the fund from which the appropriation may be made. These are considered in the opinion above referred to and the conclusion to the second inquiry therein submitted gives the general principals applicable. Reference is made to this opinion for answer to your fourth inquiry.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

882.

STREET—PAVING—REPAVING—ASSESSMENT.

Where a certain street was paved the width of forty feet, and repaved the width of forty-six feet, after the repaving of this street, three feet on the sides thereof were to be considered as merely a repaving of the entire street, and consequently section 3822, General Code, would apply and property cannot be assessed for more than one-half.

COLUMBUS, OHIO, April 24, 1914.

HON. WALTER S. RUFF, *City Solicitor, Canton, Ohio.*

DEAR SIR:—Under date of January 30, 1914, you ask opinion of me on questions stated by you as follows:

> "A street in this city was paved about twenty years ago, and the abutting property was assessed for the payment of same. At that time the roadway was paved to a width of forty feet, and in preparing the legislation for repaving the same, during the coming summer, the council has instructed me to prepare legislation to pave the roadway forth-six feet in width, increasing it three feet on each side.
>
> "Does section 3822, G. C., apply to the assessment for the forty feet only, or to the entire forty-six feet?
>
> "It is customary in this way in paving a new street to charge 98 per cent. to abutting property owners.
>
> " Can we under section 3822, G. C., assess the abutting property 98 per cent. of the cost of the additional three feet on each side?"

Section 3822, General Code, referred to in your communication, provides as follows:

> "When a special assessment for the improvement of a street or other public place has been levied and paid, the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade thereof is changed."

The liability of the owners of abutting property to pay for street improvements is created by statute founded on, and measured by the benefits received from such improvements. When, however, the power to make local improvements at the expense of the owners of abutting property has been vested in a municipality, such power, in absence of other provisions, is a continuing one and is not exhausted by being once exercised.

Wells vs. Wood 114 Cal., 255.
C. & N. P. Ry. Co. vs. Chicago 172 Ill., 66.
Lux Stone Co. vs. Donaldson, 162 Ind., 481.
Addams vs. Beloit, 105 Wis. 363.

Usually the determination of the municipal authorities as to the necessity for a subsequent improvement of a street at the expense of abutting property is final, though sometimes such determination has been held subject to review in cases presenting circumstances of manifest unreasonableness or oppression.

Lamb vs. Chicago, 219 Ill., 229.
Hammett vs. Philadelphia, 65 Pa. St., 146.
Kokomo vs. Mahan, 100 Ind, 242.
Field vs. Barber Asphalt Co., 117 Fed, Rep. 925.

The liability of abutting lot owners to pay for street improvements to the extent of benefits received being created by statute, it is, of course, competent for the lawmaking power of the state to limit that liability, either as has been done in some of the states by exempting them from all obligation as to the cost of subsequent improvements of the street, or as has been done in this state by exempting them from a part of such cost.

Page vs. Columbus, 15 C. C. n. s. 40, 45.
Gray vs. Toledo, 80 O. S., 445, 447.

The street referred to in your inquiry was originally improved to a width of 40 feet; and the subsequent improvement contemplated improves the street to a width of 46 feet, and the question is whether the extra six feet is within the provisions of section 3822, or whether the whole cost and expense of the construction of the six feet (less 2 per cent.) can be assessed against the abutting property. The determination of this question does not, I apprehend, proceed on different considerations than it would if section 3822 provided that the abutting property should be wholly exempt from assessment for the cost and expense of repaving.

In the case of Dickinson vs. City of Detroit, 111 Mich., 480, the controlling statutory provision was a section of the city's charter, providing as follows:

> "The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross-streets, and alleys, for the cross walks at such intersections, and for repaving streets, avenues, and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district. * * * The cost of all repaving of streets, avenues, and highways of the city shall be paid out of the repaving fund."

Under this charter provision it was held that:

> "An improvement of a city street 200 ft. wide, of which 40 feet in width in the center was originally paved, consisting of a driveway of asphalt 25 feet wide on each side of a strip 100 feet wide left in the middle of the street for park purposes, constitutes a repavement, where there is nothing to show that the original pavement was inadequate, within a provision in the charter requiring the cost of all 'repaving' to be paid out of the repaving fund, instead of by the abutting lot owners."

In the case of Wreford vs. City of Detroit, 132 Mich., 348, it appeared that a certain street in the city of Detroit was in 1876 graded and paved with a roadway 40 feet wide, the entire cost of which was assessed upon the abutting property. The street was wide and a grass plot was left between the sidewalks and the 40 ft. roadway, in which were set rows of trees which stood there for forty years. In 1899 steps were taken to widen this roadway by about fifteen feet on each side and to repave this street the entire width of the old roadway and extensions—about 70 ft. Contracts were let and the entire cost of the pavement outside of the old 40 ft. road-

way was assessed to the abutting owners. The action was one to set aside this assessment. The syllabus in the case is as follows:

"Where under a city charter providing that the cost of paving, but not the repaving, shall be assessed upon the abutting property owners, a street which has been paved, is paved again, including a portion of the street between the original pavement and the sidewalk, no part of the pavement can be assessed upon the owners of the adjoining property."

The court in its opinion says:

The only question we need to discuss is can the abutting property owner, having once been assessed for grading and paving the street, be again assessed for paving extensions thereof * * *. The principle upon which abutting owners are charged with the expense of paving the street in the first instance is that their property is benefited by the pavement. After the improvement has once been made, its care belongs to the entire public; and it must be kept in repair and in condition, or widened or improved by the public, and not at the expense of the owners.

"It is difficult to imagine what benefit accrues to abutting owners where the grass plots in front of their property is removed and the travel upon the street with its dust and noise brought nearer to their dwellings. Such improvements are clearly not for the benefit of private owners, but for the benefit of the public. We are of the opinion that when the authorities of the city laid out this street and paved a roadway therein suitable at the time for the use of the public, their power to assess such improvements upon abutting owners was exhausted."

In the case of In re Garvey, 77 N. Y., 523, where it appeared that the charter of the city of New York provided that no street which had been once paved, and the expense thereof paid by assessment upon the adjoining owners, should thereafter be paved at their expense or an assessment imposed therefor, unless petitioned for by a majority of such owners, is was held that:

"Where the city has once determined the character and extent of the flagging of a sidewalk, and has assessed and collected the expense of the owners, it has no further jurisdiction over the flagging of that sidewalk until a petition is presented as so prescribed. Where, therefore, a sidewalk 12 ft wide was, in pursuance of an ordinance, graded and flagged, the flagging being a strip 4 ft. wide in the center of the sidewalk, a new ordinance covering said sidewalk, directing that curb and gutter stones be set and reset, the sidewalk be flagged and reflagged, where not already done, which was not so petitioned for, was illegal; and that an assessment upon the owners to pay the expenses of the improvement was void."

The court in its opinion in this case says:

"A sidewalk furnished with a stoneway four feet in width may properly be said to be flagged, although the whole surface is not covered. It was one mode of improvement and furnished a convenient and sufficient way for travel. The statute referred to permits the owner to judge of the necessity or expediency of a new or better or different improvement, and unless it applies to a case like the present, the city may pave one-third of the walk at one time, one third at another, and afterwards the rest. This

would be contrary to the plain reading and obvious purpose of the statute. The city having once determined the character and extent of the pavement and laid it, can have no further jurisdiction over the flagging or pavement of that sidewalk until a petition has been presented therefor, by a majority of the owners of the property on the line of the proposed improvement."

In the case of In re Smith, 99 N. Y., 424, on consideration of the same charter provision before noted in the Garvey case, it was held:

"Where a sidewalk in the city of New York has once been paved, upon a plan and of a width at the time deemed suitable, any additional pavement, although it be simply to give additional width, leaving the original undisturbed, is a repavement, requiring as a condition precedent a petition of a majority of the property owners along the line of the improvement, and if made without such petition, an assessment therefor is invalid."

In the case of In re Brady 85 N. Y., 268, it was held:

"To constitute a prior pavement within the meaning of the provisions of the acts of 1870, 1872 and 1874 (chap. 383, laws of 1870; chap. 580, laws of 1872; chap. 313, laws of 1874); in relation to local improvements in the city of New York, where the assessment in question is for paving the traveled part or carriage way of the street, there must have been a substantial pavement of that portion of the street; although a street has been curbed, guttered, and a narrow strip on each side laid with cobble stones for the purpose of binding and protecting the gutter stones, and although the sidewalks have been flagged and crosswalks laid, this is not a prior pavement."

In the case of Alcorn vs. City of Philadelphia 112 Pa. St., 494, it was held that where the municipality in paving a street at the cost of the owners of the property fronting thereon, adopted a plan leaving eight feet in the center of the street unpaved for trees and shrubbery, and where after a number of years the plan was changed and the said eight feet in the center of the street was paved, the paving of said eight feet was an original improvement and the owners of the property fronting on said street were liable for the cost thereof.

Now in the case of Baldwin vs. Springfield, 20 Ohio Dec., 265 (10 N. P. n. s. 65) it was held:

"'Macadamizing' a street, formerly made by graveling, pursuant to municipal direction, constitutes a 'repaving' within the meaning of section 53 Municipal Code of 1902 (Gen. Code. 3822), for which not more than one-half the cost may be assessed against the abutter.

"The limitation of section 53, Municipal Code of 1902 (G. C., 3822), as to 'repaving' assessments does not apply to assessments for curbing and guttering if the former improvement did not include and the property was not assessed therefor either as part of a street or sidewalk improvement."

This case was affirmed by the circuit court, but I am not advised whether the second proposition above noted was involved in the decision of the case in the circuit court or not. The court in its opinion in the case of Baldwin vs. Springfield, *supra*, says:

"To constitute an original paving of a street there must have been a substantial paving of the part of the street improved."

Page & Jones, Taxation, section 462.
Brady in re, 85 N. Y., 268.

"A street including sidewalks and gutters, and paving includes flagging; the work therefore of setting curb and gutter stones and flagging the sidewalks of a street, which has once been done, is included in the phrase 'repaving a street.'"

Burmeister in re, 76 N. Y., 174.

"It is not claimed that the property owners in question have previously constructed or been assessed for any curbing and guttering of this street or a sidewalk improvement. The only expense to which they have been subjected relates to the grading and graveling of the portion of the highway in question."

Further on in its opinion the court in this case says:

"As the plaintiffs have never constructed or been previously assessed for curbing and guttering, either as a part of a street improvement, or as a part of a sidewalk improvement, I do not think the cost of the curbing and guttering in question would come within the repaving limitation."

In this state of the authorities the precise question submitted by you is not one easy of solution. Looking to the facts of the case, in the light of the terms of the statute itself, it seems clear that the paving of the street in question to a width of 40 feet was an improvement of the street within the meaning of the section, as much so as if it had been paved to a width of 46 feet. The question as to the width of the improvement was a matter in the discretion of the city authorities, the improvement being one substantial in its nature, it was an "improvement" within the terms of this section. The assessment for this former improvement having been paid, the question here presented, applying the facts stated in your inquiry to the terms of the statute itself is, not so much whether the particular 6 feet of the proposed improvement constitutes a repaving, but rather whether the proposed paving of the street to a width of 46 feet constitutes a repaving of the street.

Looking to the language of the section, and applying the spirit of the decisions which more nearly meet the situation of fact here presented, I am constrained to the opinion that the proposed action of the city to improve this street to a width of 46 feet, will, in view of the former improvement of the street, constitute a repaving of the street within the meaning of this section, and that the abutting property cannot be assessed for more than one-half the cost and expense thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

883.

EMERGENCY COMMISSION—COUNTY COMMISSIONERS—REPAIR OF DAMAGES CAUSED BY FLOOD.

After the expiration of the terms of the members of an emergency commission appointed under the act found in 103 *O. L.*, 206, *the county commissioners may undertake further repairs or replacements on account of damages wrought by the floods of* 1913, *and for the purpose of so doing said commissioners may avail themselves of the provisions of the act found in* 103 *O. L.*, 141.

COLUMBUS, OHIO, April 24, 1914.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 20, 1914, in which you request my opinion upon the following questions:

> "After the expiration of the terms of members of an emergency commission appointed under the act found in 103 O. L., 206, may county commissioners undertake further repairs or replacements on account of damages wrought by the floods of 1913; and especially may the commissioners exercise the power vested in them in the premises by the act found in 103 O. L., 141?"

The first act referred to by you provides for the establishment of a state flood relief commission, and for the establishment of emergency commissions in counties and municipalities, the function of which, as indicated by the title of the act, is to assist in restoring the public works and property damaged by the floods of March and April, 1913.

The act provides for the appointment of a county flood relief commission upon petition of a certain number of electors of a county, and contains the following language with respect to such commissions.

> "Members of such emergency commission shall serve for a period in no event to exceed one year from the date of the appointment of the first member of such commission, and without compensation; provided that whenever such commission files a report with the probate judge of the county, that its work has been completed or that there is no further need for the existence of such commission the terms of the members of such commissioners shall terminate. Any commissioner may be removed by the probate judge with the approval of the Ohio flood relief commission, and all vacancies shall be filled by the probate judge with the approval of the Ohio flood relief commission.
>
> "The emergency commission of any county shall exercise in conjunction with the county commissioners such powers and duties as are conferred upon the county commissioners insofar as they extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and the emergency commission shall exercise and perform such duties jointly with such county commissioners."

There are certain other provisions of the act which I need not quote, but which shed some light upon the question which you submit. I refer to the provisions authorizing an election for the discontinuance of a county emergency commission

provided for by sections 14 to 16, inclusive, of the act. It appears that under these sections the county emergency commission may be discontinued at any time within the year of its existence under section 9 of the act, this discontinuance evidently not to be predicated necessarily upon the completion of the work, for section 9 provides that upon such completion and the filing of a report thereof, the emergency commission shall automatically go out of existence.

It seems, therefore, that the effect of the several provisions, to which I have called attention, considered together, is such that the emergency commission is to expire by limitation in one year, and may be put out of existence any time by a special election. Both these contingencies, which would serve to terminate the existence of the commission, have no relation to the completion of the work, nor do I find any evidence on the face of the act or otherwise of an intention to require all replacement and repair work to be completed within one year.

On the other hand, the other act to which you refer, 103 O. L., 141, insofar as it relates to permanent replacement and repairs, merely authorizes money to be raised by certain special means for the purposes to which the act relates, that is, replacements and repairs necessitated by damages wrought by the 1913 flood. It is clear that there is no limitation of time upon the making of the repairs and replacements to which the act refers, and I am of the opinion that so long as such repairs or replacements are occasioned by the damages referred to, they may be made at any time, and the funds necessary therefor may be raised at any time under the provisions of that act.

I am of the opinion, then, upon consideration of both the acts, that upon the dissolution by lapse of time of the emergency commission, the power to make the necessary repairs and replacement is not thereby destroyed, but vests in the county commissioners and may be exercised by them; and that for the purpose of so doing the commissioners may avail themselves of the provisions of the act found in 103 O. L., 141.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

884.

VILLAGE COUNCIL—COMPENSATION TO MAYOR—MARSHAL—FEES AND CASES.

The council of a village in fixing the compensation of the mayor and marshal may not provide that the salary fixed shall be in lieu of any fees and costs allowed by law for services rendered by such officials in civil, state and ordinance cases.

COLUMBUS, OHIO, April 24, 1914.

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

GENTLEMEN:—Under favor of February 11, 1914, you request my opinion upon the following questions:

> "May the council of a village, in fixing the compensation of the mayor and marshal, provide a salary that shall be in lieu of all fees and costs allowed by law or ordinance for official service rendered by said officials?
>
> "May the council require that said officers' fees in civil cases and in cases of violation of ordinances be paid into the village treasury and compensate officials by a stated salary?"

The answer to your questions hinges upon the construction of the following statutes:

First. With reference to the mayor:

"Section 4257. The mayor shall receive the costs as provided by ordinance, but in no case greater than the fees for similar services before justices of the peace, and in addition thereto he shall receive such salary, payable quarterly, from the corporation treasury, as may be provided by ordinance, but the amount shall not be increased or diminished during his term of office.

"Section 4550. He shall keep a docket, and shall be entitled to receive the same fees allowed justices of the peace for similar services. He shall keep an office at a convenient place in the corporation, to be provided by the council, and shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, 'Mayor of the city of _____,' 'Mayor of the village of _____,' as the case may be."

Second. With reference to the marshal:

"Section 4387. In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safe keeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

Third. With reference to both mayor and marshal:

"Section 4556. The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace. In case of conviction the fees of officers, jurors, and witnesses shall be taxed against the parties convicted, and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation.

"Section 4219. Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

Section 452 of Throup's "Public Officers" is as follows:

"Gross sum in lieu of statutory fees. To this branch of the subject belongs a class of cases, where an officer has been required, by contract or by municipal ordinance, to accept a gross sum, in lieu of the fees allowed to him by law. An English case, where such a bargain between a munic-

> ipal corporation and its officer, was decreed in equity to be unlawful, as being against public policy, on the ground that the law would not allow any bargain to be made, respecting an appointment to a public office, and also because the officer 'is considered to require them' (his fees) 'to enable him to uphold the dignity and perform the duties of his office,' was fully cited in a former chapter. And it was held in Louisiana that the sheriff of a parish cannot be compelled, without his consent, to accept a gross sum, in lieu of his statutory fees. So a contract to that effect was adjudged to be void in Iowa. But in Texas it has been held that such a contract is lawful."

An examination of the authorities cited by this author, however, discloses that in these cases the contract was looked upon as contrary to public policy for reasons that might well be distinguished from the case at hand.

The facts involved in these cases either pointed to a situation in the nature of bribery wherein the officer promised to serve for a reduced compensation for the consideration of being elected or appointed, or where the contract was made by a public officer, such as a justice of the peace or sheriff, with a private individual for the reduction or relinquishment of his fees in behalf of such particular individual alone.

The following cases, however, have a more direct bearing upon the question presented. In People ex rel. vs. Board of Police, 45 N. Y., 38, an appointing board was held to have no power to reduce salaries below that fixed by statute. In People ex rel. vs Ryan, 91 N. Y., 265, it was held that where a policeman's salary was fixed by law and power vested in the board of police to make rules and regulations for the government and discipline of its subordinates, such board would not be permitted to make reductions in the compensation of police officers for temporary absence on account of sickness or disability; and in Kohn vs. State of New York, 93 N. Y., 291, it was held that when the compensation of a state employe is fixed by statute it cannot be reduced by the state officer under whom he is employed.

When the above quoted sections of the General Code are examined it appears that each of these officers are provided for substantially in like manner, that is, there is express provision for fees for services in state and civil cases, and a like provision for an additional compensation by council. There is, furthermore, with reference to each of these officials, a provision for the receipt by them of such fees as are fixed by council for services in ordinance cases.

By section 4219, above quoted, council is empowered to fix the compensation of all officers, clerks and employes in the village government, *except as otherwise provided by law.* This statute must be read in connection with the other statutes above quoted, and when so read, the words "except as otherwise provided by law," are given a very definite meaning.

Under the decisions above referred to, holding that an appointing board or officer is without power to increase or reduce the compensation fixed by statute, I am of the opinion that council is without power to deprive these officers of the fees definitely fixed by these statutes for services in state or civil cases. (Sections 4550 and 4387 of the General Code.)

I am of the opinion that section 4550, providing the same fees for the mayor as are permitted a justice of the peace in similar cases, and section 4387, providing the same fees for a marshal as are permitted sheriffs and constables in similar cases, must control as regards services performed by these officers in civil and state cases. These are matters over which the legislature has control, and these are the only fees which justices of the peace, sheriffs and constables are at any time entitled to receive. It is clear that in these provisions the legislature has the

interests of the state at large in view and is providing a compensation for such services performed by such officers as are required by state laws. A city council, therefore, in view of sections 4387 and 4550, General Code, may not require fees received by the mayor or by a marshal, for services in state criminal cases or in civil cases, to be paid into the village treasury.

As regards services performed by these officials in the police or mayor's courts, however, in the prosecution of violations of village ordinances, we are presented with a somewhat different situation. The provisions of the statutes providing for the fixing by council of fees for these services are as follows:

Section 4257 (above quoted).

Section 4556, applying to both mayor and marshal:

> "The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace. * * *"

It is true that under the ruling of City of Bellefontaine vs. Haviland, 3 N. P. n. s., 99, these officials are not entitled to receive any fees in ordinance cases when council fails to fix such fees by ordinance. Whilst, therefore, the fees for such services may not be said to be fixed by law in the sense that the fees for services in state and civil cases are fixed, for the reason that under the control council has over the same they may not be fixed at all or they may be fixed at such a minimum amount as to be inconsiderable, nevertheless, the manner of paying these fees is definitely fixed by statute, and the statutes controlling the same manifest a clear legislative intent in this respect. Thus in respect to the mayor, under section 4257, the provision is clear that the mayor shall receive the fees fixed by ordinance, *and in addition thereto* shall receive a salary; and so with respect to the marshal, in section 4387, it is provided that he shall receive the fees designated and such additional compensation as the council prescribes.

Since the legislature has spoken in the matter, therefore, and since its intended plan is clear, to wit: that the official shall receive the amount fixed by ordinance in such cases, and since we cannot find any language in the statutes which would extend to council any authorization enabling them to over-ride the legislative direction in this respect, we must conclude that it was intended that the fee so fixed by council was a fee intended for the officer in question, and by no means intended as a fee for the municipal corporation itself. The powers of a municipal corporation are restricted to those expressly granted or necessarily implied, and under this rule we can find nothing in the statutes authorizing council to replenish the municipal revenues through the method of having fees payable to officials paid into the municipal treasury.

This construction is borne out by the language of section 4270, General Code, which further exemplifies the nature of the plan intended to be followed in these matters by the legislature. This statute requires all fees and forfeitures collected by the mayor, *other than his fees of office,* to be paid into the treasury of the corporation, thereby clearly manifesting the recognition by the legislative mind of the intention of these statutes to enable the mayor to retain as his own fees fixed in such cases in villages.

Making specific answer to your inquiries, therefore, I conclude that a council of a village in fixing the compensation of a mayor and marshal may not provide that the salary fixed shall be in lieu of any fees and costs allowed by law or ordinance for services rendered by such officials in civil, state and ordinance cases.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

885.

STATE AID—TUITION FUND—DEFICIENCY.

1. *The funds appropriated in house bill* 104 *O. L.*, 196, *are not available to pay application for state aid intended to make up deficiency in the tuition fund shown on September* 1, 1913, *for the year preceding, unless such deficiency existing on said date might lawfully be carried over into the current year then beginning so as to produce a deficiency for that year.*

2. *The funds so appropriated are available to pay state aid on application for advances on estimated deficiencies for the year ending August* 31, 1914, *providing the application was made within the time specified in section* 7596, *General Code.*

COLUMBUS, OHIO, April 24, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 21st, requesting my opinion upon the following questions:

"1. Are the funds appropriated in house bill No. 31, passed at the last session of the legislature, available to pay applications for state aid intended to make up deficiencies shown on September 1, 1913, for the year preceding?

"2. Are said funds available to pay state aid on application for advances on estimated deficiencies for year ending August 31, 1914, provided the applications were made within the time specified in section 7596, G. C.?

"3. If applications for state aid for estimated deficiencies are filed after January 1, 1914, for the year ending August 31, 1914, can money be advanced by the auditor of state to meet such deficiencies out of this appropriation?"

You enclose a copy of house bill No. 31, which is in full as follows:

A BILL.

"Relative to appropriating money for the assistance of weak school districts.

Be it enacted by the general assembly of the state of Ohio:

"Section 1. That there be and is hereby appropriated from any moneys raised or coming into the state treasury for the support of the common schools and not otherwise appropriated, *to assist in the maintenance of weak school districts,* the balance of former appropriations and the sum of eighty-five thousand dollars which shall be distributed by the auditor of state *in accordance with the provisions of the act passed April* 2, 1906, *as amended April* 18, 1913."

I am clearly of the opinion that the money appropriated by the above quoted act can be distributed by the auditor of state only in accordance with the act referred to as amended, *April* 18, 1913.

Reference here is to section 7596, as amended 103 O. L., 267. This amended section is as follows:

"Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

Your first question discloses on its face that applications for state aid, to which it relates, under section 7596, are made under the former provisions of the same section. I have heretofore advised you that the appropriation found in 103 O. L., 261, is available for extension of state aid, both upon the applications made under the old law, and upon applications made under the new law. The appropriation of 1914, however, differs in an essential respect from that referred to, and the difference is such as to lead to the opposite answer.

I am, therefore, of the opinion that the funds appropriated in house bill No. 31, are not available to pay applications for state aid intended to make up deficiencies shown on September 1, 1913, for the year preceding, unless such deficiencies existing on said date might lawfully be carried over into the current year then beginning so as to produce a deficiency for that year, such as that to which your second question relates. (A question not decided here.)

As already partially indicated the funds described in your letter are clearly available to pay state aid upon application for deficiencies for the year ending August 31, 1914, providing the applications were made within the time specified in section 7596, General Code. Such an application would be in strict accordance with the provisions of amended section 7596. Accordingly, your second question is to be answered in the affirmative.

Your third question involves consideration of the question as to whether or not a valid "application" for state aid may be made after the first of January of a current school year for the relief of the deficiency anticipated for that year.

As a general rule provisions as to time are regarded as directory merely. This is true when the law requires that a thing shall be done at all events, and stipulates a time within which it is to be done; the paramount intention being that the thing shall be done. Such intention must prevail over the subordinate intention that it shall be done within a given time.

In my judgment that rule governs the interpretation of section 7596. That section imposes upon the board of education a "duty" rather than a privilege. Its provision is that the board upon finding a deficit,

"*shall* * * * make affidavit to the county auditor, who *shall* send a certified statement of the facts to the state auditor."

I am aware that in the past the action of the board has been regarded as the exercise of a privilege and the auditor's statement to the auditor of state has been termed an "application." Notwithstanding the customary way of viewing such action, however, I believe the statute is mandatory with respect to the action of the board in securing state aid. That being the case, under the rule above stated, the requirement as to time is directory merely.

Accordingly, I am of the opinion that your third question is to be answered in the affirmative.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

886.

WORKMEN'S COMPENSATION ACT — EMPLOYER — EMPLOYE — WHO WITHIN COMPENSATION ACT.

Under the workmen's compensation act an employer who has a number of places maintained at widely separated places in the state, but all under the same management and in the same line of business, though each separately operated, in some of which five or more employes are employed, and in others fewer than five, is within the workmen's compensation act as a person employing five or more workmen in the same business.

COLUMBUS, OHIO, April 24, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission, Columbus, Ohio.*

DEAR SIR:—Under date of March 12, 1914, you make the following request for opinion:

> "We desire your opinion as to the application of the workmen's compensation act to an employer and his employes, where a number of places of employment are maintained at widely separated places within the state, all of which are under the same management but each of which is operated independently of all of the others, in some of which five or more employes are employed and in others of which fewer than five employes are employed.
>
> "There are a number of such employers in the state which maintain retail stores in the various cities of the state. All of these stores are under the same central management but each is conducted as a separate and distinct enterprise. Some of them employ more than five employes and others fewer than five.
>
> "The question is whether the employes of all of the branches of such a concern should be considered together in determining whether the compensation law applied to the employer or whether each such branch should be considered separately, and the status of the employer determined as to each one in accordance with the number of persons employed by it."

The workmen's compensation act (103 O. L., 72), provides that:

> "Every person, firm and private corporation, including any public service corporation, that has in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written."

shall constitute employers subject to the provisions of the act.

The terms "employe," "workman" and "operative," as used in the act, are construed to mean:

> "Every person in the service of any person, firm or private corporation, including any public service corporation, employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire * * * (see section 14)."

From the foregoing quotations it is clear that it was the manifest intention of the general assembly to render the act applicable to employers having in their

service five or more workmen or operatives in the same business, *or* in the same establishment. It is not essential that the employes be in the same establishment provided they are regularly working in the same business. In other words, the use of "or" is disjunctive, and therefore there are two contingencies stated in the quoted sections, viz.: those wherein the employes are in the same business, and those wherein they are in or about the same establishment.

Applying these principles to the concrete facts, I am of the opinion that if, as a matter of fact, the employer provide a number of places of employment, all of which are under his management and are used for the same purpose, the act applies to them in the aggregate and if a total of five or more workmen or operatives are employed in the combined establishments, then the business comes within the purview of the act. This question will have to be decided as a matter of fact, the ultimate conclusion being dependent upon the character of the branch stores. If they are but subsidiary, or rather agencies, it follows that they are essential parts of the business, provided they are all under the management and control of a single head and are all engaged in the same business. In this event, there is only one business, it being conducted in different places. I assume that when you say each is conducted as a separate and distinct enterprise you mean that the earnings of each branch store are kept separate from the earnings of the other branches. This would have no effect upon the business being an entity and the branches being but component parts thereof.

Hence, in conclusion, I desire to say that if there is but one concern, the employes of all of its branches should be considered together in order to determine whether the workmen's compensation act applies to the owner of such concern, and the status of the employer should be determined by the aggregate number of employes, and not as to each branch in accordance with the number of persons employed by it as a separate business.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

887.

PAYMENT INTO THE STATE INSURANCE FUND—HOW PAYMENT SHOULD BE MADE.

In paying into the state insurance fund, the premium is not paid until the same has reached the state insurance fund, which is under the custody of the treasurer of state; the industrial commission has no control whatever over the custody of this fund.

When the industrial commission fixes the amount of a premium, it should transmit to the employer a statement thereof with instructions to pay the treasurer of state, and at the same time transmit to the treasurer of state a duplicate. The treasurer of state, when payment is made should issue to the employer a receipt and at the same time transmit to the industrial commission a duplicate thereof.

COLUMBUS, OHIO, April 24, 1914.

HON. J. P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On February 25, 1914, you made the following requests for my opinion:

> "Under the provisions of the workmen's compensation act the treasurer of state is custodian of the state insurance fund.
>
> "Under the present conditions there is no uniformity or any definite understanding as to how the payment of premiums paid by individuals or corporations into this fund shall be made to the treasurer of state.
>
> "In order that the treasurer of state and the industrial commission may come to a definite and thorough understanding as to how this money shall be paid into the fund I would be pleased to have you interpret the law, giving me your opinion and interpretation as to the manner in which these payments should be made."

The following provisions of the act found in 103 O. L., 72, entitled, "An act to further define the powers, duties and jurisdiction of the state liability board of awards, etc.," may be quoted as the only statutory provisions pertinent to your inquiry.

Subsection 1 of section 7 is as follows:

> "It (the liability board of awards, now the industrial commission) shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the disbursements on account of injuries and death of employes thereof, and it shall also keep an account of the money received from each individual employer and the amount disbursed from the state insurance fund on account of injuries and death of the employes of such employer.
>
> "Section 8. * * * and should such actual premium, when ascertained as aforesaid exceed in amount the premium so paid by such employer at the beginning of such six months' period, such employer shall immediately upon being advised of the true amount of such premium due, forthwith pay to the treasurer of state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of said six months' period.
>
> "Section 9. The treasurer of state shall be custodian of the state insurance fund and all disbursements therefrom shall be paid by him upon

vouchers authorized by the state liability board of awards and signed by any two members of the board; or, such vouchers may bear the fac-similie signatures of the board members printed thereon, and the signature of the chief of the auditing department.

"Section 10. The treasurer of state is hereby authorized to deposit any portion of the state insurance fund not needed for immediate use, in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer; and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of authority herein given, shall be collected by him and placed to the credit of such fund.

"Section 12. The treasurer of state shall give a separate and additional bond in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund.

"Section 17. In the month of January in the years 1914 and 1915, the auditor of state shall draw his warrant on the treasurer of state, in favor of said treasurer as custodian of the state insurance fund, and for deposit to the credit of said fund, for a sum equal to one percentum of the amount of money expended by the state during the last preceding fiscal year, for the service of persons described in subdivision one of section fourteen hereof, which said sums are hereby appropriated and made available for such payments; and thereafter in the month of January of each year, such sums of money shall in like manner be paid into the state insurance fund as may be provided by law; and it shall be the duty of the state liability board of awards to communicate to the general assembly on the first day of each regular session thereof, an estimate of the aggregate amount of money necessary to be contributed by the state during the two years next ensuing as its proper portion of the state insurance fund.

"Section 19. In January of each year following the filing with him of the list mentioned in the last preceding section hereof, beginning with January, 1914, the auditor of each county shall issue his warrant in favor of the treasurer of state of Ohio on the county treasurer of his county, for the aggregate amount due from such county and from the taxing districts therein, to the state insurance fund, and the county treasurer shall pay the amount called for by such warrant from the county treasury, and the county auditor shall charge the amount so paid to the county itself and the several taxing districts therein as shown by such lists; and the treasurer of state shall immediately upon receiving such money, convert the same into the state insurance fund.

"Section 22. Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by the board; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of the board, and a *receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the state liability board of awards, which receipt or certificate attested by the seal of the board shall be prima facie evidence of the payment of such premiums.*

"Section 28. If any employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the state as plaintiff; and it shall be the duty of the state liability board of awards on the first Monday in February, 1914, and on the first Monday of each month thereafter, to certify to the attorney general of the state the names and residences of all employers known to the board to be in default for such payments for a longer period than five days, and the amount due from each such employer, and it shall then be the duty of the attorney general forthwith to bring, or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this act requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the treasurer of state for credit to the state insurance fund."

In many other sections of the act the words "pay into the state insurance fund" are used in one form or another. The difficulty, as I understand it, arises from an apparent conflict between section 22, above quoted, and the other provisions of the act, as to whether the payments shall be made in the first instance direct to the treasurer of state, or shall be made to the industrial commission, and by it transmitted to the treasurer of state. There can be no question whatever but that the payment must be made to the treasurer of state. The entire custody of the state insurance fund is vested in him and the industrial commission has no control whatever over the custody of this fund or any part of it and no premium due from an employer is paid or can be considered as paid until the amount due has actually been covered into the state insurance fund. This, of course, can only occur when such amount is actually paid to the treasurer of state.

As I interpret section 22 the implication of that section is not that the payment of premiums should be made to the industrial commission and by it transmitted to the treasurer of state; for it will be observed that said section provides, "* * * every employer * * * shall * * * pay into the state insurance fund the amount of premium * * * and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the state liability board of awards * * *." This receipt of certificate must certify that such premium has been paid into the *state insurance fund,* and the industrial commission would not be authorized to issue a receipt or certificate for a premium paid to it until it had caused such premium to be paid into the state insurance fund, that is to the treasurer of state as custodian of such fund; and the proper authority to certify that a certain payment has been covered into a certain fund is the custodian of the fund.

It seems to me that every employer making a payment of premium under the compensation act is entitled to a receipt from the treasurer of state as custodian of such funds. As to the method by which payments shall be transmitted to the treasurer of state I can do nothing more than to offer a suggestion.

This matter should be arranged by yourself and the industrial commission and a method adopted which will protect every one interested, which will provide that payments reach the state insurance fund at the earliest possible moment, and that the receipt to which the person making the payment is entitled shall be issued as soon as the payment is made.

While this is a special fund not controlled by the general laws, still it may be helpful to consider sections 248 and 303 of the General Code. These sections are as follows:

"Section 248. No payment into the state treasury shall discharge a liability to the state unless it is made on the certificate and draft of the auditor of state, and the certificate, together with the draft of the auditor in favor of the treasurer of state, delivered to the treasurer by the person paying, at the time of making payment. The treasurer of state shall number, file, and carefully preserve the certificate and draft, and on receiving payment, give such person duplicate receipts for the money so paid, specifying therein the liability on account of which payment is made, according to the certificate. One of the receipts shall be delivered to the auditor of state, and the liability of the person shall not cease until the delivery of such receipt.

"Section 303. If the law requires it, the treasurer of state shall give triplicate receipts, in other cases, duplicate receipts, to each person who pays money into the state treasury. One receipt shall be deposited with the auditor of state by the person paying the money into the treasury, and no such payment shall discharge a liability to the state until the receipt is deposited with the auditor of state."

Simply as a suggestion, and without any intention whatever of seeming to dictate to either the treasurer of state or the industrial commission as to the method which should be followed, I would suggest that when the industrial commission fixes the amount of premium to be paid by a given employer, that it transmit to such employer a statement of the amount he is to pay, with clear instructions to pay the designated amount directly to the treasurer of state and not to send the same to the industrial commission; and at the same time it transmit to the treasurer of state a duplicate of such statement, or advise him by a communication of some character so that he will know the amount of premium such employer is to pay and the date of the notification to such employer; and that the treasurer of state, when such payment is made by the employer, in compliance with such notice, issue to the employer a receipt for such payment, and at the same time transmit to the industrial commission a duplicate of such receipt, or a statement clearly indicating the amount of such payment, the employer from whom the amount was received, and the date upon which it was received. This receipt, I think, would be considered as the receipt or certificate provided for by the state liability board of awards; as the treasurer of state may be considered as treasurer of this board for the purpose of the custody of the state insurance fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

888.

ERECTION OF A NEW SCHOOL BUILDING—BOND ISSUE—TAXES AND TAXATION—EMERGENCY.

Where the inspector of workshops and factories prohibits the use of a schoolhouse until certain repairs are made, but the board of education decides to erect a new school building instead, and the electors vote for a $25,000 *bond issue for the construction thereof, but cannot levy sufficient taxes to pay bonds and maintain school, there would be an emergency within the meaning of section* 5649-4, *General Code, and the necessary taxes for the retirement of bonds required for the purpose might be levied outside of all limitations of law.*

COLUMBUS, OHIO, April 24, 1914.

HON. H. R. LOOMIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 17th, submitting for my opinion the following inquiry:

> "Several months ago this school district by the vote of the electors sold $25,000 of bonds to construct a new school house. This action was taken because of an order made by the state bureau of inspection. The order is as follows:
>
> "Order 252. Provide new floors for all study and class rooms; provide 16 square feet of floor space per pupil in primary grade and 18 square feet in grammer grade, 20 square feet per pupil in high school, and provide air space in accordance with the school code; place suitable supports under the floor of the vestibule and clean and repair boys closet; this order to be complied with within sixty days.
>
> "They find that they cannot levy a sufficient tax to pay these bonds and maintain their schools under the present limitations, and desire to know if by virtue of section 5649-4 and section 7630-1 they are authorized to exceed this levy."

Sections 7630-1 and 5649-4, General Code, were amended in 103 O. L., 527. They are in full as follows:

> "Section 7630-1. If a schoolhouse is wholly or partly destroyed by fire or other casualty, or if the use of any schoolhouse for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such schoolhouse or to construct a new schoolhouse for the proper accommodation of the schools of the district and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such boards of education shall annually levy a tax as provided by law.

"Section 5649-4. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

You do not quote enough of the order of the chief inspector of workshops and factories (or the bureau of inspection within the department of the state industrial commission, which in my opinion amounts to the same thing) to indicate whether or not it amounts to a prohibition of the use of the schoolhouse for its intended purpose unless the repairs to which the order relates are made as therein required. It is true, of course, that as to school house, sections 1031 et seq., General Code, apply. Among those provisions are the following:

"Section 1032. Upon inspection of such structure, the district inspector of workshops and factories shall file with the chief inspector a written report of the condition thereof. If it is found that necessary precautions for the prevention of fire or other disaster have not been taken or that means for the safe and speedy egress of persons assembled therein have not been provided, such report shall specify what appliances, additions or alterations are necessary therefor. Thereupon the chief inspector shall notify in writing the owner or persons having control of such structure of the necessary appliances, additions or alterations to be added to or made in such structure.

"Section 1033. If such structure is located in a municipality, a copy of such notice shall be mailed to the mayor thereof, otherwise such notice shall be mailed to the prosecuting attorney of such county. Thereupon the mayor with the aid of the police or the prosecuting attorney with the aid of the sheriff, as the case may be, shall prevent the use of such structure for public assemblage until the appliances, additions or alterations required by such notice have been added to or made in such structure.

"Section 1037. Whoever, being a person, firm or corporation or member of a board, and being the owner or in control of any building mentioned in section ten hundred and thirty-one of this chapter, uses or permits the use of such building in violation of any order prohibiting its use issued as provided by law, or fails to comply with an order so issued relating to the change, improvement or repair of such building shall be fined not less than ten dollars, nor more than one hundred dollars, and each day that such use or failure continues shall constitute a separate offense."

Upon consideration of these sections I am of the opinion that the mere service of an order, such as that which you quote, upon the board of education amounts to a prohibition of the use of the building for its intended purpose, unless the things commanded thereby are done.

The order does not require the construction of a new schoolhouse. However, section 7630-1, in my opinion, affords its benefits to the board of education in case the board in the exercise of a sound discretion determines that for the proper accommodation of the schools of a district, the construction of a new schoolhouse is to be preferred to the rebuilding or repairing of a schoolhouse the use of which is thus prohibited. In other words, if the chief inspector of workshops and factories, by the service of an order such as that set forth in your letter, prohibits the use of a building unless certain repairs are made, and the board of education is of the opinion that it would be better to build a new school building than

merely to repair the old building; and if the vote of the electors, as provided in section 7630-1 is taken; and if all of such proceedings would be futile to accomplish the intended purpose because of the limitations placed upon the taxing power of the board of education, then, and in that event there would be an emergency within the meaning of section 5649-4, and the necessary taxes for the retirement of bonds required for the purpose might be levied outside of all limitations of the law.

I am, therefore, of the opinion that under the circumstances mentioned by you, a levy, may be made outside of all limitations of the law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

889.

CONSTRUCTION OF SECTION 9716, GENERAL CODE.

Section 9716, General Code, applies to banks and corporations prior to the enactment of the Thomas banking act.

COLUMBUS, OHIO, April 24, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your favor of March 2, 1914, asking opinion of me in which you say:

> "Section 9716, G. C., provides that an incorporated bank before commencing business is required to have its capital stock fully subscribed and at least 50 per cent. paid thereon. Section 5495 et seq., requires each domestic corporaton for profit organized under the laws of this state to file an annual report with this commission during the month of May and pay a fee upon its capital stock subscribed or issued and outstanding. An investigation of the annual reports filed under this section by some of the incorporated banks discloses a number of companies that fail to show the capital fully subscribed. The commission, therefore, desires to submit for your consideration, and respectfully requests your opinion upon the following questions:
>
> "First. Does section 9716 above referred to apply to incorporated banks incorporated prior to the enactment of said statute?
>
> "Second. If said statute does apply to said banks, on what date are such banks required to show full compliance with said section.
>
> "Third. If said section does apply to said corporations, is it not the duty of the tax commission to certify such corporations to the auditor and treasurer of state for the levy and collection of the corporation fee upon the amount erroneously omitted from the annual report for the various years?"

The determination of the questions presented by you depends upon the construction of certain sections of the Thomas banking act, which act has, in part, been carried into the General Code as sections 9702 to 9797, inclusive.

Section 9702 et seq., General Code, provides for the incorporation and organization of banks in a manner, which though exclusive to banks, is quite similar to the method provided by statute for the organization of corporations generally.

Section 9711, General Code, provides that as soon as the capital stock of such corporation is fully subscribed, and 10 per cent. thereof paid in, the subscribers of the articles of incorporation, or a majority thereof shall certify such fact in writing to the secretary of state, and thereupon give notice to the stockholders to meet for the purpose of choosing the directors of the bank.

Section 9716, G. C., provides:

> "The entire capital stock of such corporation shall be subscribed and at least fifty per cent. of each share paid in before it may be authorized to commence business. The remainder of its capital stock shall be paid in monthly installments of at least ten per cent. each on the whole amount of the capital, payable at the end of each succeeding month from the time it is authorized by the superintendent of banks to commence business. The payment of each installment shall be certified under oath to the superintendent of banks by the president, secretary, treasurer or cashier of such corporation."

The provisions of this section requiring the capital stock of banks within its provisions to be fully subscribed is a condition precedent to the right and qualification of such banks to transact business, and looking to the terms of this section alone, the nature of the requirement as well as ordinary rules of construction leads to the view that the provisions of the section are wholly prospective and apply only to banks incorporated under the act of which the section is a part. The section is not to be considered as prescribing a qualification with respect to the right of previously organized banks to do business, nor as effecting a disqualification of such previously organized banks which have not caused all of their stock to be subscribed. On the contrary, the terms of section 9739, G. C., forbid the application of section 9716 to previously organized banks with respect to their right and qualification to do business.

Section 9739 provides:

> "Banks * * * heretofore incorporated under any law of this state, may continue business and the exercise of powers they now have without prejudice to any rights acquired under the acts under which they were incorporated; and there shall be saved to such associations and corporations all the rights, privileges and powers heretofore conferred upon them."

Pertinent to the consideration of the questions at hand, I note certain of the provisions of sections 9741, 9742 and 9743, General Code. Section 9741, General Code, provides:

> "Banks * * * heretofore incorporated in this state which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred, by signifying such election and declaration under their seal, attested by the signature of the president and secretary, to the secretary of state and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all the privileges and powers conferred by this chapter, and from that time such association or corporation shall be governed by its provisions."

Section 9742 provides that the election and declaration provided for in section 9741 shall be made only when authorized by a vote of at least two-thirds of the capital stock at a meeting of the stockholders, notice of which meeting has been given as therein provided, and further provides as follows:

> "But after April 1, 1910, every such corporation or association in all respects must conform its business and transactions to the provisions of this chapter."

Section 9793, G. C., provides:

> "Every banking company * * * except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section 9704, shall be required to increase its capital stock in order to conform to the provisions of such section."

Speaking with reference to the proper construction of sections 9739, 9742 and 9793, General Code, with respect to banks organized before the enactment of the Thomas act, the court (Bigger, J.) in the case of American Trust & Savings Bank Co. vs. Baxter, Franklin Common Pleas No. 63172, says:

> "The legislature had in mind the distinction between the rights conferred by the charters of these institutions to conduct a banking business, and the right of the state to regulate the exercise of that right. It is only by observing this distinction that we can harmonize these apparently conflicting provisions, which, in my opinion, are not conflicting when rightly interpreted. It is impossible without reserving this as a fundamental distinction to harmonize the provisions of section 35 (9739, G. C.) with the language of section 91 (9793, G. C.), that, 'every such banking institution whether now existing or chartered or incorporated, or which may hereafter become incorporated, shall be subject to the provisions of this act.'"

Keeping in mind the distinction above referred to, it will be noted that section 9716 goes to the right of the banking companies within its provisions to transact business at all by force of its own terms, and those of section 9739 can apply only to banking companies organized under the act of which its provisions are a part.

Sections 9742 and 9793 make provisions looking at the regulation of the business of banking companies whether they have been organized and authorized to transact business under the provisions of the Thomas act or under the provisions of prior legislation.

My conclusion, therefore, is that section 9716 does not apply to banks incorporated and organized prior to the enactment of this section. This conclusion with respect to the first question presented by you, answers your second and third questions for the reason that they are dependent upon the application of section 9716 to previously organized banks, and as before noted, my conclusion is that the section does not so apply.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

890.

CANAL LAND DEPARTMENT—RENEWING LEASES ALONG THE CANAL IN THE CITY OF CINCINNATI.

The superintendent of public works would have the right to extend or renew leases for the use of surplus water, which are expiring along that part of the canal located in Cincinnati, which is under lease to that city, until at least a conduit will be built to take care of the water which would otherwise flow through the canal.

COLUMBUS, OHIO, April 27, 1914.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of November 10, 1913, you call my attention to the provisions of the act of 102 Ohio Laws, 168, wherein authority was granted to lease to the city of Cincinnati a certain part of the canal in said city.

You then state:

> "The department of public works is placed in the position of supplying water which is being used by parties who have no longer a contract for the same. It would be a hardship to the said concerns to cut off their supply of water and it would appear to be unnecessary to do so, since enough water is being carried down the canal to supply them.
>
> "It seems to me that it is clear that the city of Cincinnati has no rights or interests in the disposal of the water, since one of the conditions of the lease is that the city shall build suitable works for the conveying of the water for the purposes of its use and to enable the state fully to carry out and discharge its obligations. The city of Cincinnati thus far has done nothing toward carrying out these conditions. It has furnished no bond as security that the conditions stated in the act will be performed. The state has maintained the banks of that section of the canal and repaired them at various times and has kept up a patrol upon them through the city the same as it always has done, and still maintains said patrol at considerable expense.
>
> "The auditor of the state of Ohio requires contracts as the basis for collections for water rentals. As stated above, several contracts have expired but the parties still want to use the water.
>
> "Has this department the right to make provisional contracts which will run for so long a time as the city of Cincinnati does not fulfill the conditions of its contracts with the state of Ohio?
>
> "These contracts would be provisional in this sense, that at any time the city of Cincinnati fully complies with all the terms of the act that the said contracts shall cease."

You state that enough water is being carried down the canal to supply water to the water users who had leases at the time the act in question was passed, but whose leases have now expired.

Section 1 of the act of 102 Ohio Laws 168, provides:

> "Permission shall be given to the city of Cincinnati, in the manner hereinafter provided, *to enter upon, improve and occupy forever, as a public street or boulevard, and for sewerage, conduit and if desired for subway*

purposes, all of that part of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in said city, including the width thereof, as owned or held by the state, but such permission shall be granted subject to all outstanding rights or claims, if any, with which it may conflict, and upon the further terms and conditions of this act."

Section 2 thereof reads:

"Such permission shall be granted upon the further condition that said city, in the uses aforesaid of all or any portion herein mentioned of such canal, *shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes.* Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general for the faithful performance of the work.

"And such permission shall be granted upon the further condition that said city shall adopt and construct appropriate works for the purposes of supplying water to the lessee users of said water along that portion of the canal to be abandoned, *in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during* the period of construction of a street or subway or of appropriate works for the purposes of supplying water to the lessee users of said water, as herein provided said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except insofar as such cessation or diminution of such supply of water may be absolutely necessary."

By virtue of section 5 of the act, the lease is to be entered into for a term of ninety-nine years, renewable forever. The city of Cincinnati has accepted under this act and a lease was executed August 29, 1912.

The provisions of sections one and two of the act are contained in the terms of the lease.

The city of Cincinnati has not as yet constructed the works provided for in section two of the act and the state of Ohio is still conveying its water through the original canal. It must continue to do this until the works for the discharge of the water as provided in the first paragraph of section two are constructed.

In no part of this act is the ciy of Cincinnati granted the use of the water, or the right to lease water. Section one of the act states the purpose of the grant and the extent of the interest to be conveyed, in these words:

"as a public street or boulevard, and for sewerage, conduit and if desired for subway purposes."

Nothing is said herein about the use or lease of the waters of the canal.

In the first paragraph of section two of the act, the city is required to construct suitable works for the discharge of the water of said canal,

> "so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes."

This provision shows that it was intended that the use of the water for mechanical or commercial purposes was not to be injured or destroyed. It was to be preserved. This part of section two refers to the remaining part of the canal, that is, the part which is not leased.

In the second paragraph of section two, the city is required to build a conduit for the purpose of supplying water to the users thereof along that portion of the canal that is leased, in order to permit the state to fully carry out its obligations under existing leases for water.

This conduit is to be constructed so that the state may carry out these contracts. No obligation is placed upon the city to fulfill these contracts. The state furnishes the water and has reserved the right of an easement over the canal land for the purpose of carrying the water. The contracts to be carried out are those subsisting and in force at the time the act became effective.

This limitation as to contracts then subsisting, was to prevent the state from increasing the water leases between the time of the passage of the act and the acceptance by the city, so as to require a greater conduit than would be necessary to supply the water contracted for at the time the act became effecive. In other words, this is a limitation upon the size of the conduit. It is not a limitation upon the state as to its right to use the water in such manner as it sees fit, provided the burden of the city is not increased in its duty to furnish a conduit.

Some of the leases along this part of the canal are for definite terms, others for ninety-nine years, renewable forever. In order to fulfill these long term leases a certain amount of water must be supplied. These long term leases are usually for water power. The water is not actually consumed but is returned to the canal. It can be and is used by different concerns along the route of the canal, without increasing the supply, and without increasing, to any extent, the burden upon the city of Cincinnati as to the construction of a conduit.

There is nothing in this act to show that the state was to be denied the right to lease the water passing through this part of the canal or through the conduit, if such leases do not in any way increase the obligations of the city. The city does not furnish any water. It is required to provide a conduit for carrying the water. The state has in effect reserved an easement in this part of the canal for this purpose. The use of the canal land by the state for this purpose does not and need not interfere with the rights and privileges granted to the city of Cincinnati by section one of the act, to wit, "to enter upon, improve and occupy" said land, "as a public street or boulevard, and for sewerage, conduit, and if desired for subway purposes."

These uses may be enjoyed and the state may also have a means of carrying its water. In fact the city is required, by the terms of the act, to provide a means of carrying this water.

If it were to be held that the state could not renew leases which have expired, this situation would present itself.

The state would be required to furnish water to a certain number of water users, growing fewer in number from time to time as other leases expired, who have long term and perpetual leases, with a constantly decreasing revenue, and without benefit to any one, not even to the city.

This same water could be used along the route for many commercial and mechanical purposes. Yet, by such a holding, no one can use or lease the water and this valuable use must go as an entire loss.

It is to be presumed that the legislature knew of these long time leases, which it has required the state to carry out and fulfill. It is not to be presumed that the legislature intended such a waste of water and such a loss of revenue.

The state must continue to furnish a certain amount of water in order to carry out its contracts. To deny it the right to relet this water at the expiration of a lease, would be to require the state to furnish water to these long term water users at an actual loss.

Such an intent is not to be presumed. It should be expressed in clear and unambiguous terms. I find nothing in the act which requires or calls for such a restriction.

The purpose of section two in referring to existing contracts is to determine the size of the conduit to be constructed by the city. It is not a limitation upon the use of the water by the state or its lessees.

As a matter of fact the city of Cincinnati has not yet constructed a conduit or an outlet for the waters of the canal.

To permit the state to renew the leases upon the terms you suggest, that is, that such renewals shall terminate upon the construction of the conduit by the city, and appropriate works for the discharge of the water, would not in any way interfere with the rights of the city under its lease or increase its obligations.

Section 431, General Code, as amended in 103 Ohio, 122, authorizes the superintendent of public works to lease surplus water. This section provides in part:

> "The superintendent of public works may lease surplus water power on any of the public works, under such rules and regulations as may be prescribed by him."

I am of opinion, therefore, that the superintendent of public works may renew leases for the use of surplus water along the part of the canal leased to the city of Cincinnati, subject to termination when the city constructs the works provided for in section two of the act of 102 Ohio Laws, 168. Such leases should be entered into for definite terms, subject to termination as above stated.

The right of the state to renew leases or to continue renewed leases as above granted, after the construction of such works is not herein passed upon.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

891.

CONTRACTS LIMITED BY 1913 APPROPRIATION CANNOT BE CONTINUED UNDER 1914 APPROPRIATION.

Where the superintendent of public works entered into a contract for the building of a proposed wall specifying that the amount of work covered in this contract is limited by the 1913 *appropriation, work cannot be done under this old contract to be paid out of the* 1914 *appropriation.*

COLUMBUS, OHIO, April 27, 1914.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Your favor of February 21, 1914, is received in which you inquire:

> "An appropriation has been made by the recent legislature for the continuation of the work of building the revetment walls at Lake St. Marys, also at Indian Lake.
>
> "The question has been raised whether it will be necessary to re-advertise the new work and relet it. I would be greatly obliged to you if you would give me an opinion upon that question."

Upon inquiry at your office I am informed that the original contracts for each of these improvements were let on competitive bids after advertisement. In each of the published notices to contractors, the length of the proposed wall was given, with the following restrictions:

> "Length of proposed wall _____ feet, but the amount of work covered in this contract is limited by the 1913 appropriation."

The length of the wall at St. Marys, Lake was stated as 8,000 feet and that at Indian Lake at 7,200 feet.

The bids were received by virtue of this notice and contracts awarded on said bids. The contracts provided that the work was to be "the same as described in the advertisement and specifications."

The contracts were in effect limited to the amount of the 1913 appropriation. This fund has evidently been exhausted and that terminates the original contract.

A new appropriation has been secured for the year 1914. This does not extend the term of the old contract. New contracts will be required and these will be subject to the provisions of section 428, General Code, as amended in 103 Ohio Laws, 121.

This section provides for competitive bidding and has heretofore been construed by this department in opinions to you.

The old contracts do not cover the appropriations for 1914, and they cannot be extended beyond the appropriation of 1913.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

893.

MUNICIPAL CORPORATION—SINKING FUND TRUSTEES—POWERS—CERTIFICATES OF INDEBTEDNESS—RESERVE FUND—INTEREST—ASSESSMENT.

1. *Sinking fund trustees cannot invest their reserve fund in certificates of indebtedness issued under authority of section* 3913, *General Code; such indebtedness should be taken care of by the city auditor and city treasurer as provided in section* 3913, *General Code.*

2. *Sinking fund trustees cannot invest reserve fund in certificates of indebtedness authorized under section* 3915; *the city auditor and city treasurer should take care of such indebtedness.*

3. *If a certificate of indebtedness is sold in anticipation of collection of special assessments and at maturity is not presented for payment, there is no authority for the sinking fund trustees to pay interest thereon.*

4. *If certificates of indebtedness are presented to the sinking fund trustees and endorsed by the secretary "not paid for want of funds," and if the place of presentment fixed in the notes is the office of the sinking fund trustees, then interest would be properly chargeable after maturity. The endorsement or refusal to pay is not essential in order to constitute a foundation for right to receive further interest. Furthermore, the liability for interest after maturity would continue until actual notice was given to the holder of obligation that the obligation would be paid when presented.*

5. *If the sinking fund trustees have sufficient funds on hand to redeem obligations at maturity and did not do so when the same were presented for payment, in accordance with the terms of the obligation on the note, then if they exercise due care and reasonable judgment, it would be a complete defense to an action brought against them to recover the amount which the municipality would be chargeable for as interest. Under no circumstances would the surety on the official bond of these officers be liable.*

6. *The sinking fund trustees not having funds on hand to pay a given obligation at maturity may extend the indebtedness by refunding it under authority of section* 4520, *General Code, or they may apply to council; their action in either event is discretionary.*

7. *In the event that special assessments are enjoined, the general sinking fund may be drawn upon to meet maturing special assessment bonds, if the bonds are the general obligation of a municipality.*

COLUMBUS, OHIO, April 27, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 15, 1913, requesting my opinion upon seven questions as follows:

"1. May sinking fund trustees invest their reserve funds in certificates of indebtedness issued under authority of section 3913, G. C., or should such indebtedness be taken care of by the city auditor and city treasurer?

"2. May said trustees invest their reserve funds in certificates of indebtedness authorized under section 3915, G. C., or should such indebtedness be taken care of by the city auditor and city treasurer?

"3. If certificates of indebtedness are sold in anticipation of the collection of special assessments and the same are not redeemed at maturity

through failure of the holders thereof to present same for payment, may the sinking fund trustees legally continue to pay interest on such obligations?

"4. If such last mentioned obligations are presented to the sinking fund trustees and endorsed by their secretary 'not paid for want of funds' or some like endorsement, will interest continue to run until notice be given by the trustees? Must such endorsement be made on the obligation or is it sufficient for the holder to show by proof that such demand was made by calling upon the secretary or a member of the board of trustees?

"5. If such trustees or their secretary have sufficient funds on hand to redeem such obligations at maturity and do not do so, would they be liable for the needless expenditure for interest on such obligations and would such liability extend to their bonds? If such obligations bear 5 per cent. interest and the holder of a large portion thereof is the depositary bank selected by said trustees (which pays 2½ per cent. interest on said deposits) would there be any liability on the part of the holder of said obligations, or the trustees and their bondsmen, for the needless expenditure for interest paid after maturity?

"6. Is it the duty of the sinking fund trustees to apply to council for a refund issue in the event that they have not sufficient funds to cancel debt at maturity? If trustees assume the duty of caring for certificates of indebtedness issued under the authority of section 3915, would they be liable for the misapplication of said funds?

"7. In the event that special assessments are enjoined, may the general sinking fund be temporarily drawn upon to meet maturing special assessment bonds?"

The sections of the General Code involved in your several inquiries are as follows:

"Sec. 3913. In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. *The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity.* These certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., shall not be sold for less than par with accrued interest.

"Sec. 3915. Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments. Such notes shall be signed and sealed as municipal bonds are signed and sealed. They shall bear interest at a rate not to exceed six per cent. per annum and be due and payable not later than five years from the date of issue. The notes shall not exceed in amount the estimated cost of the improvement, and shall recite upon their face the purpose for which they were issued. *All assessments collected for the improvement, and all unexpended balances remaining in the fund after the cost and expenses of the improvement have been paid, shall be applied to the payment of the notes and the interest thereon until both are fully provided for.*

"Sec. 4506. Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other

taxes authorized by law, levy and collect annually a tax upon the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of *all bonds and funded debts* and for the payment of all judgments final except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever.

"Sec. 4512. Upon demand of the board, the city auditor or village clerk shall report to it balances belonging to the city or village, to the credit of the sinking fund, interest accounts, or for any bonds issued for or by the corporation, and for officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall elect.

"Sec. 4514. The trustees of the sinking fund shall invest all moneys received by them in *bonds* of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner.

"Sec. 4517. The trustees of the sinking fund shall have charge of and provide for the payment of *all bonds* issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession.

"Sec. 3922. When a municipal corporation issues its *bonds,* it shall first offer them at par and accrued interest to the *trustees of the sinking fund,* in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. * * *

Sec. 3932. Premiums and accrued interest received by the corporation from a sale of its *bonds* shall be transferred to the *trustees of the sinking fund* to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others.

"Sec. 3804. When any unexpended balance remaining in a fund created by an issue of *bonds,* the whole or part of which are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the *trustees of the sinking fund* to be applied in the payment of the bonds.

"Sec. 3919. Bonds, notes or certificates of indebtedness issued by a municipal corporation shall be signed by the mayor and by the auditor, or the clerk thereof, and be sealed with the seal of the corporation. When issued for street improvements, they shall have the name of the street or portion thereof so improved, and for which they were issued, legibly written or printed upon them."

I have considered all of these sections in connection with your several questions and I am clearly of the opinion, in answer to your first question, that trustees of

the sinking fund could not invest their reserve funds in certificates of indebtedness issued under authority of section 3913, General Code; their investment must be in *bonds*. Hence, evidence of indebtedness under section 3913, General Code, are neither bonds nor evidence of a funded indebtedness. They are short time notes and the sinking fund trustees have no right whatever to invest their funds in them. Such indebtedness should be taken care of by the city auditor and the city treasurer in the manner provided by the above italicized portion of section 3913, General Code.

Answering your second question I am of the opinion that the trustees of the sinking fund could not lawfully invest their reserve funds in certificates of indebtedness authorized by section 3915, General Code.

This question is somewhat closer than your first question in that notes issued under section 3915 do represent, in a way, a funded indebtedness Nevertheless, they are not bonds and section 3915, General Code, on its face, provides the proper method of taking care of such notes. The provision is that the assessments and unexpended balances remaining in the improvement fund shall be applied to the payment of the notes and the interest thereon. If it were intended that the sinking fund trustees should have charge of this matter a provision like those found in some of the other sections above cited would have been necessary to accomplish such a result. That is, it would have been provided that the balance remaining in the improvement fund should be paid over to the sinking fund trustees as is provided in section 3804 and section 3932, General Code, with respect to bonds, and it would have been provided that the assessments should be paid to the sinking fund trustees as is provided in section 3512 with respect to bonds.

Section 4506, General Code, therefore, although it speaks of "bonds and funded debts" does not have the force of vesting in the sinking fund trustees the management of all the debts of the corporation; when notes are issued under sections 3913 and 3915, General Code, such notes must be provided for and paid as these sections direct and not through the agency of the sinking fund trustees.

Nor may the sinking fund trustees invest their funds in such notes as they would invest in bonds of the United States or of another municipal corporation as provided in section 4314. As already pointed out, this section limits the trustees' power of investment to bonds only.

In a way, my answers to your first two questions obviate the necessity of my answering your third question. The payment of interest on certificates of indebtedness sold in anticipation of the collection of special assessments is not a function in the sinking fund trustees. However, I assume in asking your third, fourth and fifth questions that you have in mind, a case wherein sinking fund trustees have actually undertaken to provide for the retirement of special assessment notes, possibly under the supposed authority of an ordinance directing them to do so.

In connection with this question I assume that the notes to which you refer bear on their face a statement to the effect that they are payable at the office of the sinking fund trustees. Even if no such statement did appear on the face of the notes, it would be clear that in order to be entitled to payment of them at maturity their holders would have to present them at the proper municipal office for payment, as the municipal authorities would have no means of knowing who might be the holders of the notes at their maturity.

It is clear, then, that presentation for payment at maturity is a condition precedent to the foundation of a valid claim against the municipality on the part of the holder of such an obligation, and I am further of the opinion that such presentation is necessary in order to lay the foundation for a valid claim of interest after the date of maturity. Under the section, as above quoted, the notes of a municipality are required to stipulate the rate of interest payable thereon, and it is

the settled law of this state that where there is a general stipulation respecting the rate of interest, the rate stipulated controls that chargeable after maturity as well as that payable before maturity. Hydraulic Co. vs. Chatfield, 38 O. S., 577.

However, the fact that the contract fixes the rate after maturity as well as prior to maturity does not, in my judgment, change the character of the interest payable after maturity. In its essential nature the right to receive such interest is conditioned upon default in the payment of the principal when due; therefore, if the holders of the securities in question fail to present them for payment when due the municipality is not liable for any further interest thereon, and any city officer paying out public funds in his hands by way of such interest is guilty of a misapplication of such funds; he has made a gift of the public money to one who has no claim whatsoever against the corporation.

Answering your fourth question, I am of the opinion that if the obligations are presented to the sinking fund trustees and indorsed by their secretary as you state, and if the place of presentment fixed in the notes is the office of the sinking fund trustees, or if by some other course of conduct the municipal government as a whole has estopped itself from claiming that presentation to the sinking fund trustees is not a proper presentation, then interest would be properly chargeable after maturity and when earned might be lawfully paid. All these conditions, however, should be present in order to support the answer which I have given. That is to say, unless by recital on the face of the notes or otherwise the municipal corporation has notified the holder of the obligation to present it for payment at the office of the sinking fund trustees, such presentation and indorsement would not constitute a proper presentation for payment.

Further answering your fourth question, I beg to state that in my opinion the indorsement of refusal to pay is not essential in order to constitute a foundation for the right to receive further interest; such an indorsement not being provided for by statute, as in the case of county warrants, is evidential merely, and other proof would be receivable to show presentation and non-payment.

I am further of the opinion in answer to your fourth question that under the circumstances as I have stated them, the liability for interest after maturity would continue until actual notice had been given to the holder of the obligation by the sinking fund trustees that the obligation would be paid when presented. The mere publication of notice in some newspaper of general circulation in the municipality would be insufficient, there being no statute on the subject.

Answering the first part of your fifth question I am of the opinion that if the trustees of the sinking fund had sufficient funds on hand to redeem such obligations at maturity and did not do so, but under the circumstances detailed in my answer to your fourth question, so acted as to make the municipality liable for further interest, they are themselves liable to the municipality on this account. You will note that I am still assuming that the notes have, by ordinance or by recitals on their face, been made payable at the office of the sinking fund trustees. Clearly without such an ordinance or without such recital the action of the sinking fund trustees would have no effect whatever, as I have already stated. It is, therefore, a condition of my present answer that the sinking fund trustees actually have authority in the premises to provide for the payment of the notes—an authority which they do not possess under the statutes themselves as interpreted in my answer to your second question. In the event that the trustees had no authority to refuse payment and so to bind the municipality, then the officer paying interest after the maturity of the obligation on account of the erroneous presentation to the sinking fund trustees and their erroneous refusal to pay, would be the person liable; for he could not shield himself behind his void act of the sinking fund trustees nor could the holder of the security found a valid claim for interest upon

such a nugatory act. The officer paying interest under these circumstances would be liable for misapplication of public funds on the theory already stated in answer to your third question.

Further, with respect to the liability of the trustees as inquired about in the first part of your fifth question, I may say that it is founded upon their failure to exercise due care in the management of the public affairs entrusted to them. It differs from the liability on account of the misapplication of public funds which has already been discussed in this opinion upon another assumption of fact, in that the exercise of due care and reasonable judgment on the part of the trustees would constitute a complete defense to an action brought to charge them therewith; so that the mere fact that their action which resulted in an imposition of a needless liability upon the municipality may have been erroneous, is not sufficient to make them liable. See Attorney General's Opinions, 1910-1911, page 431. Dillon on Municipal Corporations, 5th Ed. Vol. 1, Section 433.

Coming now to that portion of the first part of your fifth question which relates to the liability of the official bonds of the trustees, I am clearly of the opinion that under no circumstances and in no event would the sureties on the official bonds of these officers be liable on account of anything concerning which you inquire. As stated in the answer to your second question the statutes do not authorize nor require the trustees of the sinking fund to have anything to do with the payment of notes issued by a municipal corporation either in anticipation of the returns from a semi-annual installment of taxes or in anticipation of the collection of special assessments. It is well established in Ohio, as well as elsewhere, that whatever may be the right of the municipal council, by fixing a place of payment and by other provisions in an ordinance to fasten upon the sinking fund trustees the extra-statutory duty of providing for the payment of obligations of this kind, a duty so created is not one for the breach of which the official bond of the officer is liable. The distinction is pointed out in State vs. Griffith, 74 O. S., 80. In that case a board of education, by a rule, had attempted to confer authority upon its clerk to receive and become the custodian of funds arising from tuition fees paid by pupils non-resident of the district—a duty naturally devolving upon the treasurer of the district, just as in the question asked by you, the duty to provide for the payment of the obligations of the municipality under the statute naturally devolves upon the auditor and treasurer of the municipality instead of upon the sinking fund trustees. The clerk in the case cited defaulted and action was brought on his bond. The syllabus holds as follows:

> "A public officer is personally, and may even be criminally, liable for malfeasance in office; but the sureties on his official bond are answerable only within the letter of their contract for the unfaithful performance of his official duties and not for dereliction outside of the limits of his official duties. State vs. Carter, 67 O. S., 422, distinguished."

In State vs. Carter, it had been held that a clerk of a municipal corporation receiving payment of sewer assessments under an ordinance providing for the assessment, was criminally liable in a prosecution for embezzlement upon a default by him whether the council had the right to authorize or require to handle the money or not, and from the language in the case of State vs. Griffith it is at least inferable that *individual* civil liability might have arisen under the facts of that case, but it is such individual liability which the court in the syllabus distinguishes from liability on the official bond. On this point Davis, J., at page 94 in State vs. Griffith says:

> "But it is insisted that the receipt of these moneys by the clerk was *colore officii,* if not *virtute officii* and that for acts * * * *colore officii* sureties are held

responsible in this state. While there has been confusion of terms in some cases, and possibly a confusion of classification in some instances; yet this conclusion results from the cases in this state and elsewhere, that there are three classes of cases, against sureties on official bonds; one class in which the officer acts, *virtute officii,* within his official authority but unfaithful or improperly exercises his official duties, and another class in which the officer while acting *colore officii,* with pretense of official authority, is guilty of trespass upon persons or property. Of this class illustrations are found in Story vs. Jennings, 4 Ohio St., 418, and Drolesbaugh vs. Hill, 64 Ohio St., 257. In both of the classes already named the sureties are generally held to be liable. The third class is of those cases in which the officer has been guilty of misconduct which is wholly outside of the line of his official duty as defined by law. In this class of cases the sureties have generally, and we believe upon the soundest of reasoning, been held not to be liable. We refer this case to the third class and cite as an illustration the following cases: State vs. Medary, 17 Ohio, 554; Wilson vs. State, 67 Kan., 44; People vs. Pennock, 60 N. Y., 421; State vs. Bonner, 72 Mo., 387; Orton vs. City of Lincoln, 156 Ill., 499; State vs. Moores, 56 Neb., 82; County of San Luis Obispo vs. Farnum, 108 Cal., 562."

I am, therefore, of the opinion, that in any event there will be no liability on the official bond of the trustees of the sinking fund under the circumstances mentioned by you.

Another point must be taken into consideration in answering the first part of your fifth question. As already observed, the sinking fund trustees are not by law charged with the duty of providing for the payment of special assessment notes. This is but another way of saying that the trustees of the general sinking fund levies are not available for the payment of such notes. Primarily, the revenues properly appropriated for this purpose are the special assessments themselves, as the section relating to their issuance, above quoted, provides. Should there be any shrinkage in the revenues from this source then the difference is a general unfunded obligation of the municipality like any other claim against it; and such an obligation or claim cannot be paid out of the general moneys of the sinking fund in the hands of the trustees except after judgment against the municipality.

So that the question as to whether or not the sinking fund trustees have "sufficient funds on hand," as stated by you, is not to be determined by ascertaining whether or not at the time of the presentation of the obligations the sinking fund trustees had general sinking fund moneys in their possession sufficient to pay them, but it must be ascertained whether or not there were assessment moneys in the possession of the trustees sufficient for that purpose.

My complete answer, then, to the first part of your fifth question may be stated as follows:

If the trustees of the sinking fund fail to redeem special assessment notes presented to it for redemption at maturity, such failure imposes no liability upon them unless by reason of the ordinance issuing the notes, or recitals on the face of the notes, the latter were properly presented to the sinking fund trustees, so that the act of the trustees became the act of the municipality, binding upon them; but in the event that these conditions are satisfied, then if the sinking fund trustees have in possession sufficient funds *arising from the assessment,* and negligently, carelessly, willfully and without extenuating circumstances, fail to pay the obligations as they are presented to them, the result of their failure will be not only to make the municipality, as such, liable for further interest (which would be the case even though the non-action of the trustees was in good faith), but also to render the trustees *personally* liable for the damage suffered by the municipality, as such; but there would be no liability on their official bonds.

Answering the second part of your fifth question, I am of the opinion that the fact that the holder of the obligation is a bank which has the funds belonging to the sinking fund trustees on deposit at 2½ per cent. interest might become material as affecting the question of measure of damages; but it cannot affect the pure question of liability. Otherwise, the second part of this question is to be answered in the same manner as the first part has been answered.

I have assumed that the first part of your sixth question relates to the general duties of the sinking fund trustees, and has no special reference to the matters elsewhere inquired about, viz., those concerning the handling of special assessment notes by the sinking fund trustees. That is to say, I assume that the debt concerning which the question arises is one properly payable through the sinking fund trustees.

If the sinking fund trustees have not sufficient funds on hand to pay a given obligation at maturity, they may extend the indebtedness by refunding it under authority of section 4520, General Code, which provides as follows:

> "For the purpose of refunding, renewing or extending the bonded debt at a lower rate of interest, or for buying the fee simple of real estate held by the corporation under special leases wherein is secured to the corporation the option to buy the fee simple at a fixed price, and where the money to buy can be procured at a less rate of interest on the price than is represented by the stipulated rents, the trustees of the sinking fund may issue the coupon or registered bonds of the corporation for such period not exceeding fifty years, in such denominations, payable at such places and at such rate of interest, not exceeding six per cent. as they may determine. The aggregate amount of such refunding, renewing or extending bonds so issued shall not exceed that of the bonds so refunded, renewed or extended."

Section 4522, General Code, relates to the same subject-matter and is as follows:

> "Bonds issued by the trustees of the sinking fund shall be signed by the mayor and president of such board of trustees. When the mayor of a village is also the president of such board of trustees, he shall sign as such mayor and president of the board. They shall be attested by the auditor or clerk of the corporation and the secretary of the board of trustees of the sinking fund and have affixed the seal of the corporation issuing them. They shall be sold as provided by law for the sale of bonds by a municipal corporation. The trustees of the sinking fund, on demand of the owner or holder of any coupon bond, may issue in place thereof a registered bond of the same denomination, bearing the same rate of interest and payable both interest and principal at the same time, and provide the method of effecting such exchange."

From these two sections you will observe that sinking fund trustees desiring to refund indebtedness need not "apply to council for a refund issue" as you state, but may, at least to some extent, themselves make the issue without authority of council. It is true that section 4520 seems to require as a condition of the exercise of this power that the renewal or extension be "at a lower rate of interest," so that possibly if the trustees are unable to secure a lower rate of interest it would be necessary for them to call the matter to the attention of the council for action under sections 3916 et seq., General Code. This question has not, so far as I have been able to ascertain, been considered by the courts. At any rate, whether the

power of the trustees under section 4520 is sufficient, or whether in a given case council have to act, it seems to me that the question of refunding lies within the discretion of the proper board or legislative body; so that if the sinking fund trustees or the council were of the opinion that the best interests of the municipality would justify failure to pay the debt when due, and a continuance of the payment of interest at the stipulated rate until sufficient funds could be raised, otherwise than by a refunding issue for such purpose, I do not believe that any liability could attach on account of such policy. Therefore, it cannot be said to be a "duty" resting upon the sinking fund trustees to act in any particular with respect to such a question. Circumstances might arise under which it would constitute better business judgment to default for a short time in the payment of the principal of the bonds of the city and to pay interest until the principal sum could be raised. Such might be the case, for example, when the original bonds were issued at a very low rate of interest—also than could be commanded on bonds issued at the time of their maturity. Of course if the funds for payment were on hand at maturity, it would be the positive duty of the trustees to pay the bonds. But if the funds did not happen to be on hand, and if the bondholders offered no positive objection, the course of action which I have suggested might be taken to the advantage of the municipality.

The second half of your sixth question has already been considered in part. In my opinion if the sinking fund trustees assume the duty of caring for certificates of indebtedness issued under authority of section 3915, General Code, although such duty is not imposed upon them by law, and although no ordinance of the municipality might so require, the trustees would be personally liable if, the other officers of the city consenting thereto (which would be a necessary condition in point of fact, it would seem) the trustees acquire possession of the funds *colore officii,* and then misapply them i. e., pay them out in violation of the law governing their payment. Such trustees would be *personally* liable for such misapplication, both civilly and criminally, but there would be no liability on their respective official bonds.

Answering your seventh question, I am clearly of the opinion that the general sinking fund may be drawn upon to meet maturing special assessment bonds. The bonds are the general obligations of the municipality despite their issuance in anticipation of a special assessment. Nor would the fact that they might have been paid before the assessment is collected affect either their validity or the validity of the subsequent levied assessment. Chamberlain vs. Cleveland 54 O. S., 551. Nor, under the sinking fund statutes, is there any distinction between the "general sinking fund" and the "proceeds of an assessment." On the other hand, the "sinking fund" consists of all sources of revenue available for the payment of bonds, as well as special assessments, and surplus waterworks revenues, as the proceeds of tax levies. (Section 4512, General Code.) The sinking fund is a single thing, and obligations payable from it may be so paid without respect to the time of the collection of the particular revenue intended to be applied wholly or partly to the payment of such obligation.

This question is answered with reference to the sinking fund statutes as they appear in the General Code, and not with reference to anything in article XII, section 11 of the new constitution. It may be stated, however, that in the recently decided case of Link vs. Karb, 89 O. S., the view was expressed that the sinking fund statutes applicable to municipal corporations comply in all respects, save one, with the mandate of the new constitution; the one respect referred to being the fact that they do not require the municipal borrowing authority to incorporate in the borrowing resolution a form of words equivalent to the language of the constitution.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

894.

DIRECTOR OF PUBLIC SERVICE—CONSTRUCTION WORK—FORCE ACCOUNT—LABOR—COUNCIL.

Where the director of public service is required to procure labor for the performance of work in addition to that which is already provided in the department, which additional labor added to the cost of material and other costs incident to the work, will make the expenditure more than $500, *authorization of council must be obtained before the work can be advertised under section* 4328, *General Code.*

COLUMBUS, OHIO, April 27, 1914.

HON. G. W. ADAMS, *City Solicitor, Wellsville, Ohio.*

DEAR SIR:—I have at hand your letter of January 13th, wherein you state:

> "The city of Wellsville has authorized the issuance of bonds for the construction of a sanitary sewer. The estimated cost of the material to complete the work is less than $500. Is it possible under the code to construct the work and complete the same under 'force account;' i. e., can the city complete the work without advertising and letting the contract to the lowest and best bidder? The total amount of the bond issue is $1,200, and it is believed that the city can do this work considerably cheaper than if it is let to bidders."

The answer to your question involves a construction of section 4328 of the General Code, which is as follows:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisements for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The answer involves primarily an interpretation of the words *"or provide labor* for *any work* under the supervision of that department not involving more than five hundred dollars," and also of the words *"expenditure* within the department, other than the compensation of persons employed therein exceeding five hundred dollars."

I am of the opinion that the very manifest intent of this provision is to restrict the director of public service in incurring expenses on his *own initiative* to sums of less than five hundred dollars. When this view of the statute is taken there is just as much reason for restricting expenditures for labor as for restricting expenditures for any other purpose, and I am of the opinion that the rule of the statute is extended to expenditures for labor as well as for materials or any other expenses involved in the performance of any work.

The term "work" as employed in the first clause referred to in the above

statute and the term "expenditure" as used in the second clause referred to, have substantially the same effect. In either case the "work" or "expenditure" refers to a purpose which is substantially separate and distinct in its nature.

In the case of L. & C. R. R. Co. vs. Wilson, 138 U. S., 505, the court said:

> "The terms 'officers' and 'employes' both, alike, refer to those in regular and *continual service*. Within the ordinary acceptation of the terms, one who is engaged to render service in a *particular transaction* is neither an officer or an employe. They imply *continuity* of service, and exclude those employed for a *special* and single transaction. Citing 30 Atl., 928."

Keeping in view this rule as expressed by Justice Brewer above the words "provide labor" refer to such service as the director requires in the accomplishment of a special and single purpose not involving more than five hundred dollars in toto, including labor; and the words "compensation of persons employed therein" as used in the above statute refer to persons regularly and continually employed in the department.

Under section 4328 of the General Code, therefore, after council has fixed the compensation of persons regularly employed in the department under section 4214 of the General Code, the director of public service is permitted the free and unrestricted use of such employes for whatever purposes are appropriate to the nature of their position, and the services so made use of by the director of public service are not to be taken into consideration or accorded any value whatever for the purpose of computing whether or not a specific purpose involves an expense of more or less than five hundred dollars. The director of public service may, therefore, on any work, make use of the regular employes in his department and it is only when the expense over and above that required for the compensation of regular employes exceeds five hundred dollars that an authorization of council is required, or that a contract must be entered into upon the advertisement for bids under section 4328, General Code. The director of public service may hire labor or provide for services in addition to those regularly provided for in the department only when the expenditure involved in any particular work is less than five hundred dollars, taking into consideration all elements of such expenditure which must be met outside of the regular expenditures in the way of labor, material or otherwise which the director of public service has continually within the department.

The answer to your question is, therefore, that if the director of public service is required to procure labor for the performance of the work contemplated in addition to that which is regularly provided within the department, which additional labor when added to the cost of materials and other costs incidental to the work will make the expenditure more than five hundred dollars, it is necessary to have the authorization of council and to advertise the work as provided in section 4328, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

895.

STREET IMPROVEMENT—WHEN PARTS OF STREET MAY BE LEFT OUT IN FRONT OF LOTS, THE ASSESSMENT ON WHICH WOULD EXCEED 33⅓ PER CENT. OF THE ACTUAL VALUE THEREOF.

The city council may not proceed with a street improvement and leave out part of the street in front of lots, the assessment on which would exceed 33⅓ per cent. of the actual value thereof, if the leaving out of the street in front of such lots would destroy the contiguity of the improvement and substantially change the improvement from what was desired by the petitioners, but if it would not do so, the improvement in front of such lots may be left out.

COLUMBUS, OHIO, April 27, 1914.

HON. C. E. VAN DUESEN, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I have your letters of February 3rd and 18th, and as I understand your question, it is:

> "Certain people petitioned your council for a street improvement on the foot front assessment plan; the council after passing the resolution of necessity and an ordinance to proceed, discovers that the assessments where made will exceed 33⅓ per cent. of the actual value of certain of the lots to be assessed, and it is desired to know whether the council may proceed with the improvement, leaving out that part of the street in front of the lots which, as you put it, cannot 'stand the assessment.'"

You have not informed me whether the plan of assessment is to divide the entire cost of the improvement by the number of feet improved and having thus determined the cost per foot front, charge abutting property accordingly, or, whether the benefits of the improvement to each lot or piece of property have been determined and the cost of the improvement apportioned to the several lots in proportion that the special benefit to each lot or parcel bears to the whole, special benefits conferred by the improvement.

The first is the method usually followed, while the second would seem to find support in Chamberlain vs. Cleveland, 34 O. S., 557. If the first method has been adopted, I would feel that the case you cite, Minor vs. Board, 20 O. C. C., 4, would be in point, controlling and preclude the making of the improvement, except in strict conformity to the petition, but as stated in that opinion, no authorities were offered, which leaves it as a case standing upon first impression.

In the above case the petition was to improve Second street from the south side of Court to north side of Black street. The resolution covered "from Court to Black street" and the ordinance "from north side of Court to north side of Black street."

Assuming which is doubtless true that the street to be improved ran north and south, the petition asked for both crossings, the resolution for neither and the ordinance for the crossing of Black street only. Under these circumstances, the divergence from the petition was—in the resolution, both crossings were omitted, in the ordinance only one was left out, and in either event it could not affect the amount of the assessments, as the city was chargeable with cost of crossings.

This leaves the conclusion in 20 O. C. C., 4 unsupported by authority and outside the facts and issues presented.

I am, therefore, of opinion that it is not controlling nor even authority to be

followed and that the council has power to make an improvement on petition of lot owners so long as the improvement substantially conforms to the petition as filed.

This may and doubtless does resolve the matter into a matter of fact rather than law and makes its solution dependent upon the frontage and location of the lots that cannot be assessed to their share of the cost of the improvement. If such lots were of no extensive frontage and at one of the termini of the improvement, the improvement might proceed leaving them out, upon the theory that the improvement as made was substantially the same as described in the petition, while if they were in the body of the improvement, and not at the end, the leaving the street in front of them would necessarily destroy the contiguity of the improvement, and substantially change the improvement from what was desired by the petitioners. In other words, and regardless of the frontage of the non-assessable lots, the leaving out of the improvement that part of the street in their front would be a substantial deviation from the petition which should not be done, and the doing of which would doubtless furnish grounds for restraining the improvement.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

896.

CORPORATION — CHARTER — REINSTATEMENT OF CORPORATION WHEN CHARTER HAS BEEN CANCELLED.

When a corporation whose charter has been cancelled, applies within two years mentioned in section 5511, *General Code, to the tax commission for the issuance of a certificate looking towards its reinstatement, as provided in said section, the commission may require, as a condition precedent to the issuance of such certificate, the compliance by the corporation with all the requirements for failure to comply with the corporation's charter, and the payment of all fees and penalties, for failure to pay which, action was taken.*

COLUMBUS, OHIO, April 27, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 26th, submitting for my opinion thereon the following question:

> "When a corporation whose articles of incorporation have been cancelled by the secretary of state, as provided in section 5509, General Code, seeks, within two years after such cancellation, the certificate of the tax commission, that it has complied with all the requirements of law and paid all taxes, fees and penalties due from it, with a view to securing a cancellation of the entry of cancellation upon the payment to the secretary of state of the penalty of $100 provided for in section 5511, General Code, must the certificate of the tax commission embrace the excise taxes or franchise fees or penalties for the year or years within the two years' grace provided for in that section?"

I understand that your question relates particularly to a corporation whose articles of incorporation have been cancelled on account of its delinquencies as a domestic corporation for profit. I mention this fact because I shall limit this

opinion to the case of a corporation whose corporate franchise have been cancelled on account of delinquencies under the so-called Willis law sections of the act; so that the opinion does not necessarily relate to a corporation delinquent as a "public utility" whose articles of incorporation have been cancelled on that account.

The sections of the General Code whose consideration is involved in your inquiry are as follows:

> "Section 5509. If a corporation wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation *to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him.*
>
> "Section 5510. Any person or persons who shall exercise, or attempt to exercise, any powers, privileges or franchises, under the articles of incorporation or certificate of authority, after the same are cancelled, as provided in section one hundred and twenty (G. C. section 5509) of this act, shall be fined not less than one hundred dollars nor more than one thousand dollars.
>
> "Section 5511. Any corporation whose articles of incorporation or certificate of authority to do business in this state has been cancelled by the secretary of state, as provided in section one hundred and twenty (G. C. section 5509) of this act, upon the filing, within two years after such cancellation, with the secretary of state, of a certificate from the commission that it *has complied with all the requirements of this act and paid all taxes, fees or penalties due from it,* and upon the payment to the secretary of state of an additional penalty of one hundred dollars, shall be entitled again to an exercise of its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry made by him under the provisions of section one hundred and twenty (G. C. section 5509) of this act, and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises."

In an opinion to the secretary of state under date of May 31, 1914, I held that notwithstanding the italicized portion of section 5509, General Code, a domestic corporation whose articles of incorporation have been cancelled, as therein provided, constitutes an existing corporation within the meaning of section 8628, General Code, which prohibits the secretary of state from filing or recording the articles of incorporation of a company whose name is similar to that of such corporation. That is, I held that such a corporation continued to "exist" for this purpose during the two-year period provided for in section 5511, General Code.

The conclusions of that opinion, however, are to be strictly limited to the question then before me. It does not follow that because a corporation may "exist" for one purpose it may be said to be in existence for all purposes. The corporation is at least moribund during the two years in which the cancellation remains subject to recall. Though it may retain during this time the exclusive right to its name, there are few, if any, other attributes of a corporation which it possesses. Not only does section 5509 provide that all the powers, privileges and franchises conferred upon such corporations by such articles of incorporation or by such certificate of authority shall cease and determine, but section 5510 provides for certain penalties which may be assessed upon individuals attempting to exercise "any powers, privileges or franchises, under the articles of incorporation or certificate of authority, after the same are cancelled."

Presumably, a corporation whose articles have been cancelled, has the right to appoint trustees to distribute its assets, but not otherwise, and proceed to wind up its affairs; but it is clear to me that no other constituent acts can be committed lawfully by any person on behalf of the corporation; dividends cannot be declared; officers cannot be elected; stock cannot be issued nor any of the internal affairs of the corporation, as such, carried on after the cancellation.

So that the effect of such action is not only to cut off the right of the corporation to do business, i. e. to deal with third parties, but also to prevent its managing officers from performing its constituent acts, i. e., those relating to its internal concerns, except insofar as might be necessary to distribute its assets. On the other hand, no automatic winding up of the corporation is provided by the related statutes. It would be necessary, at least, for the attorney general to proceed in quo warranto against such a corporation in order to bring about such a result, and in order to prevent the corporate officers from retaining possession of the capital and assets of the corporation after cancellation. They might deal with such assets otherwise than in the corporate name and might not, indeed, take any action with respect to them at all; yet at the end of the two-year period should the corporation be revived as provided in section 5511 it would doubtless resume control of such capital and assets and use them in the further transaction of its business.

I have thus briefly discussed the status of a corporation after the cancellation of its articles of incorporation and before the two years of grace have expired so that the situation may be clearly in mind in discussing the main question.

It is clear that after the first cancellation a corporation is not liable for further taxes and certainly for no penalties. It cannot at the time be anticipated that the proprietors of the corporation will desire to renew its life. Perhaps in the great majority of cases there will be no attempt made to proceed under section 5511, General Code. It would not be contended, I think, that as to corporations not attempting to act under that section there is any liability for franchise taxes during the first two years after the cancellation takes place. There would be no liability to make annual reports under sections 5495 and 5499, General Gode, as no person would be authorized, because of the language of section 5510, to represent the corporation, and as, indeed, for practically all purposes the corporation itself is, by reason of section 5509, at an end.

In short, I am satisfied that throughout the two years mentioned in section 5511, General Code, a corporation to which its provisions relate would not be liable for any annual fees or penalties, and that no question as to its liability for such fees or penalties could arise unless it *should apply to the commission as therein provided.*

This brings me to the question as to whether or not a corporation applying to the commission for a certificate as provided in section 5511 is in a situation different

from a corporation which does not apply for such a certificate. That is, it being conceded that a corporation whose articles have been cancelled under section 5509 ceases to be liable for annual reports and fees thereon, *unless* application is made for reinstatement under section 5511, does such liability arise in retrospect, so to speak, *if such application is made?*

On the one hand it would seem quite reasonable and proper in one view of the case to exact fees for the two years in question from a corporation desiring a renewal of its certificate of authority to do business or its articles of incorporation, as the case may be. That is to say, it would not be unreasonable to interpret section 5511 to produce this result if the statute will bear such interpretation.

However, section 5511 does not, in my judgment admit of the interpretation which I have just suggested. It requires merely that the commission's certificate state that the company has complied with all the requirements of this act and paid all taxes, fees or penalties due from it. There is no "requirement of this act" to the end that a corporation, after the action described in section 5509 is taken, shall make any annual reports. Therefore, there could be no taxes, fees or penalties due from a corporation not under any obligation to make reports, for I think it will be readily agreed that only those corporations which are liable for annual reports are liable for fees or could become subject to penalties.

If section 5511 explicitly provided that the corporation should make reports for the two years in question and pay fees thereon together with or without penalties, a different conclusion would follow. But the section merely requires a certificate to the effect that the requirements have been satisfied—by which is meant the requirements of other sections of the act, and that the taxes, fees and penalties due have been paid—by which is meant such taxes, fees or penalties as would become due from the corporation by reason of the other provisions of the act.

Of course, any corporation applying for the commission's certificate under section 5511 would have to pay some back taxes; for, except in case of mistake, the corporation would not have been certified for cancellation in the first instance if it had not been delinquent either for reports or fees and penalty. The commission's certificate would naturally relate to the payment of the charges, for nonpayment of which the corporation's charter was first cancelled, or the doing of the things for the failure to do which such action was taken. But without more explicit language than appears in section 5511 I do not believe that it would be held that the commission might lawfully withhold its certificate mentioned in that section until the corporation had made reports for the two years after its charter had been cancelled and had paid the taxes or fees with or without penalty thereon.

Accordingly, I am of the opinion that when a corporation, whose charter has been cancelled, applies within the two years mentioned in section 5511 to the tax commission for the issuance of a certificate looking toward its reinstatement as provided in said section, the commission may require, as a condition precedent to the issuance of such certificate, the compliance by the corporation with all the requirements for failure to comply with which the corporation's charter was cancelled, the payment of all the fees and penalties for failure to pay which, such action was taken; but that the commission may not lawfully withhold its certificate until reports are made and fees are paid for the year or years following the original cancellation of the certificate and preceding the expiration of the two-year period mentioned in section 5511, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

897.

CLERK OF COUNCIL—PARTY TO BE SELECTED.

The members of council should select a person from the list submitted by the civil service commission to be clerk of council.

COLUMBUS, OHIO, April 27, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of March 20, 1914, Hon. G. W. Adams, city solicitor of Wellsville, Ohio, inquires:

> "As the clerk of council is under civil service which would select from the three highest on the eligible list: The president of council or the council?"

Secion 4210, General Code, provides:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

By virtue of this section the members of council select the clerk of council. The civil service law does not change the appointing authority.

Therefore, the members of council should select from the names submitted by the civil service commission, one of them to be clerk of council.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

898.

MOVING PICTURE CENSORS NOT IN CLASSIFIED SERVICE—CIVIL SERVICE.

Members of the board of censors of moving picture films are appointed with the consent of the governor. This board, therefore, comes within the terms of subdivision 2 of section 8 of the civil service act and the members thereof are in the unclassified service.

COLUMBUS, OHIO, April 28, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 18, 1914, the industrial commission of Ohio submit the following inquiry:

> "Kindly advise us whether in your opinion the members of the board of censors of moving picture films are members of the classified service, or unclassified service, under the civil service act."

As this question concerns the civil service law, the opinion is addressed to the state civil service commission.

The censors of moving picture films are appointed by virtue of the act of 103 Ohio Laws 399, and their duties prescribed therein.

Section 1 of this act, to be known as section 871-46, General Code, provides:

> "There is created under the authority and supervision of the industrial commission of Ohio a board of censors of motion picture films. Upon the taking effect of this act, the industrial commission shall appoint with the approval of the governor, three persons, one for one year, one for two years and one for three years, who shall constitute such board. Upon the expiration of the term of each member so appointed a successor shall be appointed in like manner for a term of three years."

Section 2 of the act, section 871-47, General Code, provides in part:

> "The members of the board shall be considered as employes of the industrial commission and shall be paid as other employes of such commission are paid. The industrial commission shall appoint such other assistants as may be necessary to carry on the work of the board."

Section 3 of the act, section 871-48, General Code, provides:

> "It shall be the duty of the board of censors to examine and censor, as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. Such films shall be submitted to the board before they shall be delivered to the exhibitor for exhibition. The board shall charge a fee of one dollar ($1.00) for each reel of film to be censored which does not exceed one thousand (1,000) lineal feet; for any reel of film exceeding one thousand (1,000) lineal feet, the sum of two dollars ($2.00) shall be charged. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund."

Section 4 of the act, section 871-49, General Code, provides:

> "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, there shall be projected upon the screen the words 'Approved by the Ohio board of censors' and the number of the film."

Section 8 of the civil service act, section 486-8, General Code, places ten classes of positions in the unclassified service.

Subdivision two of this section provides:

> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district."

There are two possible constructions of this subdivision. It may be construed to read "all heads of principal departments, and all principal boards and commissions," or it may mean "all heads of principal departments, and all boards and commissions" appointed by the governor or by and with his consent.

It has been held by this office that a principal department of the state is one responsible directly to the governor or the people. If the word "principal" is construed to modify "boards and commissions" it must have the same meaning, and then it would be hardly possible to have principal boards and commissions appointed by and with the approval of the governor. I know of none so appointed. This construction would practically nullify the phrase "or by and with his consent."

It is my opinion that the phrase "all heads of principal departments" is complete in itself, and that the words "boards and commissions" are not modified by the word "principal" or the words "heads of principal."

This subdivision should be construed to read "all heads of principal departments, and all boards and commissions appointed by the governor or by and with his consent."

By virtue of section 1 of the act of 103 Ohio Laws 399, the board of censors of moving picture films is appointed with the consent of the governor. This board, therefore, comes within the terms of subdivision 2 of section 8 of the civil service act and the members thereof are in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

899.

DISTRICT BOARD OF COMPLAINTS IN UNCLASSIFIED SERVICE.

The members of the district board of control, under the Warnes law, is a board and is appointed with the consent of the governor, consequently, the members of this board are in the unclassified service.

COLUMBUS, OHIO, April 27, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of March 19, 1914, you inquire:

> "Numerous persons are inquiring of this department as to whether or not the members of the district boards of complaints under the Warnes law, are in or out of the classified service."

The board of complaints is appointed by virtue of section 13 of the act of 103 Ohio Laws 786, section 5591, General Code, which provides in part:

> "In each assessment district of the state there shall be appointed annually by the tax commission of Ohio with the consent of the governor three competent persons who shall constitute a 'district board of complaints' for such district. * * *"

Subdivision 2 of section 8 of the civil service act, section 486-8, General Code, places the following class of positions in the unclassified service:

"2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district."

This subdivision should be construed to read "all heads of principal departments, and all boards and commissions appointed by the governor or by and with his consent."

The "district board of complaints" is a board and it is appointed with the consent of the governor.

I am of opinion therefore that the members of the district board of complaints are in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

900.

CONSTRUCTION OF "HERETOFORE AND HEREAFTER" AS USED IN SECTION 5649-2, GENERAL CODE.

The meaning of the words "heretofore" and "hereafter" occurring in section 5649-2, *General Code, originally enacted on May* 31, 1911, *and approved on June* 2, 1911, *but subsequently amended April* 16, 1913, *by an act which was approved by the governor May* 6, 1913, *filed in the office of the secretary of state on May* 9, 1913, *and which is the case of State ex rel. Schreiver vs. Milroy,* 88 *O. S.,* 301, *is that the original meaning of these words as established at the first enactment of the section was not changed when it was amended, and that the day to which the amended section refers is still June* 2, 1909.

COLUMBUS, OHIO, April 27, 1914.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, East Liverpool, Ohio.*

DEAR SIR:—Under date of February 26th, you submit for my opinion some nine questions, all of them of considerable importance, accompanying your statement of them with a full statement of your views thereon.

The first of these questions is of a character somewhat different from the others, and is of immediate and universal importance throughout the state. The same question has already been raised elsewhere and will undoubtedly be raised in every county in the state. Therefore, I have ventured to separate its consideration from that of the eight other questions submitted in your letter and shall confine myself in this communication to this single question which may be stated as follows:

"What is the meaning of the words 'heretofore' and 'hereafter' occurring in section 5649-2 of the General Code, originally enacted on May 31, 1911, and approved on June 2, 1911, but subsequently amended on April 16, 1913, by an act which was approved by the governor on May 6, 1913, filed in the office of the secretary of state on May 9, 1913, and which in the case of State ex rel. Schreiver vs. Milroy, 88 O. S., 301, was held to be subject to the referendum and therefore postponed as to its effectiveness until the constitutional period of 90 days had elapsed?"

You state that your view is that the original meaning of these words, as established at the first enactment of the section, was not changed when it was amended, and that the date to which the amended section refers is still June 2, 1911.

The conclusion which I have reached agrees with yours.

The question, however, is by no means a simple one. Prefatory to any discussion of it I shall state fully the facts upon which it arises.

Section 5649-2, General Code, is a part of the Smith One per cent. law, so-called, which as originally enacted provided, generally speaking, two classes of limitations upon tax rates, with machinery for rendering both of them effective. The first class of limitations which I mention is that consisting of the number of mills which may be levied by specific levying authorities, such as those of the county, those of the township, those of the school district, those of the city, etc. These limitations which still exist are found in section 5649-3a of the General Code. The second general class of limitations referred to above consist of those applicable to the aggregate of all levies made upon the taxable property of a given territory. Originally there were three limitations of this kind which may be described as that of ten mills, that of the amount of the taxes levied in the territory in the year 1910, and that of fifteen mills.

As the Smith one per cent. law was originally constructed the 1910 limitation and the 10 mill limitation were both provided for in section 5649-2 and 5649-3, General Code. These sections in full were as follows:

"Section 5649-2. Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, *for the year* 1911, *and any year thereafter, including taxes levied under authority of section* 5649-1 *of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in anyone year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year,* 1910, *provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein,* shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, *and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.*

"Section 5649-3. The maximum rate of taxation in any taxing district for any purpose, as now fixed, shall be and is hereby changed so that such maximum rate, as levied on the total valuation of all taxable property in the district for the year 1911, and any year thereafter would produce no greater amount of taxes, than the present maximum rate for such purpose, if levied on the total valuation for all the taxable property therein for the year 1910, would produce. Any minimum rate required by law to be levied for any purpose, is hereby reduced in like proportion that the maximum rate is herein reduced.

"If in any year the taxing authorities of any taxing district shall desire to raise a less amount of taxes for a particular purpose than was levied for such purpose in the year 1910, the amount of taxes that may be levied for another or other purposes may be correspondingly increased; the intent and purpose of this act being to provide the total amount of taxes which

may be levied in the year 1911, or in any year thereafter, for all purposes, shall not exceed in the aggregate, the total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912, nine per cent, for the year 1913, and twelve per cent. thereof for any years thereafter, or, such less amount as may be produced by the levy of a maximum rate of ten mills on each dollar of the tax valuation of the taxable property therein, of any county, township, city, village, school district or taxing district, for that year, whether such taxes be levied for the same or other purposes, except to the amount of such levies as may be made for interest and sinking fund purposes as provided in section 5649-2 of the General Code, as herein enacted, for emergencies as provided in section 5649-4 of the General Code and such additional levies as may be authorized by a vote of the people as provided in section 5649-5 of the General Code."

The general assembly in 1913 repealed section 5649-3 and amended section 5649-2 by striking out the matter first above italicized, leaving the second italicized phrase exactly as it had been, so that the amended section reads as follows (103 O. L., 552):

"Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

The primary effect of the amendments as indicated by the quotations already made, is the elimination of the so-called 1910 limitation, and unquestionably this was the controlling, if not the only purpose of the legislature.

The other facts necessary to be considered—those relating to the dates when the two enactments were passed and became effective respectively—have already been stated.

The first question which is encountered is whether or not there is room for the exercise of the function known as "statutory construction," it being fundamental that where the terms of a statute are unmistakably plain on its face, the exercise of this function is inadmissible. Slingluff vs. Weaver, 66 O. S., 621.

It seems to me that in this connection it may be stated that as a general rule all *relative* words call for "interpretation." I do not know that there has ever been a decision to this effect, but in the very nature of things the proposition seems to me to be true. A relative word is always plain enough in absolute meaning, the difficulty being in the ascertainment of its connotation; that must be discovered by looking at some other word, if it is to be found in the context or at some extrinsic fact if the relative word points to some such fact. As soon as one commences a search for the antecedent of the pronoun or for the thing denoted by any relative word he has, I think, commenced the process known as "intepretation" or "construction."

However this may be with respect to relative words, the antecedent of which is to be found on the face of the written law, it seems to me that it must certainly be true as to words, the connotation of which must be found in facts outside of the written law. Thus the words "heretofore" and "hereafter," the paraphrased meaning of which is plain enough, viz., "before this date" and "after this date,"

respectively donate a time which must be fixed by something other than the terms of the statute itself. It cannot be said that there is any universally true rule for determining what time is intended to be referred to in a given instance by a word of this sort. For example, in the case of an original act (no question of an amendment being involved) it would never be perfectly plain and clear, I think, in the sense contemplated by the supreme court in, laying down the principle involved in Slingluff vs. Weaver, supra, whether the legislature meant the date of the passage of the act in which the terms were used, that of its approval by the governor, or that of its effectiveness as determined by the initiative and referendum provisions of the constitution. That is to say, it would not be conclusively presumed that any one of those three dates must have been intended, so that the application of the rules of statutory interpretation would be forbidden.

Smith vs. Foster, 55 Ind. 592, 593.
Commonwealth vs. Horner, 48 N. J. L. 441.
Perrine vs. Farr, 22 N. J. L.358.

But there is an additional reason why I think inquiry into the intention of the general assembly in this case is not foreclosed by the application of the principles involved in Slingluff vs. Weaver, supra. The act found in 103 O. L., 552, purports on its face to be "An act to amend section 5649-2 of the General Code." Authorities will hereinafter be cited to the general effect that so much of an amended law as consists of a repetition of the original law is to be regarded as having been the law all the time; that is, in repealing and re-enacting a statute or a section for the purpose of an amendment, the general assembly is presumd not to have intended to destroy the old law and to enact a new and distinct measure save insofar as the changes made by the amendment may be concerned. The amended law, then, on its face, advises its reader that, in part at least, it is a continuation of a law previously in existence; so that one must turn to the original law and compare it with the amended law in order to find out how much of the original has been continued, and in what respects the original has been changed. In short, then, the mere fact that a section purports to be an amended section is itself sufficient to bring to notice the section as it was before the amendment, and to compel for various purposes, the joint reading of the two sections, the original and the amended section. This constitutes "interpretation." Of course, I do not mean to say that the doctrine of Slingluff vs. Weaver is never applicable to an amended statute. Indeed, that case was decided under an amended statute. An examination of the opinion of the court in that case will show that reference was made to the prior form of the statute, which, in the particular which gave rise to the question, was the same as it was when the statute was amended, both being equally plain on their face. The point I make is, that where relative words are involved, and it is apparent on the face of the statute that an amendment has ben made, which may or may not affect the meaning of the connotation of the relative words, the fact that the statute is an amended one, of itself, opens the way for consideration of changes that have been made by the amendment and this constitutes "interpretation." Again, the amendment takes the form of a re-enactment of the original section "to read as follows." The form of the amendment suggests at once its compliance with article II, section 16 of the constitution, and brings into play any principles which may be held applicable to amendatory statutes, the form of which is dictated by that section of the organic law.

For both of these reasons, then, I am clearly of the opinion that section 5649-2, as amended, has no such clear and unmistakable meaning in its face as precludes the consideration of extrinsic circumstances, with a view to determining what its

proper interpretation may be. The first extrinsic fact which comes to my notice is the fact that the last clause of section 5649-2 is the same, both in the original and in the amended section. The second extrinsic fact which I observe is that the change made in the language of the section by the amendment, i. e., the elimination of certain language therein providing for the 1910 limitation could in no way, as a mere verbal change, affect the meaning of the clause in which the words "heretofore" and "hereafter" are found. In this respect the question differs from the case of the interpretation of a word like "herein," which, whether found in an amended section or in another section of the amended law not itself specifically amended, would necessarily suffer a change of connotation if any part of the provisions constituting its antecedent should be changed by amendment.

McKibben vs. Lester, 9 O. S., 627.
Jobe vs. Harland, 13 O. S., 485.
State vs. Vause, 84 O. S., 207.
State ex rel. vs. Cincinnati, 52 O. S., 419.

Of course, the question involved here is by no means to be confused with the type of questions involved in cases like those cited for the reason which I have just pointed out. The two extrinsic facts to which I have called attention, construed together, lead directly to the conclusion at which I have arrived, viz., that the connotation of the two words in question is the date of the approval of the original Smith one per cent. law, viz., June 2, 1911. They invoke the following well settled principles:

"The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized, 'by observing the constitutional form of amending a section of a statute,' says the court in one case, 'the legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience.'

"The amendment operates to repeal all of the section amended not embraced in the amended form. *The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act.*

Lewis Sutherland Stat. Con. Section 237.

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactmnt of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time."

Lewis Sutherland Stat. Con. Section 238.

"Ordinarily the mere re-enactment of a statute does not change its meaning or construction."

Lewis Sutherland Stat. Con. Vol. 2, page 783.

Thus Black on Interpretation of laws, pages 356-357 gives the following:

"When an amendment to a statute is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, namely, the statute as amended. From this it follows that the legislative intention, in making the amendment, is to be learned from a consideration of the original act and the amendment as one act. * * * And it will be presumed that a word used in a certain sense in the original act is used in the same sense where it occurs in the amendatory act."

Again at page 357:

"An amendment to a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made. (Citing the case of McKibben vs. Lester, 9 O. S., 627.) For it must be remembered that an amendment becomes a part of the original act, whether it be a change of word, figure, line or entire section, or a re-casting of the whole language."

These principles are of themselves sufficient to dispose of the question; and it will be observed, in passing, that they are quite consistent with the Ohio decisions following McKibben vs. Lester, supra, which have already been mentioned, the distinction between those cases, and cases like the one presented by your question having already been pointed out. However, the text writers and the decisions supply principles more explicit than those already quoted.

"The word 'hereafter' used in the statute as amended must be construed distributively. As to cases within the statute as originally enacted, it means subsequent to the passage of the original act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment. Lewis Sutherland Stat. Con. Vol. 1, page 444."

"Thus the words 'now' or 'now existing' in a re-enacted statute refer to the time of the original enactment. Lewis Sutherland Stat. Con. Vol. 2 page 783."

The following cases are more or less directly in point in support of the points above referred to:

Ely vs. Holton, 15 N. Y., 595.
Matter of Pengnet, 67 N. Y., 444.
Gilkey vs. Cook, 60 Wis., 133.
Parsons vs. Circuit Judge, 37 Mich., 287-290.
Barrows vs. Peoples Gas Light & Coke Co., 75 Fed., 794.
Fisher vs. Simon, 95 Texas, 234.

It is true that in all these cases there was some particular reason for the holding reached in addition to the mere fact that the language of the amended statute was the same as that of the statute prior to its amendment. It would, therefore, perhaps be unsafe to impute universality to the rule as I have stated it. Indeed, I do not think there is any such thing as any universal rule of statutory interpretation. These cases, however, do establish the conclusion that words like "heretofore" and "hereafter" are not *conclusively presumed to refer to the date of the passage of the amending act;* in fact, they go further, in my judgment, and establish the conclusion that if there is a presumption it does not relate to the date of the amending act.

While, therefore, I think that the above cited decisions and other authorities would justify the statement that as a *general rule* where words like "heretofore" and "hereafter" appear in an amended statute, under the circumstances in which they appear in amended section 5649-2, they will be interpreted as denoting the date of the passage of the act in which they first appeared, yet I am content to rest at this stage of the case upon the proposition that at least it is settled that under such circumstances these words *may* refer to the date of the passage of the original act in which they were first used.

My final conclusion, then, is based upon what must be, I think, at all times a determining factor in the application of so-called "rules of construction," viz., consideration of the evil to be remedied and the exercise of what appears to me to be common sense in reading the mind of the legislature.

We are, of course, certain that one of the evils, at any rate, which the general assembly was trying to remedy in the enactment of the so-called Kilpatrick law, was the operation of the 1910 limitation. One legislative purpose was to eliminate this provision, and desiring to do this by the amendment of section 5649-2, the general assembly found itself confronted with the necessity of complying with article II, section 16 of the constitution. It desired for the purpose of eliminating the 1910 limitation to strike certain language from the section. For this purpose it must needs go through the form of repealing the section and re-enacting it without the objectionable language in it. All this the legislature would have done if its purpose had been simply to eliminate the 1910 limitation.

It being clear, then, that the legislature would have done no more than it has done if its purpose had been simply to eliminate the 1910 limitation, it seems to me that in the light of the authorities above cited, and upon reason and common sense it must be conclusively presumed that it did not intend its action to have any more far-reaching result than the one which it certainly did have. It is true that the legislature might have removed the doubt as to the interpretation of the last clause of the section by inserting specific dates; but to hold that by failing to do so it evinced the intention of changing the connotation of the relative words in question would be tantamount to presuming that the general assembly conned over the entire section when is was re-enacted and deliberately left certain language unchanged with the idea of effecting a change in the law thereby. Such a presumption is too artificial to be indulged in; it finds place in my mind with the supposition first discussed, viz., that under all circumstances the words "heretofore" and "hereafter" denote the date of the passage of the act in which they are found whether that be an amendatory act or not. Both "presumptions" are violently artificial and if applied strictly would, I apprehend, many times defeat the obvious legislative intention. At least this much is apparent from the cases which I have cited, when one reflects that if the clause in which the words "heretofore" and "hereafter" are found had happened to be in one section of the Smith law, and the objectionable language which the legislature desired to eliminate had constituted a section bv itself, there would, to a moral certainty have been no "re-enactment"

of anything. The legislature undoubtedly being content, under such circumstances, with merely repealing the imagined section, the absurdity of supposing that anything more than this was intended by the action that was actually taken becomes apparent.

Being satisfied, therefore, that in order to accomplish what was evidently one of the purposes of the legislature, viz., the elimination of the 1910 limitation, the legislature would not have acted otherwise than it has acted, I am of the opinion that the intention to be ascribed to the general assembly is not to be extended beyond the accomplishment of that purpose. That being the case, I am of the further opinion that the question is one substantially like those presented in the cases which I have cited, and that whatever principles may be adduced from those cases are to be applied to its solution. So that whether upon the ground that these decisions justify the general statement that words of this class in an unchanged context in an amended statute continue to denote the date of the passage of the original statute, or upon the ground that under such circumstances such words *may* denote the date of the original statute and will be held to do so where sufficient reason appears, I am of the opinion that the words "heretofore" and "hereafter" as found in amended section 5649-2 of the General Code denote June 2, 1911.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

901.

CONTRACT — INSURANCE CONTRACT UNDER OHIO LAWS — "BUSINESS OF INSURANCE"

A contract by a real estate agent guaranteeing to keep property listed with him rented, and guaranteeing that tenants secured for such property will pay rent as agreed is not an insurance contract under the statutes of Ohio, and does not constitute the business relations established upon such a contract the "business of insurance."

COLUMBUS, OHIO, April 29, 1914.

HON. R. M. SMALL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your favor of February 27, 1914, enclosing communication to you from McMahon & McMahon, attorneys at law, Dayton, Ohio, inquiring whether a certain proposed contract of a real estate agent in that city, guaranteeing to keep property listed with him rented, and guaranteeing that tenants secured for such property will pay rent as agreed, is an insurance contract, and whether business relations established upon such contract constitute business of insurance. A draft of the proposed contract accompanied the communication above referred to, and is as follows:

> "The undersigned, in consideration that A. B. puts his real estate in their hands exclusively as agents for renting the same for a period of _____ years, beginning _____ and ending _____ the following real estate:

DESCRIPTION.

hereby agree that in consideration of such agency they will lease the same at the figures named by said A. B., promptly collect and pay over the rents, paying all bills incurred in the care and repair of the same. The said owner agrees to keep the property in good repair, having in mind the rent it brings in.

"The owner agrees to pay the following commission or compensation: (fix gross sum or a per cent.)

"In considertion of all of the above the said _____ guarantee that they will keep the said premises rented during the whole of said period, and that the tenants they secure will pay the rent as agreed, excepting always losses caused directly or indirectly by fire, invasion, insurrection, civil war, mob, military or usurped power, or by order of any civil authority, or by floods or other acts of Providence."

Preliminary to a consideration of the question presented, it may be observed that in this state the right to transact the business of insurance is a franchise and not a matter of common right.

In the case of Robbins vs. Hennessey, 86 O. S., 181, 197, the court says:

"The statutes of the state now require compliance with certain conditions designed for the security and protection of the public, and therefore, the right to transact this business is no longer a private right, but a franchise.

"This question was so fully considered in the case of State ex rel. vs. Ackerman, 51 O. S., 163, that it would be a waste of time and space to review the subject further. In that case this court held that the right to carry on the business of insurance was a privilege or franchise, and no longer a matter of natural right."

Again, if the proposed contract above set out is an insurance contract, and if the business contemplated thereunder, is insurance, it follows that such business cannot lawfully be transacted without permission to do so granted by the superintendent of insurance. Pertinent to this point, sections 665 and 670, General Code, provide as follows:

"Sec. 665. No company, corporation or association, whether organized in this state, or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with.

"Sec. 670. The provisions herein relating to the superintendent of insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance."

The statutes of this state do not define insurance, but definitions of this subject, which have been accepted by the supreme court (68 O. S., 30) are as follows:

"A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

"An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed."

It may be safely said, I think, that definitions of insurance, such as the foregoing, are descriptive only, and are not, in a strict sense, definitions which contain every element without which the thing cannot exist, and which exclude everything not necessary to its existence.

In the case of Tyler vs. New Amsterdam Fire Insurance Company, 4 Robertson (N. Y.), 151, a case often cited, but which goes more particularly to the elements necessary to the validity of such contracts rather than to their nature, it was held:

"There are at least five ingredients necessary, in a contract of insurance, viz.: the subject-matter; the risks insured against; the amount insured; the duration of the risk, and the premium of insurance; and a contract deficient in any of these is incomplete."

If the proposed contract is an insurance contract, and the business contemplated thereunder is insurance, it is evident that the same falls within that branch of the subject known as "guaranty insurance," which, in turn, includes insurance of a number of specified kinds including what is known as "credit insurance."

"In legal acceptation guaranty insurance is an agreement whereby one party (called the 'insurer') for a valuable consideration (termed the 'premium') agrees to indemnify another (called the 'insured') in a stipulated amount against loss or damage arising through dishonesty, fraud, unfaithful performance of duty or breach of contract on the part of a third person (hereinafter denominated as the 'risk') sustaining a contractual relationship to the party thus indemnified. (Frost Guaranty Insurance, page 11.)"

Further on this subject, the same author says:

"Again, treating a guaranty as a form of a suretyship, it should be noted that the words 'guaranty' and 'insurance' have to a great extent the same meaning and effect, and many contracts may, with equal propriety, be called contracts of insurance or contracts of guaranty. There is no hard and fast line to be drawn between contracts of insurance and contracts of guaranty. But speaking generally, the former have several features in their character and in the way they are effected which distinguish them from ordinary contracts of guaranty. (Frost Guaranty Insurance, page 16.)"

I do not doubt that rents can be made the subject of insurance by appropriate contract to that end, and when made it would be a species of credit insurance.

Palatine Ins. Co. vs. O'Brien, (107 Md., 341).
Whitney Estate vs. Northern Assurance Co., (155 Cal., 521).
Claflin vs. Credit System Company, (165 Mass., 504).
Shakman vs. Credit System Company, (92 Wis., 366).

Though, as noted, rents, as well as other credits, may be the subject of insurance contracts, there are, however, contracts, which, not involving the element of indemnity, or being incidental to other transactions, are held not to be insurance contracts. Thus, a contract in which no loss or casualty or peril was named, for which indemnity was promised, has been held not to be an insurance contract.

State vs. Towle, (80 Maine, 287).

Where a contract of employment obligated the employer to pay for the work of an employee, even if the goods should be destroyed by fire, and on account of this obligation the employe permitted the employer to deduct one per cent. for an agreed compensation, it was held that as the employer ran no risk, being obliged to pay for the labor absolutely and unconditionally, the contract lacked one of the essential elements of an insurance contract.

Stern vs. Rosenthal (71 Misc. N. Y., 422).

More pertinent to the question here presented, it was held, in the case of Cole vs. Haven (Iowa) 7 N. W., 483, that a guarantee by a seller of lightning rods that the rods would protect the building, and that if they should fail to do so, he would pay the purchaser a specified amount, was not an insurance contract. In the case just cited, the contract was as follows:

> "We hereby guarantee that the said rods will protect said buildings or building from all damages by lightning for the term of five years, commencing at noon (12 o'clock) of above date; and said Cole Bro. & Hart hereby agree to make good unto the said J. C. Haven, his, her, or their heirs, assigns, or administrators, all such immediate loss or damage as may occur by lightning communicated directly to said building, and not by or through any intermediate or contiguous building, to an amount not to exceed $500. The said loss or damage by lightning is to be estimated by the cash value of the property at the time the same shall occur, and to be paid within 90 days after notice and clear proof thereof is made to Cole Bro. & Hart, by the above J. C. Haven, that said damages were caused by lightning, and that said rods were in good repair at the time of the accident."

With respect to this contract, the court, in its opinion, says:

> "Whether what is claimed to be a policy of insurance is such in fact, was somewhat considered, but not determined, in Cook vs. Wierman, 51 Iowa, 561. We think the contract is one of guaranty, and not insurance. If one is employed to watch a building, he may agree, in consideration of such employment, that he will pay therefor if it burns down through his negligence. In fact, the agreement to pay might be absolute and unconditional. This would not be a contract of insurance, but a guaranty. So one may sell goods, and agree that the purchaser will receive certain named benefits or advantages. Such a contract would be a guaranty or warranty, and not a contract of insurance."

Looking to the contract here presented, it occurs to me that the contract partakes of the nature of a strict guaranty rather than that of insurance. The primary purpose of the real estate agent responsible for this contract is to procure

persons having property to rent, to list the same with him for attention, and as an inducement and consideration for such persons so to list this property with him, he guarantees that the property so listed will be kept rented, and the rent therefor paid.

It is not clear that the idea of indemnity enters into this contract at all, but if it does, it is simply incidental to a contract whereby the agent is to look after the property, for a commission. I am, therefore, of the opinion that the proposed contract is not an insurance contract, nor does the business contemplated thereunder constitute insurance.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

902.

INSURANCE—REINSURANCE OF UNMATURED POLICIES—DISCONTINUANCE OF BUSINESS BY INSURANCE COMPANY—POLICY HOLDER.

Where a certain life insurance company reinsured all its unmatured policies in another company, if the reinsurance is consummated in conformity to statute and the policy holder had actual notice of the contemplated discontinuance of the first company, and the substitution of the second, and made no objections, but paid subsequent premiums to the second company, the presumption would arise that he had consented and released the first company, and if the rider, which was placed on each policy of the retiring company by the taking over said policy, is broad enough to cover the above conditions, he would be estopped from asserting a claim against the first company.

The superintendent of insurance would be justified in considering such debt and liability of the first company to such policy holder paid and extinguished under section 655, General Code.

COLUMBUS, OHIO, April 29, 1914.

HON. ROBERT M. SMALL, *Acting Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Under favor of December 19, 1913, former superintendent of insurance, Mr. E. H. Moore, made the following request for my opinion:

> "As you will recall, the Great Northern Life Insurance Company, of Toledo, Ohio, some time ago reinsured all its unmatured policy obligations with The Cleveland Life Insurance Company, of Cleveland, Ohio. The agreement was approved by the commission, of which you were a member.
>
> "Subsequent to the approval of this agreement, the Great Northern gave its notice, pursuant to section 655, G. C., that it had discontinued business within this state and requesting a delivery of its securities.
>
> "In accordance with the terms of that statute, publication was duly made and no objection has been filed with this department to such withdrawal.
>
> "The deposit referred to is one of $100,000 of approved securities, deposited by The Great Northern Life Insurance Company, under the terms of section 9346, G. C.
>
> "Upon the approval of such reinsurance agreement, The Cleveland Life Insurance Company placed upon all of the policies of The Great

Northern Life Insurance Company, so reinsured, its rider, assuming all the obligations of The Great Northern Life Insurance Company, upon such policies.

"I, therefore, respectfully request your opinion upon the following:

"Under the foregoing state of facts, may the superintendent of insurance lawfully permit the withdrawal of such deposit?"

Section 655, General Code, provides as follows:

> "When a life insurance company doing business in this state decides to discontinue its business, the superintendent of insurance upon application of such company or association shall give notice, at its expense, of such intention at least once a week for six weeks in a paper published and of general circulation in the county in which such company or its genera' agency is located. After such publication the superintendent shall deliver to such company or association its securities held by him, *if he is satisfied* on an exhibition of its books and papers, and on an examination made by himself or by some competent disinterested person or persons appointed by him, and upon the oath of the president, or principal officer, and the secretary or actuary of such company, that *all debts and liabilities due or to become due upon any contract or agreement made with any citizen or resident of the United States are paid and extinguished;* but the superintendent from time to time may deliver to such company or association or its assigns any portion of such securities on being satisfied that an equal proportion of the debts and liabilities due or to become due upon any such contract or agreement have been satisfied, if the amount of securities retained by him is not less than twice the amount of the remaining liabilities."

Under section 655, General Code, the superintendent of insurance, after compliance with the conditions therein prescribed, may permit the withdrawal of $100,000.00 worth of approved securities deposited with him by The Great Northern Life Insurance Company, if he is satisfied that all debts and liabilities due or to become due upon any contract or claim made with any citizen or resident of the United States *are paid and extinguished.*

This provision confers a discretion on the superintendent of insurance which is final and conclusive within the province of its exercise, in the absence of clear and manifest evidence of fraud, unreasonableness, arbitrariness, or some other undoubted abuse of the power. The discretion, however, can by no means be stated to extend to other than questions of fact. It will certainly not be asserted that, in the exercise of such discretion, the superintendent would be justified in ignoring a definite rule of law as to what is or what is not an obligation or a liability, or a definite rule of law upon the question of whether or not a certain state of facts constitute a release of what was a liability or obligation.

The question presented for consideration, therefore, is whether or not, under the steps taken by your department and the companies in question, the so-called reinsurance of The Great Northern Life Insurance Company by the Cleveland Life Insurance Company, relieved, as a matter of law, the former company from all liabilities and from all obligations upon the policies so reinsured. It is well settled that a strict contract of reinsurance proper does not relieve the reinsured company from liability upon the policies reinsured even though the reinsuring company contracts by such reinsurance to pay all claims to the original insured holder of the policy. When the contract of reinsurance contains a promise to pay to the original insured, the latter has a right of action, both against the reinsuring company and the reinsured. These principles are briefly summed up in Vance on Insurance, page 61, as follows:

"Reinsurance is a contract whereby the reinsurer agrees to assume the whole, or a part, of a risk undertaken by the original insurer. In its nature it is not different from a contract of original insurance, but it possesses some peculiarities. *The contract is personal between the insurer and the reinsurer, and the original insured is no party to it.*

"(a) The contract of reinsurance is an original undertaking, and not within the statute of frauds.

"(b) The liability of the reinsurer under the contract is measured by the liability of the orginal insurer, not by his ability to pay.

"(c) *The original insured acquires no rights under the contract of reinsurance when the promise of the reinsurer is to pay the insurer, nor has he any lien upon money paid by the reinsurer.*

"(d) But when the reinsurer's promise is to pay losses incurred to the policy holders, the original insured then *takes a right of suit under the contract thus made* for his benefit, even though he is not a party to it.

"(e) Any settlement made by the insurer, without the consent of the reinsurer, which imposes additional burdens upon the reinsurer, will release the latter from his liability."

On page 62 the same author, however, calls attention to the fact that the term "reinsurance" is sometimes improperly implied, and as an example of the somewhat misdirected employment of the term, the author makes the following statement:

"It is well to call to the reader's attention the distinction which exists between a contract of reinsurance and other somewhat similar contracts that frequently pass under the same name. When a person who has already insured his property secures a second insurance upon the same property, the second contract is frequently called 'reinsurance,' but this is merely a case of double insurance, and not at all 'reinsurance' in the technical sense of the word. Another instance of the untechnical use of the word occurs when two insurance companies are consolidated, or when one buys out another, assuming all of its policies and obligations, in order that that other may discontinue its business. In such cases the consolidated company, or the purchasing company, is said to 'reinsure' the risks of the company that ceases to exist; but this is a case of substitution, in which the so-called 'reinsurers' engage to take the place of the original insurer, and themselves directly to make good losses to the holders of the original policies. It must be borne in mind that such cases of consolidation, or of successive insurance, are not technically cases of reinsurance, and what is said of the rules of law determining the peculiar rights of the parties to the contract of reinsurance does not apply to the cases mentioned. It is also to be noted that the contract of reinsurance does not amount to a novation, even when the contract provides for a payment by the reinsurer directly to the original insured, in case of the happening of the event insured against. This is so although the original insured may accept the obligation assumed by the reinsurer, and bring suit against him to enforce the payment undertaken under the contract."

The author cites no decisions supporting the statements so made with reference to the discontinuance of business by one company and the taking over of its obligations by another, and I have been unable to uncover any authorities directly in point, outside of the statement by Vance above quoted.

On page 68, the statement of the same author, which seems to be very much in point, is as follows:

"A third kind of relation between the original insured and the reinsurer may arise in those cases in which the circumstances attending the making of the contract of reinsurance amount to a novation of the original contract, and hence operate to discharge that contract and the original insurer from all obligation thereunder. Such a result can arise, however, only when the insured agrees with the insurer and reinsurer that he will accept the obligation of the reinsurer in consideration of the discharge of that of the insurer. Such an agreement is ordinarily carried into effect by a surrender of the original policy, and the issue of another policy under the same terms and conditions by the so-called 'reinsurer.' As is shown above, however, such a transacton is not one of technical reinsurance, for here the so-called 'reinsurer' is *but substituted for the original insurer, and hence becomes the immediate insurer of the subject* of the original policy, instead of being the insurer of the original insurer's risk by reason of such policy, as would be the case if the transacton were one of proper reinsurance. In such cases of novation the original insurer is, of course, wholly discharged from any obligation that may have existed under the former policy, and the insured in turn secures the same rights against the so-called 'reinsurer' as if the policy had been originally issued by him."

In brief, the authorities disclose that the rules applying to contracts of insurance and reinsurance are the same as the rules applying to ordinary contracts, and under such rules it is clear that the original insured is not precluded from any claim or right of action upon an obligation against a former debtor in the absence of an express or an implied consent on his part to the substitution of another debtor. In short, a complete novation must be accomplished in order to establish the extinction or relinquishment of liability on the part of the first debtor.

The question involved herein, therefore, is whether or not the policy holder may be said to have consented to the substitution of The Cleveland Life Insurance Company, for The Great Northern Life Insurance Company as the obligor upon its policies. The contract of reinsurance referred to in your letter was the result of proceedings taken by The Great Northern Life Insurance Company to discontinue business and to turn over its assets and its obligations to The Cleveland Life Insurance Company through the steps provided by section 9352 and following, of the General Code. The procedure of these statutes is one provided for and one that therefore may contemplate a final discontinuance of business. These statutes are as follows:

"Sec. 9352. When any such company proposes to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of insurance, setting forth the terms and conditions of the proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve.

"Sec. 9353. The superintendent thereupon shall issue an order of notice, requiring notice to be given by mail to the policyholders of such company, of the pendency of such petition, and the time and place at which it will be heard, and the publication of the order of notice and petition, in five daily newspapers to be designated by him, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing on the petition.

"Sec. 9354. The governor or in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney

general, and the superintendent of insurance, shall constitute a commission to hear and determine upon such petition. At the time and place fixed in such notice, or at such time and place as is fixed by adjournment, the commission shall proceed with the hearing, and may make such examination into the affairs and condition of the company as it may deem proper. The superintendent of insurance may summon and compel the attendance and testimony of witnesses and the production of books and papers before the commission. Any policyholder or stockholder of the above named company or companies may appear and be heard in reference to such petition.

"Sec. 9355. If satisfied that the interests of the policyholders of such company or companies are properly protected, and that no reasonable objection exists thereto, the commission may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as seems to it best for the interests of the policyholders, and make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission, whose duty it will be to guard the interests of the policy holders of any such company or companies proposing to consolidate or reinsure."

Under section 9353, above quoted, each policy holder should receive a personal notice of the fact that the matter of the discontinuance of the business of the first company, and the assumption of its obligations by the second, is under consideration, and he is given an opportunity to present any objections he may have thereto. The settlement of the question depends upon whether or not a policyholder expressly or impliedly consents to the substitution of the second company for the first company as obligor upon his policy. Whether or not he so consents is a question to be decided from the attending facts and circumstances.

I am of opinion that if the reinsurance is consummated in strict conformity to the statutes, and all statutory notices are given, and the policyholder has actual notice of the contemplated discontinuance of the business of the first company, and the substitution of the second company (so far as the policyholder is concerned) for the first company, and if, after receiving such notice the policyholder makes no objection but pays his subsequent premiums to the second company, then a presumption would arise that he had consented to the substitution of the second company for the first company and agreed to release the first company from liability and to look only to the second company for whatever claim he might have.

You state in your request "upon the approval of such reinsurance agreement, The Cleveland Life Insurance Company placed upon all of the policies of The Great Northern Life Insurance Company, so reinsured, its rider, assuming all the obligations of The Great Northern Life Insurance Company, upon such policies."

If this rider is broad enough to cover all of the details mentioned in the last preceding paragraph, and the policyholder, after the attachment of such rider to his policy, pays his premium to the second company, then I think he would be estopped from asserting a claim that he had not consented to the reinsurance and the substitution of the second company as insurer upon his policy in place of the first company, and the superintendent of insurance would be justified in considering that the debt and liability due from the first company to the policyholder was extinguished.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

903.

ABSTRACT OF TITLE.

Abstract of title to site of the proposed armory at Defiance, Ohio.

COLUMBUS, OHIO, April 29, 1914.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 16th wherein you enclose abstract of title to the site of the proposed armory at Defiance, together with a deed from the city to the state of Ohio therefor, and request my opinion as to the character of title that the state will acquire thereunder.

It appears that the two ordinances to which objecion was made in my opinion of April 8, have been duly repealed as therein suggested. A new ordinance donating said land to the state and authorizing the mayor and clerk of council to sign a deed on behalf of the city, without any restrictions or conditions, was passed by the city council on April 13th, approved by the mayor, and filed in his office on the same date. Pursuant to the provisions of this ordinance, the officers authorized therein, executed and delivered on behalf of the city, a deed to the state of Ohio for said real estate, which deed is dated April 14th. No emergency clause was attached to the ordinance.

Under section 4227-2, General Code, as amended in 1913 (103 O. L., p. 211), "no ordinance or other measure shall go into effect until 30 days after it shall have been filed with the mayor of such municipal corporation, except as hereinafter provided."

This statute is very general and, in my judgment, is applicable to the aforesaid ordinance of the city of Defiance. The mayor and clerk of council derived their authority to execute the deed on behalf of the city, from the ordinance and as the ordinance will not go into effect until 30 days after it was filed with the mayor, unless there is a referendum petition filed in the meantime, in which event the going into effect of the ordinance would be postponed until it is approved by the electors of the city, I am of the opinion that said deed was prematurely executed and that the state of Ohio cannot acquire a good title thereunder.

I advise that you return same to the city of Defiance and instruct the officers named in the ordinance to execute a new deed when the ordinance goes into effect. The penciled notations on the present deed should be incorporated in the new one in order to make it a deed in fee simple, as required by section 3631 of the General Code.

Abstract and deed are herewith returned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

904.

STATE DEPOSITORY LAW—INSURANCE FUND OF COMPENSATION ACT OF THE STATE LIABILITY BOARD OF AWARDS—AMOUNT THAT MAY BE DEPOSITED IN A PRIVATE BANK AS AN INACTIVE DEPOSIT.

Section 12 of the state depository law applies to the insurance fund of the state liability board of awards, since the law requires that the insurance fund shall be deposited in the same manner and subject to all the provisions of law with respect to the deposit of state funds.

No bank shall have on deposit in the aggregate more than its paid-in capital stock, and in no event more than $300,000 as an inactive deposit whether the same be made up of state funds or insurance funds or both.

COLUMBUS, OHIO, April 29, 1914.

HON. JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of March 3, 1914, you write asking an opinion of me as follows:

> "Section 12 of the state depository law provides as follows:
>
> "'No bank or trust company shall have on deposit at any one time more than its paid-in capital stock and in no event more than three hundred thousand dollars ($300,000.00) as an inactive deposit.'
>
> "The state treasurer is custodian of the state insurance fund; the moneys to the credit of this fund have been kept and treated as a separate and distinct fund. Will you advise me as to whether or not this fund should be treated as a separate fund with reference to making deposits as provided for in the above section?"

Sections 9 and 10 of the act of February 26, 1913, to further define the powers, duties and jurisdiction of the state liability board of awards, with reference to the collections, maintenance and disbursements of the state insurance fund, for the benefit of injured and the dependents of killed employes, and requiring contribution thereto by employes (103 O. L., 72), provides as follows:

> "Section 9. The treasurer of state shall be the custodian of the state insurance fund and all disbursements therefrom shall be paid by him upon vouchers authorized by the state liability board of awards and signed by any two members of the board; or such vouchers may bear the fac-simile signatures of the board members printed thereon, and the signature of the chief of the auditing department.
>
> "Section 10. The treasurer of state is hereby authorized to deposit any portion of the state insurance fund not needed for immediate use in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer; and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of authority herein given, shall be collected by him and placed to the credit of such fund."

It is quite clear that awards made by the board under the act of which these sections are a part, are to be paid specially out of the said insurance fund therein provided for. It follows that you have been quite correct in keeping moneys to the

credit of the state insurance fund as a separate and distinct fund; and in case of a deposit by you of such moneys under the state depository law (section 321, et seq., G. C.) such moneys should be deposited as a separate and distinct fund. The deposit of such moneys, however, is subject to the provisions of section 12 of the state depository act (Section 330-1, G. C.) noted by you, which provides as follows:

> "No bank or trust company shall have on deposit at any one time more than its paid-in capital stock and in no event more than three hundred thousand dollars ($300,000.00) as an inactive deposit."

That is, no bank or trust company is authorized to receive such moneys, in the event that the same, either alone or in addition to other state monyes on deposit with such bank or trust company, exceeds in amount the limitations of this section.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

905.

EIGHT HOUR LAW—DISTINCTION BETWEEN WORKMEN ENGAGED IN PUBLIC WORK AND WORKMEN WORKING FOR THE PUBLIC.

The words "public work carried on or aided by the state, etc.," refer solely to construction work, making a distinction between workmen engaged in public work and workmen working for the public.

Section 3 of house bill 100, 103 O. L., page 854, has the effect of postponing the application of section 2 until July 15, 1915, section 2 being the section imposing penalty.

COLUMBUS, OHIO, April 29, 1914.

HON. C. E. VAN DUESEN, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I have your favor of February 11, 1914, in which you inquire:

> "I am asking you at this time for an interpretation of house bill No. 100 (103 Laws of Ohio, p. 854), providing for an eight-hour day on public work in the state or any political subdivision thereof, or by contract or subcontract on behalf of the state, or any political subdivison thereof, and penalties for violation of same, as pertaining to engineers, firemen, and other employes of the waterworks department of this city.
>
> "There seems to be some difference of opinion as to whether this act went into effect August 8, 1913, or whether it will be in force or applicable on July 1, 1915."

Your inquiry involves a consideration of the act you mention and also of the constitutional amendment on the same subject, which reads:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

The act of April 28, 1913, 103 O. L., 854, reads:

"Section 1. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.

"Section 2. Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both.

"Section 3. This act shall be in force and applicable to all contracts let on and after July 1, 1915."

Section 1 of this act merely carries the provisions of the constitution into the statutes. Section 2 provides a penalty for violation of the law and section 3 provides when it shall be applicable. That section 3 was only intended to mean "all contracts for public work let on or after July 15, 1915," cannot be questioned for the reason that to not so limit it and to leave "all contracts" to apply to those of a private or public character as well as for public works, would make it extend beyond the authorization of the constitution.

This brings us to a consideration of the meaning of "any public work," as used in the constitutional amendment and the act in question.

For a great many years the term "public work" or "public works" as used in this state has had a well defined and at the same time a limited meaning as applying to the canals of the state and such other state property as was in the charge and under the control of the board of public works, but the language "carried on or aided by the state" clearly evinces an intention on the part of the constitutional convention to extend the meaning of the words "public work" beyond the above meaning and to include public roads and highways, the improvement of which was "aided by the state." I cannot bring myself to adopt the limited construction above set forth, and conclude that public work "carried on or aided by the state" or any political subdivision must necessarily include all public buildings constructed by the state or any county, city or township therein, all improved roads, pikes, inter-county highways, main or other market roads whether constructed with or without state aid, and all matters of a constructive character, or in repair of the same class of buildings, roads or the like.

To my mind there is a broad distinction between "workmen engaged on public work" and "workmen working for the public," and that this distinction must be kept in view all of the time.

The state house and buildings occupied by the various state departments are full of workmen "working for the public," yet very few, if any of them, are engaged on a public work carried on by the state, as I construe the term.

In Blank vs. Kearney, 44 N. Y., App. Div., 492, in a case where the language "any public work or improvement" was under consideration, it was said by the court:

"Separate lighting contracts are required to be made in each borough, 'or in such subdivision of the city as may appear to the board of public im-

provements and the municipal assembly to be for the best interest of the city.' The contracts must be for the term of one year and be awarded to the lowest bidder.

"These seem to be the principal statutory provisions bearing upon the plaintiff's cause of action, unless it is affected by the following clauses of section 413 of the charter:

"'Except as herein otherwise provided, any public work or improvement within the cognizance or control of any one or more of the departments of the commissioners who constitute the board of public improvements, that may be subject of a contract, must first be duly authorized and approved by a resolution of the board of public improvements and an ordinance or resolution of the municipal assembly. * * * When a public work or improvement shall have been duly authorized as aforesaid, then but not until then, it shall be lawful for the proper department to proceed in the execution thereof in accordance with the provisions and subject to the limitations of this act.'

"If the pharse 'any public work or improvement' in this section was intended to comprehend service rendered and supplies furnished in carrying on the ordinary functions of a municipality whenever carried on through the agency of a contract, then the learned judge at special term was right in continuing the injunction. In our judgment, however, section 413 of the Greater New York charter relates rather to *public works* in the nature of betterments and does not refer at all to such a matter as public lighting, which must constantly be provided for from day to day and month to month in the administration of the affairs of the city."

In view of this authority and the construction herein above given, as to the meaning of public works, I am of the opinion that the statute in question does not apply to employes of waterworks departments of cities, and that section 3 of the act has the effect of postponing the application of section 2 until July 15, 1915, and then to contracts for public works as herein defined only.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

906.

WARNES TAX LAW—EFFECT OF TAXATION ON BANK SHARES

The Warnes tax law does not affect taxation of bank shares in any material respect as heretofore existing under sections 5672 and 5673, General Code, as amended; the bank pays only as agent of stockholder, the stockholder being ultimately liable.

COLUMBUS, OHIO, April 29, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You inquire in your letter of April 10th, whether banks should "under the new Warnes law" pay taxes on their shares of stock owned by their stockholders. You state that there is some question with reference to the right of a bank paying taxes in this manner to deduct such a payment as a part of its expenses for the purposes of the federal corporation income tax.

Permit me to call your attention to two opinions that you will find in the annual report of the attorney general for the year 1911-1912, pages 592 and 610. These opinions discuss generally the theory of the taxation of national banks under the permissive federal statute, and show, I think, that for convenience the state has adopted the same scheme of taxation with reference to state and private banks as the one necessarily followed in the case of national banks.

The opinion in question, however, do not state the present law with respect to the question which you ask. Since their rendition, sections 5672 and 5673 have been so amended as to make the bank primarily liable for the payment of the tax, although the tax is not assessed against the bank as such, but rather against its shares of stock as the property of the shareholders. (102 O. L., 91). The sections in full are as follows:

> "Section 5672: Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares and to pay the same to the treasurer of the county in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes.
>
> "Section 5673. Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders, respectively, as provided in the next preceding section, may deduct the amount due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

These sections themselves answer your question. It is the duty of a bank to pay the taxes assessed upon its shares and to charge a proportionate amount to the account of each stockholder. In law, therefore, the bank pays only as an agent of its stockholders and has an efficient remedy for reimbursement from its stockholders. Ultimately, therefore, the bank does not pay the tax at all, in contemplation of law, any more than it could be said to pay a check presented to it against an account of one of its depositors.

The "Warnes" law, so called, 103 O. L., 786, does not affect the taxation of bank shares in any material respects so far as your question is concerned.

I trust I have made plain to you the meaning and purport of the Ohio Statute. I beg, however, to be excused from expressing any opinion with respect to the interpretation of the federal statute to which you refer. Such a matter is scarcely within the scope of my authority, and does not appear to be one in which the state is interested.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

908.

TOWNSHIP TRUSTEES — BOARD OF EDUCATION — SURPLUS FUNDS.

Township trustees are not authorized to loan the township board of education surplus funds.

COLUMBUS, OHIO, April 30, 1914.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of April 9th, requesting my opinion upon the following facts :

> "A certain school district not qualified to receive state aid has until the present been unable to secure from taxation sufficient funds to meet its current expenses on account of the salaries of its teachers, because of the operation of the 1910 tax limitation of the 'Smith one per cent. law;' anticipating relief in the future by reason of the enactment of the Kilpatrick law doing away with the 1910 limitation, the board of education desires to borrow money in anticipation of its increased returns from taxation.
>
> "It so happens that the civil township, roughly corresponding in a territorial way to the school district, has in its treasury an amount of money sufficient to enable the board of education to pay its past due and anticipated claims on account of teachers' salaries. This fund constitutes a surplus not needed for the current purposes of the township. The trustees of the township are willing to loan this money temporarily to the board of education of the school district at 4 per cent. interest, that being the rate now received by the township trustees for the use of this fund by the township depository.
>
> "May the proposed arrangement be lawfully carried out?"

There is no doubt of the right of the board of education to borrow money. Section 5656, et seq., permits money to be borrowed for the payment of any valid indebtedness which cannot be paid at maturity; and section 5661, General Code, exempts contracts for the employment of teachers from the requirement that a certificate be issued that money for the obligation is in the treasury, as provided by the preceding section. Hence, teachers may be employed whether money is in the treasury to meet their contracts or not; so that by rendering services under a contract of employment a teacher acquires a valid claim against the district.

But as to the power of the township trustees to lend money I confess that I cannot conceive of any legal justification for such a course. The statutes certainly do not authorize it; and the board of trustees being a creature of the statutes, with no powers excepting those which are expressly conferred upon it by law, it necessarily follows that absence of authority is equivalent to a prohibition.

However just, reasonable and practically sensible it may seem, therefore, to use a surplus public fund produced by the levy of taxes upon a given territory, temporarily for another purpose pertaining to the same territory, in substance, although under the name of another political subdivision, I cannot as a matter of law advise that the contemplated arrangement may be entered into.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

909.

OFFICES COMPATIBLE—MEMBER OF THE BOARD OF EDUCATION—CITY ELECTRICIAN.

A member of the board of education may be employed as city electrician; there is no incompatibility existing.

COLUMBUS, OHIO, May 6, 1914.

HON. CHARLES W. CHEW, *City Solicitor, Mansfield, Ohio.*

DEAR SIR:—I have your letter of March 23, 1914, as follows:

> "Our city electrician is also a member of the school board. I would like to have your opinion as to whether he can hold both of these positions."

Throop on Public Officers, section 33, says:

> "Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty."

And in Dillon on Municipal Corporations, in a note to section 419, it is said:

> "Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

There is nothing in the statutory law of this state that prohibits a member of the board of education from being employed as city electrician, nor does the rule of common law incompatibility, as laid down above, prohibit such employment.

I am therefore of the opinion that a member of the board of education may be employed as city electrician.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

910.

CIVIL SERVICE—INCUMBENTS UNDER SECTION 10 OF THE CIVIL SERVICE ACT.

1. *Persons, who under color of title, are occupying positions, which were in the classified service under the old municipal civil service law, in cities where no civil service commission had been appointed, are incumbents under section* 10 *of the civil service act.*

2. *Persons, who under color of title, are occupying positions, which were in the classified service under the old civil service law, in cities where the appointing power did not make requisition on the civil service commission for certification of eligibles, are incumbents under section* 10 *of the civil service act.*

COLUMBUS, OHIO, May 4, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of January 1, 1914, you inquire:

> "Are the officers below designated 'incumbents' within the meaning of section 10 of the civil service act?
>
> "First. Persons occupying offices in the service classified under the provisions of the old law in municipalities where no civil service commission has been appointed.
>
> "Second. Persons occupying offices in the service classified under the provisions of the old law in municipalities where a civil service commission has been appointed but where no competitive examinations had been held.
>
> "Third. Persons occupying offices in the service classified under the provisions of the old law in municipalities where the appointing power did not make requisition on the civil service commission for certification of eligibles."

Section 10 of the civil service act, 103 Ohio Laws 703, to be known as section 486-10, General Code, provides in part:

> "The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to noncompetitive examinations as a condition of continuing in the service."

It will be observed that this section excepts those who are holding their positions under existing civil service laws. Section 31 of the act specifically covers these positions. This section reads, in part:

> "All officers and employes in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall when this act takes effect, be deemed appointees under the provisions of this act."

By virtue of this section persons in the classified service holding their positions "under existing civil service laws" are deemed as appointees under the new law. These persons are not required to take any examination. In each of the

three cases submitted the persons are not holding their positions under "existing" civil service laws as these laws were not complied with. They are not therefore appointees under section 31. Their status must be determined by the provisions of section 10 of the act.

Are they incumbents within the meaning of this section?

The word "incumbent" is defined in 22 Cyc. at page 72:

> "Incumbent. A person who is in present possession of an office; one who is legally authorized to discharge the duties of an office."

The persons in question are in possession of the office or position and I assume are discharging the duties thereof. While their appointments were not made in compliance with the terms of the old civil service law, yet I assume that they were appointed by the officer or person who had the authority to appoint to such positions or offices. In such case the employes or officers are acting under color of title and would be considered de facto employes or officers. One of the requisites of a de facto officer is possession of the office under color of title. Possession and performance of the duties of the office, under color of title, makes him an incumbent of the office.

That in my opinion is the meaning of the word "incumbent" in section 10 of the civil service act. That is, an incumbent is one who, on January 1, 1914, is in possession of an office or position and performing the duties thereof under color of title.

Answering your specific questions:

First. Persons who, under color of title, are occupying positions which were in the classified service under the old municipal civil service law, in cities where no civil service commission had been appointed, are incumbents under section 10 of the civil service act.

Second. Persons who, under color of title, are occupying positions which were in the classified service under the old civil service law, in cities having a civil service commission but where no competitive examinations were held, are incumbents within the meaning of section 10, supra.

Third. Persons who, under color of title, are occupying positions which were in the classified service under the old civil service law, in cities where the appointing power did not make requisition on the civil service commission for certification of eligibles, are incumbents under section 10 of the civil service act.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

911.

CIVIL SERVICE—APPOINTING POWER—CITY ENGINEER—JANITOR.

If the city engineer is the head of a city department created by the director of public service, his appointment would by virtue of section 4350, General Code, be made by the mayor. The janitor would be appointed by the director of public service. Both the engineer and janitor in question were holding their offices January 1, 1914, and therefore, are incumbents under section 10 of the civil service act, and are required to take non-competitive examinations.

COLUMBUS, OHIO, May 4, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Hon. David R. Gilbert, city solicitor of Warren, Ohio, inquires of this department as follows, under date of December 23, 1913:

> "We have a new mayor, a new city auditor, and almost an entirely new council. The new mayor desires to appoint a city engineer and also a janitor. My interpretation of the law is that the mayor does not appoint these officers, but the director of public service who is himself appointed by the mayor.
>
> "The present incumbents, that is, the city engineer and janitor would like to hold their jobs. I assume that neither have ever passed a competitive examination before the city board of civil service commissioners. We have had such a board in Warren, heretofore. Granting that they have never passed such examination, are they entitled under section 10 of this act, (the civil service act), and as incumbents in these offices, to demand a non-competitive examination before the commission and passing such examination, to the satisfaction of the commission, entitled to continue to hold their positions as being protected by the civil service law?"

Two questions are to be considered:

First. Who has the power of appointing the city engineer and a janitor?

Second. Is a city engineer and a janitor who have taken no civil service examination incumbents under section 10 of the civil service act?

Section 4250, General Code, provides:

> "The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

The city engineer is the head of the subdepartment of engineering under the department of public service, if the director has created such subdepartment. Under section 4250, General Code, the mayor has the authority and power to appoint the city engineer.

Section 4246, General Code, provides:

> "The executive power and authority of cities shall be vested in a mayor,

president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title."

Section 4247, General Code, provides:

"Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, and likewise, subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes."

By virtue of these sections the director of public service has the power to appoint employes in the department of public service, unless otherwise provided by law. The heads of subdepartments are otherwise provided for in section 4250, General Code, supra.

The appointment of a janitor in the department of public service is not otherwise provided for, and therefore, the director of public service has the power to make such appointment.

Are the city engineer and the janitor to be considered as incumbents under section 10 of the civil service act?

Said section 10, provides in part:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. * * *"

It appears that these persons were occupying the positions on January 1, 1914, and were discharging the duties of such position. You assume that they have never taken an examination. I assume, however, that they were appointed by the proper appointing authority, or that the appointment has been ratified by such authority.

Even though they were required to take an examination under the old law, which is not necessary to be here determined, they would nevertheless be incumbents within the meaning of section 10 of the civil service act, if they were appointed by the proper authority, or the appointment ratified by such authority. That is, they must be holding their positions under color of title.

If they are incumbents as above defined they would be required to take a non-competitive examination as a condition of continuing in their positions.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

912.

KENT STATE NORMAL SCHOOL—CONTRACT—ARCHITECT—APPROPRIATION.

Where a contract between the board of trustees of Kent State Normal School and its architect providing that the architect must prepare all necessary sketches, etc., for buildings and improvements to be erected by the trustees under the present appropriation of 1913 *and* 1914; *such contract was entered into May* 2, 1913, *and the appropriation bill of* 1914 *was repealed and a budget bill enacted, it is necessary to enter into a new contract with the architect for buildings to be made under the appropriation provided for in the budget bill.*

COLUMBUS, OHIO, May 4, 1914.

HON. JOHN A. MCDOWELL, *Secretary, Board of Trustees, Kent State Normal School, Ashland, Ohio.*

DEAR SIR:—Under date of March 9, 1914, you submitted for an opinion the following request:

> "I am writing you for your opinion on contract our board of trustees made with Mr. Geo. F. Hammond, architect, in 1913. I am enclosing copy of contract herewith. We want to know if the contract is valid.
>
> "The contract was made with reference to the use of funds appropriated by the legislature in regular session in 1913. The legislature appropriated funds to be available in 1914. The special session repealed the 1914 appropriation and made a new appropriation. In the recent appropriation the funds are not specifically appropriated. For instance, in the former appropriation a certain amount was appropriated for powerhouse, etc. In the latter appropriation no amount is named for powerhouse, and if we proceed to build the agricultural and training building as planned we would not have sufficient funds to build a powerhouse. The real question with us is, does the action of the special session of the legislature make it necessary, or advisable, that we should have a new contract with our architect?"

Under date of April 18, 1914, by virtue of a request from this department, you submitted further information regarding the contract referred to in your former communication, as follows:

> "Referring to your letter relative to the contract our board of trustees made with Mr. Geo. F. Hammond, architect, in 1913, will say that it is our plan to pay for the buildings contracted for and to be contracted for, out of appropriations made in 1913, and also in 1914. The architect would be paid out of the same funds.
>
> "The general assembly in 1913, appropriated so much available in 1913, and a further amount available in 1914. The special session repealed the act appropriating a certain amount to be available for specific buildings in 1914, and reappropriating a sum for building purposes. Under the present appropriation we cannot undertake to build all the buildings enumerated in the contract with the architect. We cannot proceed to contract for a powerhouse. The architect's contract includes this building."

Under date of April 28, 1913, the 80th general assembly at its regular session

passed a general appropriation bill for the year 1914, which was approved by the governor May 9, 1913. That bill carried the following items for the Kent State Normal School.

KENT STATE NORMAL SCHOOL.

Salaries of teachers and officers, $37,500.00, raised by a special levy and appropriated, and	$18,500 00
Current expenses	9,000 00
Driveways, walks and improvements to grounds	8,000 00
Library	4,000 00
Apparatus	3,000 00
Farm and experiment field	3,000 00
Field work (extension teaching)	6,000 00
Pianos and musical equipment	1,000 00
Auditorium, library, gymnasium and office building	50,000 00
Agricultural building and training school	50,000 00
Powerhouse and equipment	20,000 00
Powerhouse connection with four buildings	5,000 00
Expenses board of trustees	1,500 00

As stated in your last communication, this act appropriated a certain amount to be available for specific buildings in the year 1914. At its recent session, the legislature passed an act entitled, "An act to make general appropriations and to repeal house bill 670, approved May 9, 1913 (103 O. L., 627), entitled an act 'to make general appropriations." The act so repealed was house bill 670, approved May 9, 1913, which is the same act above referred to and which made general appropriations for the year 1914.

The contract between the board of trustees and the Kent State Normal School and the architect, copy of which is attached to your inquiry, was entered into on the 2nd day of May, 1913, and contains the following clause:

> "Witnesseth: That said party of the first part has engaged and agreed with, and hereby does engage the said second party to prepare all necessary sketches, drawings, specifications, details, and estimates for all buildings and improvements to be erected by said first party under the present appropriation of 1913 and 1914, in or near the village of Kent in the state of Ohio, for the purpose of said Kent State Normal School, and to superintend their erection."

This contract was entered into before the general assembly at its special session enacted house bill 47, entitled "An act to make general appropriations and to repeal house bill 670, approved May 9, 1913 (103 O. L., p. 627), 'entitled an act to make general appropriations,'" referred to above, and which said act repealed house bill 670 referred to above. Inasmuch as the contract above quoted from specifically says that the architect, who is therein the second party, was to be paid out of the present appropriations of 1913 and 1914, for preparing all necessary sketches, drawings, specifications, etc., and inasmuch as the general appropriation for this particular purpose so provided by the general appropriation bill enacted in 1913 has been repealed by the act to make general appropriations, which was enacted by the special session of the 80th general assembly, passed February 16, 1914, and which is above referred to as house bill No. 47. I am therefore of the opinion that it is necessary for your board of trustees to enter into a new contract with said architect or such other architect as the board may agree upon, to prepare sketches, drawings,

specifications, estimates, etc., of buildings and improvements which are to be made under the appropriations provided for by house bill 47, enacted by the general assembly at its late special session.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

913.

CENTRALIZED SCHOOL—BORROWING MONEY WITH WHICH TO BUILD CENTRALIZED SCHOOL.

There is no provision of law other than sections 7626, et seq., General Code, whereby boards of education authorized by vote under section 4726 to centralize schools may borrow money with which to erect a centralized school building.

COLUMBUS, OHIO, May 4, 1914.

HON. RUSSELL M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 8th, wherein you request my opinion upon the following question:

> "Is there any provision of law other than those of sections 7626, et seq., of the General Code whereby a board of education, which has been authorized by a vote taken under section 4726, General Code, to centralize the schools of the district, may procure funds with which to build a centralized school building?"

If by "procuring funds" you mean the borrowing of money, it is my opinion that section 7626, et seq., General Code, constitute the only authority of the board of education in the premises.

Sections 7629 and 7630, General Code, formerly authorized the borrowing of money for such purposes, but these sections are seriously affected by a decision of the supreme court in the case of Rabe et al. vs. Board of Education of the Canton school district, the full text of which is published in recent issues of the current legal publications. From your letter, however, I assume that you are aware of the provisions of sections 7629 and 7630 and that you intended to ask whether or not here are provisions other than these which might be followed by a board of education under the circumstances referred to.

Of course, a board of education has the right to levy for a building fund from year to year, and in time, by this procedure, a sufficient amount of money might be accumulated for the purpose suggested, otherwise than by levying taxes in this way or by borrowing money under the statutes mentioned, however, I know of no manner in which funds might be procured by the board of education for the purpose of building a structure sufficient for the needs of the centralized schools.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

914.

DIFFERENCE BETWEEN PAID-UP STOCK OF A BUILDING AND LOAN ASSOCIATION AND PAID-UP STOCK OF OTHER CORPORATIONS—LEGAL INVESTMENT FOR CORPORATIONS AND SAVINGS BANKS.

The paid-up stock of a building and loan association, not being similar to the paid-up stock of other corporations for the reason that the same is assessable, is not within the meaning of the word "stocks" as used in section 9765, General Code, which authorizes savings banks, or section 9781, General Code, which authorizes trust companies to invest capital, surplus and deposits in "stocks" which have paid dividends for five consecutive years next prior to the investment.

COLUMBUS, OHIO, May 6, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of March 5, 1914, you write asking my opinion as follows:

> "Please render to this office an opinion as to whether or not the paidup stock of a building and loan association which has regularly paid dividends for more than four years past, would be a legal investment for a commercial savings bank and trust company."

Under the provisions of section 9702, General Code, a company may be incorporated as a commercial bank, savings bank, or as a trust company; or such bank may be incorporated to conduct all three of said departments of banking business. The bank here mentioned is a commercial savings and trust company, and in ascertaining its powers, reference must be had to statutory provisions applicable to each of the departments comprising the institution.

Section 9758, General Code, prescribing the manner in which the surplus, capital and deposits in a commercial bank may be invested, makes no mention of corporate stocks as an authorized investment, but section 9765, General Code, applicable to savings banks and section 9781, General Code, applicable to trust companies, authorize said respective companies to invest their capital, surplus and deposits in "stocks, which have paid dividends for five consecutive years next prior to the investment, * * * when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee."

The question is whether, under the statutory provisions above noted, this bank can invest its funds in the paidup stock of a building and loan association. Unless such right finds support in these provisions, it does not exist, for, independent of statute, a bank incorporated under state laws has no power, as an investment, to subscribe for or buy stock in other corporations.

(Section 9684, General Code.)
Franklin Bank vs. Commercial Bank, (36 O. S., 350).
Nassau Bank vs. Jones (95 N. Y., 115).
Preston vs. Marquette Savings Bank (112 Mich., 696).
Bank of Commerce vs. Hart, (37 Neb., 197).

Section 8683, General Code, provides as follows:

> "A private corporation also may purchase or otherwise acquire, and

hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition."

This section however, in my opinion, confers no power on the bank with respect to the question here presented. This section is one, general in its terms, and inasmuch as special provision has been made with reference to the powers of banks to purchase the stock of other corporations, such specific provision must be looked to rather than the section above noted.

It follows, therefore, that the solution of the question here presented depends upon whether paidup stock of a building and loan association is, as a matter of legislative intention, comprised and included within the term "stocks," as used in sections 9765 and 9781, General Code, above noted. There is no statutory provision in this state authorizing building and loan associations to issue paidup stock. In this connection, however, the rule seems to be that such associations have power to issue such stock unless specially prohibited.

The stock of a building and loan association, however, presents a number of features which distinguish it from the stock of ordinary corporations. It is sufficient for the present inquiry to note that the holders of shares of stock in a building and loan association sustain a relation of stock mutuality towards each other. Each shareholder participates alike in the earnings of the association and alike assists in bearing the burden of losses sustained.

Eversman vs. Schmitt, 53 O. S., 174, 184.
Leahy vs. Mutual B. & L. Asso., 100 Wis., 555.

It results from this that the paid-up stock of these institutions is not like the paidup stock of other corporations (except banks)—nonassessable. On the contrary, the mutual character of the association prescribed that the burden of losses must be sustained by the stockholders according to the amount of their stock, and this burden is borne by the holders of paidup stock as well as other members of the association.

The foregoing consideration is sufficient to distinguish the paidup stock of these institutions from the "stocks" contemplated in sections 9765 and 9781, General Code, above noted.

Whatever may be the proper scope and meaning of the word "stocks," as used in these sections, prescribing and defining the authorized investments of savings banks and trust companies, I am of the opinion that it is, in any event, to be limited to such stocks as represent capital stock in its complete and proper sense, and that stock of a building and loan association, whether paid up or otherwise, is not included within the meaning of the term.

It follows that the paidup stock of a building and loan association is not a legal investment for a bank incorporated under the laws of this state.

In conclusion it may be noted that even as to "stocks," which are properly such within the meaning of the term as used in the statute, those only are legal investments for banks which have paid dividends for five consecutive years next prior to the investment. It does not appear that the building and loan stock mentioned in your inquiry has paid dividends for this length of time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

915.

ROAD COMMISSIONERS MAY IMPROVE ROAD THROUGH THE VILLAGE.

Where a road extends from one boundary of a district to another, both wholly in one township of said district, the road commissioners may improve said road through the village under section 7108.

COLUMBUS, OHIO, May 4, 1914.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letter of February 11th, in which you state, in substance, the following facts:

Four townships in Coshocton county have formed a special district for the improvement of roads, under sections 7095-7136, inclusive, of the General Code. A road wholly in one of the townships of the district extends from one boundary of the district to another through the village of Roscoe, and is improved to the corporate limits on either side.

You request my opinion as to "whether the county commissioners, under house bill No. 277 (103 O. L., 547), or the road commissioners under section 7108, General Code, may improve said road through the village of Roscoe."

House bill No. 277 purports to supplement section 6956, by the enactment of section 6956b, which provides as follows:

> "Whenever there is a gap of unimproved road of less than a mile in length between two improved state roads or paved street of a municipal corporation where one of the the roads leads into the other, the county commissioners by unanimous action, are empowered to improve such gap of unimproved road, using such material as in their judgment is best suited for the work, the cost of which is to be paid out of the road fund of the county treasury; * * *."

This act can only be invoked when it is desired to improve a gap of unimproved road between two improved state roads, or between an improved state road and a paved street of a municipal corporation.

I am unable to state, from the facts submitted, whether this road is within the provisions of section 6956b, and for this reason I cannot give a direct answer to your first question.

Section 7108, General Code, provides:

> "If a majority of the votes cast at such election is in favor of improvement of the public roads of such district by general taxation, the road commissioners shall each year designate and determine what roads in their opinion should be improved in said year, the extent of such improvement in each township, at what points the improvement shall begin, and how much improvement shall be completed annually. No public highway within the corporate limits of a city or village in such road district shall be improved unless such road extends through such road district continuously."

The foregoing is a part of a chapter of the road statutes providing a method for the improvement of roads within districts formed from not less than two nor more than four adjacent townships, in any county, occupying contiguous and compact territory. Without quoting therefrom, it is sufficient to say that the chapter

in which the above section is found evinces an intention to make the district the unit for the improvement and repair of roads rather than the several townships composing it.

The commissioners may not improve a highway within the corporate limits of a municipality within the district, unless such highway extends through the district continuously. The purpose of this limitation was to prevent the expenditure of funds of the district for the improvement of streets of a municipality therein, indiscriminately.

As the identity of the townships composing the district is merged in the district, a road that touches any two boundaries of the district, even though it be wholly in one township thereof, provided there is no break in its continuity, may be improved within a municipality, out of funds of the district.

As the road described in your letter comes within the requirements of the statute, I am of the opinion that the road commissioners may improve the same through the village of Roscoe.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

916.

GIFT OF PROPERTY TO CITY FOR LIBRARY AND OTHER PURPOSES—CITY MAY ACCEPT SUCH GIFT.

Where a person in a city by way of gift executes a deed to the city conveying valuable residence property to certain persons as a board of trustees and directors of the public library of such city, in said deed it is provided that certain rooms shall be used for the welfare league and also certain rooms for literature, charitable and educational clubs, since the primary object of this gift is for a library, which is a public purpose, the mere fact that incidentally certain private clubs are taken care of would not vitiate the gift, and the city may accept the same.

COLUMBUS, OHIO, May 6, 1914.

HON. R. CLINT COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—I have your favor of March 25, 1914, in which you advise that Mr. George P. Jones of Findlay, Ohio, has executed, by way of gift to the city, a deed conveying valuable residence property to certain persons as the board of trustees and directors of the public library of said city; and that a question has arisen as to whether the deed for this property can be legally accepted in view of certain conditions imposed therein by the grantor.

Such of the conditions of said deed as are pertinent to the questions made are as follows:

> "Said premises so hereby conveyed shall be known and designated as 'The Jones Memorial,' which said words will be inscribed upon said premises by said grantor, and the same shall forever remain and be maintained by grantees and their successors in office as thereon inscribed.
>
> "The first floor of said building shall be used as a public library and reading rooms to and for the citizens and inhabitants of the city of Findlay; to be open to the public each week day according to the rules and regulations of the library board.

"Said public library and reading rooms shall also be open to the public on each and every Sunday between the hours of one o'clock, p. m. and six o'clock, p. m.

"The second floor of said building shall be used as follows: one room, to be designated by said library board, shall be reserved and used exclusively for said library board. One room, to be designated by said library board, shall be reserved and used exclusively for the welfare league of the city of Findlay. The balance of the rooms on said second floor shall be used exclusively for the clubs in the city of Findlay, organized for literary, charitable and educational purposes, and also for a rest room, provided, however, that at all times the same shall be under the supervision and control of the library board and shall be used and occupied in accordance with the rules and regulations adopted and provided by said board. The third floor of said building shall be used exclusively as a curio room, and for such entertainments as the library board shall permit. Upon said third floor shall be constructed, by the grantees, glass cases, kept locked and well equipped for lighting, within which shall be placed and preserved the curios accompanying said deed of gift from said grantor.

"All the expenses of the maintenance and operation of said grounds and buildings, as given for such purposes, as hereinbefore mentioned, must be paid by the grantees and their successors in office. And said premises must be kept and maintained at all times in good condition and repair.

The precise question with reference to the right of the grantees to accept this deed arises on the consideration that the grantor has imposed as a condition that a part of said building shall be used exclusively for the welfare league of the city of Findlay and a part reserved for the exclusive use of the clubs in the city organized for literary, charitable and educational purposes, and for a rest room; the deed provides, as a condition thereof, that all the expenses of the maintenance and operation of said grounds and buildings are to be paid by the grantees and their successors in office—and this, of course, out of public funds derived from taxation.

In view of the fact that municipal corporations have only such powers as the legislature expressly confers and such as are necessarily or fairly incident to its express powers, the rule seems to be that in the absence of express prohibitory statutes, or of statutes which in terms confer and limit, and therefore define and measure, the power, the capacity to acquire and hold property real or personal, must be fairly incidental to some power expressly granted or absolutely indispensable to the declared purposes of the corporation; and that it has the implied power, unless restrained by charter or statute, to purchase and hold all such real estate as may be reasonably or fairly necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created. (Dillon Municipal Corporations, Sections 975, 976.)

More immediately pertinent to the questions here presented and involved, the same author says:

"Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary, and, therefore, legacies of personal property, divises of real property, and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten

the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law. Thus a conveyance of land to a town or other public corporation, for benevolent or public purposes, as for a site for a schoolhouse, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated. (Section 981.)"

"Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of taking property, real and personal, in trust for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become cestuis que trust, within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its powers or duties, it may be compelled, in equity, to administer and execute it. * * *. (Section 982.)"

Among the authorities supporting the text of the author quoted may be cited the following:

Phillips vs. Harrow, 93 Iowa, 92.
Hamden vs. Rice, 24 Conn., 350.
In the matter of Crane, 12 App. Div. (N. Y.) 271.
Philadelphia vs. Cox, 64 Pa. St., 169, 181.
Brown vs. Brown, 7 Oregon, 285.
McIntosh vs. Charleston, 45 S. C., 584.
Beurhaus vs. Cole, 94 Wis., 617.
Clayton vs. Hallett, 30 Cols., 231.
LeCoutelex vs. Buffalo, 32 N. Y., 333.
Hatheway vs. Sackett, 32 Mich., 97.
Perin vs. Carey, 65 U. S., 465.
McDonough vs. Murdoch, 56 U. S., 367.
Vidal vs. Girard's Executors, 43 U. S., 127.
State ex rel. vs. Toledo, 3 C. C. n. s., 468.

In Vidal vs. Girard's Executors, supra, it was said:

"'If the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote and perfect those objects;' and the corporation has the legal capacity to take the estate as well by devise as otherwise, and the trust may be assumed and executed by the corporation 'even though the act of incorporation may have for its main objects mere civil and municipal government and regulating powers.'"

Phillips vs. Harrow, supra.
McDonough vs. Murdoch, supra.
Attorney General vs. Parker, 126 Mass., 221.

With respect to the question at hand I note that this property is not deeded to the city of Findlay directly and by name, but is deeded to the library trustees and their successors in office, forever. Nevertheless it is clear that upon the acceptance of this deed, the property conveyed by it will become a city institution and subject to maintenance out of the city's public funds; the trustees being, in contemplation

of law, but agents of the city, vested with such powers with respect to the control and administration of the property as a library as is given them by the provisions of sections 4004, et seq., General Code.

Cincinnati vs. Trustees, (66 O. S., 440, 448).
Sadler vs. Porter, (67 O. S., 531).

As far as the questions here presented are concerned, therefore, the proposed conveyance may be considered the same as one made direct to the city by name, and this suggests a consideration of the pertinent statutory provisions with respect to powers of the city concerning public libraries, and concerning its power to take, by way of gift, property for this or other purposes.

Section 3615, General Code, provides as follows:

"Each municipal corporation shall be a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift, devise, appropriation, lease or lease with the privilege of purchase, for any municipal purpose authorized by law, and hold, manage and control it and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest, or the provisions of any lease by which it may acquire property."

Section 3620, General Code, provides that municipal corporations shall have power "to establish, maintain and regulate free public band concerts, free public libraries and reading rooms, to purchase books, papers, maps and manuscripts therefor, to receive donations and bequests of moneys or property therefor, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose."

The property conveyed by this deed if accepted, must, by the conditions of the deed itself, be maintained by the city. This it can do only out of public funds raised by taxation levied for the support of the property as a public institution. The deed provides that certain rooms and apartments of the building conveyed shall be reserved for the exclusive use of the welfare league and clubs in the city of Findlay, organized for literary, charitable and educational purposes, and it has been suggested that these organizations are private affairs, and public moneys cannot be used for the maintenance of the building for their use.

I am not advised as to the declared or practical purpose of these organizations further than is indicated by the descriptive terms of the condition of the deed wherein they are mentioned. I infer from your communication that these organizations are wholly private; but as to the welfare league and the clubs organized for charitable and educational purposes, it may perhaps with safety be assumed that they are engaged in purposes in keeping, if not strictly germane to the purposes of the municipality.

The same assumption cannot be so safely made with respect to literary clubs, inasmuch as the benefits of their activities are probably confined to the members of the organizations.

I do not care, however, to base my conclusions with respect to the ultimate question as to whether the trustees can legally accept this deed upon speculations with respect to the possible general or even public benefit derived from the activities of these organizations or any of them.

Notwithstanding the fact that certain rooms in this building have been reserved

for these organizations, it fairly appears that the primary purpose of the grantor in this proposed conveyance is to give to the city of Findlay, as a memorial to his father and mother, a library building to be used for the purposes of a public library.

Pertinent to this consideration just noted, which, I think, is manifest, I note the case of Beurhaus vs. Cole, 94 Wis., 617. In this case certain property was devised and bequeathed by a testator to his wife and son, and the balance of his estate was devised and bequeathed to his executors in trust, with directions that certain of the property so devised in trust should, after the decease of the testator, be conveyed to the city of Watertown in said state, for the purpose of being used and maintained by said city as an old ladies' home. The balance of the property so deeded in trust was to be held by the trustees for the benefit of the wife and son of the testator during their lives, with the direction that after their death, funds or personal securities in the hands of the trustees should be given to the city of Watertown to be used in the purchase of suitable grounds upon which to erect a library and club house building.

The city refused to accept a conveyance, from the trustees, of the property devised in the will for the purpose of an old ladies' home, for the reason that the cost of maintaining the same was more than the city could, at that time, afford.

With respect to the provisions of the will providing that the city should erect a library and club house building out of funds and personal securities to be turned over to it by the trustees and with respect to the right of the city to erect a building of this kind out of the funds and property to be given it, the court held:

> "Although a city may have no authority, either over its charter or at common law, to maintain a business men's club room, yet a devise to it for the establishment and maintenance of a public library and business men's club room is not rendered void by the lack of such authority, where it was primarily the intention to make the library the important element of the trust, and the club room a comparatively unimportant accessory."

In its opinion the court says:

> "The question now arises whether it can establish and maintain a business men's club room, and, if not, whether the trust for library purposes is thereby invalidated. We have found no clause of the charter of the city expressly or impliedly authorizing the city to maintain such a room, nor do we know of any authority holding that such a purpose is germane to any of the objects of the corporation, and we think, upon principle, that it cannot be sustained. But the question whether the library trust is therefore invalidated is a different question, and one upon which we have received but little help from the briefs. The intention of the will seems quite plain that the public library is the important element of the trust, and the club room a comparatively unimportant accessory. It is evidently to be but a room in the building to be erected for the library. Must the library devise fail because the testator has directed that one room of the building, which might easily be provided without appreciable addition to the expense, shall be occupied at times, free of rent, by a business men's club? Such a result would be a reproach to the administration of justice. It has been held that where a devise otherwise valid is inseparably coupled with a void devise, and is a mere accessory thereto, and the amount of the valid part cannot be ascertained, then both must fall together. Chapman vs. Brown, 6 Ves. 404; 1 Jarman, Wills, 336. That, however, is not this case. The illegal part of this trust would require for its purpose an utterly inappreciable additional expense, if indeed it required any at all; and we do not think

that, under such circumstances, the valid devise, especially one so greatly for the public good, should be avoided. The courts are always favorably disposed to the establishment of libraries and hospitals, and all of the public institutions whose purpose is to ameliorate the condition of mankind. Gifts for such purposes are supported, if possible. We hold, therefore, that the library scheme does not fail by reason of the fact that the city cannot maintain the club room."

The question here arising upon the conditions prescribed in the proposed deed with respect to the use of certain rooms in the building by private organizations arises from the fact that the building, as a whole and as a city institution, is to be maintained by the expenditure of public funds.

In line with the case last cited and pertinent to the question presented, it has been held that "if the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves, as an incident, an expense which, standing alone, would not be lawful; but if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose."

Brooks vs. Brooklyn, 146 Iowa, 136.
Bates vs. Bassett, 60 Vermont, 535.
Wheelock vs. Lowell, 196 Mass., 220.

As before noted, I am convinced that the primary purpose of the property conveyed by the deed of Mr. Jones to the library trustees of the city of Findlay is that the same may be used as a public library which on acceptance, would become public property properly maintainable out of public funds; and the fact that as an incident to the primary purpose of this building as a public library it is subject to the occasional use of the organization named in the conditions, does not make the building any the less a public building, nor make the acceptance of the deed imposing these conditions, illegal.

The right of the city to maintain this building, coming into its possession as a gift affected by the conditions here imposed, is as full and complete as would be its right to expend public moneys in the erection of such a building.

As to the expenditure of public moneys in the erection of municipal buildings, it has been held that if a building was designed and adopted to serve the legitimate interests of the municipality, its erection will not be rendered illegal, if, when not wanted for municipal purposes, the municipality permits it to be used for other purposes having no relation to the purpose for which it was built, such as lectures and public entertainments.

Camden vs. Camden, 77 Maine, 530.
Greenbanks vs. Bootwell, 43 Vt., 207.
Bates vs. Bassett, supra.

Upon the foregoing conclusions, I am of the opinion that the deed in question may be legally accepted by the library trustees.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

917.

TEACHER'S PENSION—LEAVE OF ABSENCE CANNOT BE COUNTED AS SERVICE FOR THE AMOUNT OF PENSION TO WHICH TEACHER IS ENTITLED.

In order to be entitled to a pension, a teacher must have served thirty years of actual teaching, and a leave of absence granted to such teacher cannot be counted as service for fixing the amount of pension paid to such teacher under the provisions of section 7883, General Code, whether the same be granted because of ill health or not.

COLUMBUS, OHIO, May 6, 1914.

HON. HOWARD E. MCGREGOR, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—Under date of December 3, 1913, you submitted the following request for an opinion:

> "A teacher was employed by the board of education for two years; upon her appointment the teacher requested and was granted leave of absence during the first year without pay and the second year she returned to her work and received compensation. When this teacher after more than thirty years of teaching, retired on pension under section 7882 of the General Code, was the year of leave without pay properly counted as 'service' in fixing the amount of pension to be paid under section 7883?
>
> "The two-year appointment, given when appointments in general were for one year, was the prevailing method of making a teacher secure in a position on returning to work after absence on leave. Further, at that time, leave of absence was granted only on account of ill health.
>
> "Would the case be different if leave without pay were granted without specification of ill health as the reason?"

In reply thereto section 7882 of the General Code provides that any teacher may retire and become a beneficiary under the chapter providing for teachers' pensions, who has taught for a period aggregating thirty years, as follows:

> "Any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7883 of the General Code provides that each teacher so retiring shall be entitled to receive a pension for the remainder of his or her natural life, at the rate of twelve dollars and fifty cents for each year of *service* as teacher, as follows:

> "Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, annually, twelve dollars and fifty cents *for each year of service as teacher* except that in no event shall the pension paid to a teacher exceed four hundred and fifty dollars in any one year. Such pensions shall be paid monthly during the school year."

Section 7884 provides that no such pension shall be paid until the teacher contributes or has contributed a sum equal to twenty dollars per year for each year of service rendered as teacher, as follows:

> "No such pension shall be paid until the teacher contributes, or has contributed, to such fund a sum equal to twenty dollars a year for each year of service rendered as teacher, but which sum shall not exceed six hundred dollars. Should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, in paying the annual pension to such retiring teacher, the board of trustees must withhold on each month's payment twenty per cent. thereof, until the amount above provided has been thus contributed to the fund."

It is to be noted that section 7883 contains the phrase "each year of service as teacher" and that section 7883, supra, contains the expression "each year of service rendered as teacher." From these expressions it would seem to follow that the aggregate of thirty years as specified in section 7882 of the General Code means thirty years of active service as a teacher. In section 7881 of the General Code the legislature has seen fit to define the term "teacher" and incidentally has specified the manner whereby years of service shall be estimated as follows:

> "The term 'teacher' in this chapter, shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, *but in estimating years of service, only service in public day school or day high schools, supported in whole or in part by public taxation, shall be considered.*"

It is to be noted that section 7882, General Code, supra, now provides that one-half of the aggregate term of service therein provided must be spent in the public schools or in the high schools of such school district, etc. Prior to its last amendment, said section 7882, supra, provided that three-fifths of such term of service must have been rendered in the public schools or in the high schools of such school district or in the public schools or high schools of the county in which such district is located, so that the only change that was made in said section by the last amendment was to change the time of service required to be spent in such schools, from three-fifths to one-half of the aggregate time of thirty years.

The court in the case of Venable vs. Schafer, 7 C. C. Rep. (n.s.), page 337, has construed said section 7882 and 7881 of the General Code, supra. At the time the court so construed said sections, section 7881 existed as it is at present and section 7882 differed only in the regard as above pointed out. After quoting section 7881 supra, the court says:

> "It is contended that this sentence inserted in the act of 1902, is interpretative and sheds light upon the meaning of the word in the act of 1900. The contrary conclusion would be required by the usual canons of statutory construction. It is apparent that when the legislature meant to give a restricted meaning to the word 'teacher,' it knew perfectly well how to do so, as it expressly did in the act of a year later. When it did not enact the restricted definition, the word should be given its broader significance. The intention of the legislature in passing the act of 1900 is to be deducted from that which it said. The law does not concern itself with an unexpressed intention or an intention which there has been no effort to express.

"Resolving this question in favor of Professor Venable, we then come to the question, whether or not three-fifths of said period of service was rendered by him in the public schools or high schools of the city of Cincinnati. It appears that he was appointed on June 13, 1889, and served continuously until June, 1900, that for the next succeeding year, 1900-01, he was granted a leave of absence on account of ill health, during which year his son substituted for him, receiving a salary as substitute but contributed nothing toward the pension fund. Did Professor Venable, using the words of the act, render services for twelve years? We think not. The law does not provide for a period upon the teachers' roll of Cincinnati, *but for the period of twelve years of actual service.*"

From the foregoing it would seem to follow that the thirty years required before a teacher can be granted a pension, means thirty years of actual teaching and therefore in direct answer to your question I am of the opinion that the year of leave of absence granted to such teacher could not be counted as service in fixing the amount of pension to be paid such teacher under section 7883, for the reason that such year of absence could not be counted as a year of actual service within the purview of the holding of the court in the case of Venable vs. Schaffer supra.

In answer to your second question as to whether or not the case would be different if leave of absence without pay were granted, without specification of ill health as a reason, I am of the opinion that this would not in any wise affect my views of the matter as above set out and that such fact would not change the same.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

918.

TOWNSHIPS MAY NOT JOIN IN CONDEMNING, PURCHASING AND OPERATING STONE QUARRY PROPERTY.

The trustees of a township cannot join other townships in the county in condemning, purchasing and operating certain stone quarry property under the provisions of sections 3282-1 *to* 3282-3, *General Code.*

COLUMBUS, OHIO, May 6, 1914.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I have your letter of February 28th, which reads in part as follows:

"At the last general election the trustees of Ridge township, Van Wert county, Ohio, held an election for the purpose of issuing bonds for $10,000.00, under sections 3282-1, 3282-2 and 3282-3 of the General Code. How the trustees of Ridge township desire to join with other townships in the county in condemning and purchasing and operating certain stone quarries and property that the same is upon for material benefit of all the townships joining.

"This question arises, by the terms of sections 3282 and 3283 of the General Code what is meant by 'two or more adjoining townships?' Does it mean only those townships that lie along side of each other, or can those townships which only touch at corners be considered as adjoining?"

Under date of March 7th, you also inquire:

"In connection with same subject and the same section I very respectfully request your opinion on the following:

"The land upon which is located a stone quarry, that the township trustees of Ridge township are desirous of purchasing, comprises in all 80 acres. Now they desire to know whether or not the sections above referred to are broad enough to allow them to purchase this full 80 acres, either by themselves or in conjunction with the township trustees of adjoining townships, and then dispose of all of the 80 acres except the part desired to be used by them for the stone quarry."

The statutes cited, insofar as they pertain to the question submitted by you, provide:

"Sec. 3282-1. The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township, to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor shall be submitted to the qualified electors of the township at a general election. Twenty days' notice thereof shall be previously given by posting in at least ten public places in the township. Such notice shall state specifically the amount to be raised. If a majority of all votes cast at such election are in favor of the proposition, the tax therein provided for shall be considered authorized.

"Sec. 3282-3. When such tax has been voted in a township, the trustees thereof, in anticipation of such tax may issue the township bonds, of the aggregate amount not to exceed the tax voted, in denominations of not less than one hundred dollars, bearing interest at the rate not exceeding five per cent. and payable not later than ten years from date. Such bonds shall not be sold below par, and the proceeds shall be used solely for the purchase of such real estate and the necessary machinery for operating the same. Such bonds shall be signed by the trustees, countersigned by the township clerk, and repaid from the tax when collected. * * *

"Sec. 3282. The trustees may purchase suitable stone or gravel, when deemed necessary for the improvement of the public roads within the township. For the purpose of paying the purchase price thereof they may levy and assess upon the taxable property of the township, such rate of taxation as will raise any sum not exceeding one hundred dollars in any one year. The trustees of two or more adjoining townships may jointly purchase such stone and gravel, or may obtain it by condemnation, as provided in the next section.

"Sec. 3283. When the trustees are unable to purchase of, or contract upon fair and equitable terms with, the owner of a gravel bank, gravel bed, other deposit of gravel, or of any stone, timber, or other material, in the judgment of the trustees necessary for the construction or repair of any road, improved road or highway within the township, or in case the owner refuses to sell or contract with the trustees, for the sale of such material, upon the trustees agreeing to allow a just and reasonable compensation therefor, they may condemn for public use such material, in such quantities as, in their judgment, the public needs require, allowing the owner there-

for a just and equitable compensation. Such authority to contract, sell, agree and condemn shall extend to all townships within the county in which such trustees are elected or appointed in pursuance of law, or within any township of any adjoining county."

It will be noted that sections 3282-1 and 3282-3 authorize township trustees, upon the approval of the electors of the township at a general election—the form of ballot to be used at such election being prescribed by section 3282-2—to levy a tax in such amount as the trustees may determine, to *purchase real property containing suitable stone or gravel,* and to issue bonds in anticipation of such tax, while sections 3282 and 3283 provide for the purchase or condemnation by the trustees of a township or the trustees of two or more adjoining townships, of stone or gravel to be used for the improvement of roads, and authorize the levying of a tax for such purpose at such rate as will produce not to exceed one hundred dollars ($100.00) annually.

It seems clear to me that when a tax has been voted in a township, and the trustees have sold bonds in anticipation thereof, for the purchase of land containing stone with which to construct, improve or repair the roads of the township, under sections 3282-1 to 3282-3, the trustees of such township cannot combine with trustees of any other township for such purpose. While the use of the word "next" in the last sentence of section 3282 would seem to indicate an intention to permit adjoining townships to levy a tax and issue bonds to purchase land containing stone, it will be seen, upon careful investigation, that such is not the case. Section 3282 and section 3283 were passed long before sections 3282-1, 3282-2 and 3282-3, and have not been amended since the enactment of the latter.

The "next" section referred to in section 3282 is 3283 and not 3282-1. Sections 3282 and 3283 must be read together, and sections 3282-1 to 3282-2 must be read together.

Therefore, the power granted two or more adjoining townships, under section 3282, to purchase or condemn stone, cannot be extended so as to permit such townships, under sections 3282-1 to 3282-3 to levy a tax and issue bonds for the purchase of land containing stone.

If, therefore, Ridge township has authorized the levy of a tax, and bonds have been issued in anticipation thereof, the funds raised thereby cannot be used in conjunction with the funds of adjoining townships to purchase land containing a stone quarry or to purchase machinery to operate the same. Such funds must be used by the trustees of Ridge township alone. The conclusion I have reached renders an answer to your first question unnecessary.

While sections 3282-1, et seq., authorize township trustees to purchase land containing suitable stone, etc, they do not authorize the trustees, either by themselves or in conjunction with the trustees of any adjoining township or townships, to purchase a larger amount of land than is necessary for this purpose, and dispose of the remainder.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

919.

FLOOD CONSERVANCY ACT—CONSTITUTIONALITY OF SAID ACT—EMPLOYMENT OF ASSISTANT TO CITY SOLICITOR.

1. *It is not a legal use of municipal funds to expend them in payment for services of an attorney employed by the city council in contesting the constitutionality of the flood conservancy act.*

2. *If the city solicitor desires counsel to assist him in conducting such matters, and so advises city council, the council may authorize by ordinance the employment of counsel for said purpose, unless provision is made in the new charter for such employment. Council alone has no power to employ special counsel, unless provision is made by a new charter.*

3. *Such contract of employment of special counsel must be certified to by the* city auditor.

COLUMBUS, OHIO, May 5, 1914.

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

GENTLEMEN:—Under date of March 25, 1914, you submit the following questions for opinion thereon:

> *"First.* Is it a legal use of municipal funds to be expended in the payment of services of an attorney, employed by the city council, in contesting the constitutionality of the flood conservancy act?
>
> *"Second.* Must such employment be made through the city solicitor, and may council also provide for an attorney to uphold the constitutionality of said law?
>
> *"Third.* Must the contract of employment of said special counsel be certified to by the city auditor?"

In answer to your first question will say, municipal corporations in their public capacity, possess such powers and such only as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted. (See case of Ravenna vs. Penn. Co., 45 O. S., 118.)

The general powers of a municipal corporation are found in sections 3615 to 3676 of the General Code, and none of these sections authorize the employment of special counsel for a city by the city council.

The special powers of a municipal corporation are found in section 3677 as amended May 3, 1913, 103 O. L., 496, and said section contains fourteen subdivisions and none of these subdivisions authorize the employment of special counsel by a city council, expressly or by implication.

The next question would be, does the new constitution which was adopted September 3, 1913, enlarge the powers of municipal corporations?

There is no question but what the new constitution enlarges the powers of municipal corporations in many respects, but I find no provision of the new constitution which enlarges the power of council with respect to the employment of

special counsel, unless it would be section 3 of article XVIII of the new constitution. That section is as follows:

> "Any municipality may frame and adopt or amend a charter for its own government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Under these provisions municipal corporations have the power of self-government and may provide in a charter to be adopted by the people of the municipality the right to employ special counsel regardless of statutory powers heretofore enumerated. If such power is provided for in the new charter, council or a similar governing body would have the right to exercise the power of employing counsel without regard to the decisions of the court heretofore rendered. But before such authority could be exercised, there would have to be a provision in the charter adopted by the municipality and where there is such power expressly exercised or set forth in the charter, it would then govern in respect to the powers of employing special counsel. Otherwise council would be governed by the powers now delegated to them by statute.

Section 4211 of the General Code seems to prohibit the city council from appointing employes of a city. Said section reads as follows:

> "The powers of council shall be legislative only, and it shall perform no adiminstrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matter to which they relate, and after authority to make such contracts has been given and the necessary appropriation made council shall have no further action thereon."

In view of the statutes and decisions council has no authority to employ special counsel unless such authority is contained in the new charter adopted by each municipality under the new constitution.

Answering your second question would say the latter part of this question, viz., "may council also provide legal counsel to uphold the constitutionality of said law," would have to be answered in the same way as the first question, that is, council has no authority to employ special counsel unless provision is made by a new charter. But the first part of the second question would be, "can council authorize a city solicitor to employ special counsel to assist him in contesting the validity of the conservancy act (house bill No. 19, as amended, house bill No. 38).

In answer to this branch of the question would say the city solicitor, by virtue of section 4305, General Code, is made the legal adviser of all the officers of the city, including members of council in their official capacity. If he should advise council it would be for the best interests of the city to ascertain whether or not the conservancy act is constitutional and that it would be necessary for him to have assistance to present the matter to the courts of Ohio, council could authorize by resolution that the city solicitor contest this legislation through the courts in order to ascertain whether or not such legislation would be a valid enactment, and by virtue of sections 4306 and 4307, as amended May 5, 1911 (vol. 102, p. 131 O. L.) there would be implied authority at least, if not express authority in council to authorize, by ordinance, the solicitor to employ special or assisting counsel for said purpose. Therefore, would say the employment would have to be made through

the city solicitor, unless, as before stated, the new charter made express provision for such employment.

In villages, council, by virtue of section 4220, have authority to employ legal counsel.

In answer to your third question would say, by virtue of section 3806 of the General Code and also by the decision of the supreme court, found in 62 O. S., 80, which requires all such ordinances making provision for such expenses must be certified to by the city auditor.

There still remains the question "can city council through its city solicitor, authorize the employment of a special counsel to uphold the constitutionality of the conservancy act?"

In answering this question, would say it would depend largely on the advice of the city solicitor as to whether or not it would be for the best interest of the city to uphold or contest the validity of the conservancy act. But he could not consistently advise both ways and if he decided that the interests of the city would be best served by contesting the validity of the enactment, in order to be consistent, he would have to pursue this method, and therefore would not be authorized, and the council would not be authorized through him, to employ counsel to uphold the constitutionality of the enactment.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

920.

DECLARING AN OFFICE VACANT—FAILURE TO GIVE BOND—NOTICE OF ELECTION.

Section 7 of the General Code has no application in the case of a referendum on a resolution declaring the office of member of public affairs vacant, under section 4242, General Code, nor is the referendum provision applicable to municipalities in the application of such an act of council, under section 4242, General Code.

COLUMBUS, OHIO, May 5, 1914.

HON. NEWTON O. MOTT, *City Solicitor, Geneva, Ohio.*

DEAR SIR:—On January 13, 1914, you submitted for an opinion the following question:

> "Is a referendum on a resolution declaring the office of member of the board of public affairs vacant under section 4242, General Code, operative, or is the office in question vacant under section 7 of the General Code without a resolution under section 4242, the officer in question failing to give bond within ten days after notice of election?"

Sections 7, 4242 and 4358 of the General Code are as follows:

"Section 7. A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.

"Section 4242. The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be.

"Section 4358. When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint the members thereof, subject to the confirmation of the council. Such appointees shall hold their respective offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such village."

Your question involves first a construction of the first two statutes above set out, and it is necessary to determine which of these two statutes are to be allowed to govern, if both are not to be permitted operation.

Section 7 applies to persons elected or appointed to an office, who are required *by law* to give a bond or security as a condition precedent to the performance of the duties of the office. Members of the board of trustees of public affairs are required to give bond by authority of council under section 4219, General Code, and the question presented, therefore, is whether or not a bond required by council is a bond which is required *by law*, within the meaning of section 7 of the General Code, above quoted.

"The terms 'by-laws,' 'ordinances,' and 'municipal regulations' have substantially the same meaning and are defined to be 'the laws of the corporate district, made by the authorized body, in distinction from the general law of the state.' They are local regulations for the government of the inhabitants of the particular place.

"They are *not laws* in the legal sense, though binding on the community affected; they are not prescribed by the supreme power of the state, from which alone a law can emanate, and therefore, cannot be statutes which are the written will of the legislature, expressed in the form necessary to constitute parts of the law."

(Rutherford vs. Swink, 96 Tenn., 564.)

"An ordinance is not in the constitutional sense a public law. It is a mere local rule, or by-law, a police or domestic regulation, devoid in many respects of the characteristics of public or general laws."

(State vs. Fourcade, 45 La. Ann., 717.)
(McInerney vs. City of Denver, 17 Colo., 302.)

"An ordinance is not a public or a general law, but a local rule or a by-law. * * *"

(City of Greeley vs. Hamman, 12 Colo., 94.)

In view of these decisions I am of the opinion that section 7 applies only to such officers as are required to give bond by virtue of a state law, to wit: an enactment of the legislature—and that such section has no application to persons who are required to give a bond by act of a municipal legislative board. Such section, therefore, does not have application to the case at hand, and section 4242, General Code, must be allowed to control.

The part of your question remaining to be considered, therefore, is whether when council declares vacant the office in question, such action is subject to the referendum provisions provided in 103 O. L., page 211.

It will not be contended that initiative and referendum provisions are intended to have application to other than legislative acts, section 1f of article II of the constitution reserving the powers of initiative and referendum to municipalities only with respect to all questions which such municipalities "may now or hereafter be authorized to control by *legislative action.*"

Referendum act, 103 O. L., page 211, section 4227-2 of the General Code, extends the referendum provisions of "any ordinance or other measure passed by council."

The term "measure" is defined as follows:

"A specified act or course of procedure designed as a means to an end; an expedient; method; step; *specifically a legislative bill;* as foolish measures; a party measure. (Standard Dictionary.)

"A determinate action or procedure intended as a means to an end; anything devised or done with a view to the accomplishment of a purpose; specifically, in later use, any course of action proposed or adopted by a government *or a bill* introduced into the legislature; as measures, (that is, bill or bills) for the relief of the poor. (Century Dictionary, No. 15.)

"Means to an end; viewed as being preparatory steps to the end for which they are to lead; an act, step or proceeding designed for the accomplishment of an object; an extensive signification of the word 'applicable' to almost every act preparatory to a final end, and by which it is to be attained; as legislative measures; political measures; prudent measures. (Webster's Dictionary, No. 9.)"

I am of the opinion that the term "measure," as used in section 4227-2, General Code, is intended to cover only such other legislative acts of council as are not comprehended by the term "ordinance;" thus rules, regulations or resolutions of council may be of a legislative character and yet not necessarily be regarded as ordinances. (See title "legislative" in words and phrases, volume 5.)

The act of declaring an office vacant, like that of appointing an incumbent to an office, is clearly of an executive or administrative character; or it may have in it an element of judicial action. It is clear, however, that such action cannot be in any sense regarded as legislative in its nature. The nature of the act and the necessities of the case require peremptory action such as could not reasonably or consistently be subjected to the delay incident to referendum procedure.

In section 4227-5, General Code, wherein the legislature withdraws the provisions of the act from application to cities, which, by a charter, have provided referendum provisions "for their own ordinances or other *legislative measures,*" it is made clear that the act is not intended to apply to other than legislative measures, since this

statute is most manifestly not intended in any way to amplify or restrict the scope of the meaning of section 4227-2. In other words, in the later expression, the legislature most manifestly means the same as it does in the former expression of the ground covered by the referendum provisions.

Stating my conclusion succinctly, therefore, I am of the opinion that section 7 has no application to the case at hand, and that the referendum provisions, applicable to municipalities, have no application whatever to an action of council, under section 4242, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

921.

STREET IMPROVEMENT—BOND SALE—ROAD IMPROVEMENT—TOWNSHIP TRUSTEES.

Township trustees have no authority to pay to a village out of funds received from a bond sale for road improvement, a sum equal to the amount the township would have been required to pay had it undertaken to improve the street, as it had the right to do, under sections 5976-7018, *General Code. The only authority they would have would be to improve said streets themselves.*

COLUMBUS, OHIO, May 5, 1914.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of April 8th, wherein you state:

> "Some twenty years ago the village of New Washington, Cranberry township, this county, improved some of its streets by macadamizing same, and paid for said improvement out of the general revenue of the village. About fourteen years ago, the township including the village of New Washington, voted under what is now sections 6976 to 7018 of the General Code, which carried, and under that authority a good portion of the main roads of the township have been improved by macadamizing as provided by the above sections, and the bonds issued to pay said improvements have been paid by a tax levied on all the real and personal property of the township including all the property of the village.
>
> "The streets improved by the village prior to the vote under section 6978, et seq., are streets that connect with roads running through the township that have since been improved by the authorities of the township under said sections above mentioned; and are also streets that could have been improved by the township trustees under the law above referred to, had the village not improved them before.
>
> "The village now desires to pave the streets by it formerly improved, and the question now is, can the trustees legally pay to the village out of a fund received from a sale of bonds for road improvement, a sum equal to the amount the township would have been required to pay, had it originally macadamized those streets?
>
> "If the foregoing is answered in the affirmative, how could this be done? Would a resolution reciting the facts and appropriating so much, and ordering it paid to the treasurer of the village be the proper way, and would this protect the township officers?"

Sections 6976 to 7018, General Code, provides a method for the improvement of roads within a township by general taxation upon a vote of the people.

As is well known, township trustees are officers of limited jurisdiction and have only such powers as are conferred upon them by statute. All power is expressly granted to the trustees under these statutes to improve streets within a city or village in the township and there is no doubt of their right to expend the money raised by taxation or the sale of bonds for this purpose.

As the statutes do not authorize it to be done, I am of the opinion that the trustees of Cranberry township may not turn over any part of the funds raised by virtue of section 6976 to 7018 to the village of New Washington for the purpose of paving the streets thereof.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

922.

THE RIGHT OF TRUSTEES AND SUPERINTENDENTS OF CHILDREN'S HOMES TO PLACE CHILDREN UNDER THEIR CARE WITH PRIVATE FAMILIES.

The trustees and superintendents of children's homes have authority to place children under their care in private families either temporarily or permanently without the consent of the living parent or parents.

COLUMBUS, OHIO, May 5, 1914.

HON. WESLEY S. THURSTIN, JR., *City Solicitor, Toledo, hOio.*

DEAR SIR:—I have your letter of February 25, 1914, as follows:

> "The question has arisen in my department relative to the authority of trustees and superintendents of children's homes to place children in private families either temporarily or permanently, without the consent of the living parent or parents."

Sections 3093 and 3096 of the General Code, as amended in 103 O. L., read in part:

> "(3093) All inmates of such 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 such home, until they are eighteen years of age, and if such child is placed out or adopted, such control shall continue until such child becomes of lawful age.
>
> "(3096) The trustees shall require an agreement in a form to be prescribed by the board of state charities, in writing to be entered into, that such child so placed out shall be furnished with good and sufficient food, clothing and a public school education, and if deemed by the trustees to the interest of the child that such provisions be made, that there shall be payment to it of a reasonable amount to be named in the agreement, to be paid in such amounts and times as may be specified. Children may be placed

in homes on trial without any written agreement. For the purpose of securing the well-being and progress of such children, and the enforcement of the agreement, the trustees shall have the control and guardianship of such children until they become of age."

Section 3095 of the General Code, reads in part:

"The trustees shall seek homes in private families for all children eligible to be placed out, but before allowing a child to leave the home, they shall cause the proposed foster home to be carefully investigated and satisfy themselves that such persons are suitable to have the care and bringing up of the child."

From a reading of these sections, it is clear that the inmates of the children's home are under "the sole and exclusive guardianship and control of the trustees" during their stay in such home, until they are 18 years of age; that the trustees have authority to place the children in private homes and that when so placed the guardianship and control of said children continues to be vested in the trustees until they (the children) are of lawful age.

Under section 3095 it is the duty of the trustees to secure proper homes for the children, and when after a careful investigation they deem it for the best interest of a child to place it in a certain private home, I know of nothing that can hinder them. The law gives them the absolute control and guardianship of the child, and this is sufficient authority to support their action.

It is therefore my opinion that the trustees of children's homes may place children in private families, either temporarily or permanently, without the consent of the living parent or parents.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

923.

EMPLOYMENT AGENCIES—FEE FOR RENEWAL OF LICENSE MUST BE PAID ANNUALLY.

The omission of the words "per annum" in section 886 of the General Code is a mistake and these words must be read into this section and the amounts prescribed in that statute must be paid annually for the renewal of licenses by employment agencies operating in cities and villages of the population respectively enumerated.

COLUMBUS, OHIO, May 8, 1914.

Industrial Commission of Ohio, HON. M. B. HAMMOND, *Commissioner in Charge of Employment Agencies, Columbus, Ohio.*

GENTLEMEN:—Under favor of April 24th, you request my opinion as follows:

"Under section 886 of the General Code of Ohio, persons, firms or corporations desiring to open, operate or maintain a private employment agency for hire, in which fees are charged to applicants for employment or applicants for help, are required to obtain a license from the commissioner of labor statistics (now the industrial commission of Ohio) and pay a fee according to the population of the municipality.

"The section as now worded does not state that this license is to be secured annually but it does state that 'the commissioner may refuse to issue or *renew* a license to an applicant if, in his judgment, such applicant has violated the law,' etc. May I ask you to render an opinion as to whether the commission is warranted in interpreting this section of the act so as to require a private employment agency to renew its license annually and pay the fee stipulated by law? Such has been the custom and is now the practice of the commission. Three agencies, however, have failed to renew their licenses, and, as I understand, the managers claim that under the statute they are not obliged to pay any fee other than that demanded at the time the original license was issued."

Section 886 of the General Code is as follows:

"No person, firm or corporation shall open, operate or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining a license from the commissioner of labor statistics, and paying to him a fee according to the population of the municipality as shown by the last preceding federal census, viz.:

In cities of 50,000 and upward	$100 00
In cities of 16,000 to 50,000	75 00
In cities of less than 16,000	50 00
In villages	25 00

"The commissioner may refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies, or is not of good moral character."

This statute as first enacted appears in 97 O. L., p. 485:

AN ACT.

To license and regulate private employment agencies within the state of Ohio.

Be it enacted by the General Assembly of the State of Ohio:

"Section 1. (That) no person, firm or corporation in this state shall open, operate or maintain a private employment agency for hire, or where a fee is charged to either applicant for employment or for help without first obtaining a license for the same from the state commissioner of labor statistics. Such license fee in cities shall not be less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) per annum. In villages not less than ten dollars ($10.00) nor more than twenty-five dollars ($25.00) per annum. * * *"

It will be seen that the codifying commission made a change in the statute so as to classify the cities and villages as to population and respective amounts to be paid for a license. In making such change however the codifying commission omitted the words "per annum," which appeared in the act as originally enacted. That this omission was the result of a mistake purely and simply is manifested beyond all doubt by reason of the fact that the statute as formulated by the codifying commission still contains a reference to renewal of licenses. The right to

correct a palpable mistake in a statute by resorting to legitimate rules of construction for the purpose of uncovering the actual legislative intent is fundamental.

Sections 410-413, Sutherland on Statutory Construction.

Furthermore, the right to resort to original acts in case of revisions and modifications for the purpose of correcting mistakes and clearing up ambiguities is equally well settled.

Sections 450-451-452, Sutherland on Statutory Construction:

> "Under well settled rules of construction 'where the general statutes of the state are revised and consolidated, there is a strong presumption that the same construction which the statute had before revision should be applied to the enactment in the revised form, although the language may have been changed.' In such case the court is only warranted in holding the construction to be changed when the intent of the legislature to make such change is clear and manifest."

Insurance Co. vs. McBee et al., 85 O. S. 161, at p. 1, citing, State ex rel vs. Commissioners 36 O. S., 326; Heck vs. State, 44 O. S., 536; State ex rel. vs. Stockley 45 O. S., 308.

The mistake of the codifying commission in the omission of the words "per annum" is manifest. I am, therefore, of the opinion that these words must be read into section 886 of the General Code, and that the amounts prescribed in that statute must be paid annually for the renewal of licenses by employment agencies operating in the cities and villages of the populations respectively enumerated.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

924.

UNDER HOUSE BILL NO. 33, AMENDING SECTION 30, THE BALANCE OF THE FINES AND PENALTIES IS TO BE PAID MONTHLY TO THE TREASURER OF THE CITY OF CINCINNATI, OHIO.

Under a mandatory act passed at the special session of the general assembly fifteen per cent. of all fines and penalties assessed and collected in the Cincinnati municipal court is payable to the Hamilton county law library association.

Also the balance over and above the amount equal to that paid to the judges, clerks and prosecuting attorneys, no matter how much in excess of fifteen per cent. should be paid to the library association.

COLUMBUS, OHIO, May 8, 1914.

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

GENTLEMEN:—Under date of March 31st, you asked my opinion upon the following questions:

> "1st. Under the amendatory act passed at the special session, what part of the fines and penalties assessed and collected in the Cincinnati municipal court is payable to the Hamilton county law library association?

"2nd. To whom is the amount equivalent to the salaries of judges, clerk and prosecuting attorney of the Cincinnati municipal court to be paid?"

1. House bill No. 33, amending section 30, 103 O. L., 279, reads as follows:

"Section 30. The clerk of the municipal court shall have power to administer oaths and take affidavits and to issue executions upon any judgment rendered in the municipal court, including a judgment for unpaid costs; he shall have power to issue and sign all writs, process and papers issuing out of the court, and to attach the seal of the court thereto; shall have power to approve all bonds, recognizances and undertakings fixed by any judge of the court or by law; shall file and safely keep all journals, records, books and papers belonging or appertaining to the court, record its proceedings and perform all other duties which the judges of the court shall prescribe, and all other duties heretofore enjoined upon the clerk of the police court by section 3056 of the General Code. He shall pay over to the proper parties all moneys received by him as clerk; he shall receive and collect all costs, fines and penalties; and shall pay all costs and subject to the provisions of section 3056 of the General Code, the balance of such fines and penalties monthly to the treasurer of the city of Cincinnati and take his receipt therefor, but money deposited as security for costs shall be retained by him pending the litigation; he shall keep a book showing all receipts and disbursements, which shall be open for public inspection at all times; and shall on the first Monday of each term of court make to the city auditor a report of all receipts and disbursements for the preceding term. He shall succeed to all and shall have all the powers and perform all the duties of police clerks, and as to the selection of the deputy clerks, he shall have the power to appoint a chief deputy and such number of other deputies and assistants as shall be designated from time to time by the council of the city of Cincinnati as hereinafter provided."

The above section evidently was intended to give to the Hamilton county law library association the same portion of the fines and penalties assessed in the municipal court as the law library associations in other counties receive under virtue of Code section 3056, which reads as follows:

"Section 3056. All fines and penalties 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 shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent. of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor. In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not

exceed five hundred per annum. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

The effect of the amendment to section 30, then, is that not less than 15 per cent. of all fines and penalties should be paid to the library association, with the further provision that in the event the amount paid to the judges, clerk and prosecuting attorney of said court did not equal the total amount of fines and penalties collected, then the balance over and above an amount equal to that paid to the judges, clerk and prosecuting attorney, no matter how much in excess of 15 per cent., should be paid to the library association.

As an illustration, should the amount of fines and penalties for one month amount to five hundred dollars, and the amount payable to the judges, clerk and prosecuting attorney be one thousand dollars, then the library association would receive seventy-five dollars, or 15 per cent., and there would be turned over to the city treasurer for the salaries of said officers the balance, or four hundred and twenty-five dollars.

Again, should the amount of salaries of said officials be one thousand dollars, and the total of fines and penalties be two thousand dollars, then there should be turned over to the library association the difference between said amounts, or one thousand dollars.

2. Under house bill No. 33 amending section 30, the balance of the fines and penalties is to be paid monthly to the treasurer of the city of Cincinnati. The fact that Code section 3056 has been by reference incorporated in said section 30 does not require that in the city of Cincinnati the balance should be paid to the county treasurer as in other counties.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

925.

PUBLICATION OF LEGAL NOTICE—WHERE SUCH LEGAL NOTICE MAY BE PUBLISHED—RATE TO BE PAID FOR PUBLICATION OF SUCH NOTICE.

Where there is one paper published in a municipality and this paper refuses to publish legal notices, unless it receives the maximum rate therefor, if upon the tender of the usual price for the publication of similar notices in such paper, said paper refuses to publish such notices, publication may lawfully be made in a newspaper of general circulation in a city under section 4676, General Code.

COLUMBUS, OHIO, May 11, 1914.

HON. AMOS C. RUFF, *City Solicitor, Canal Dover, Ohio.*

DEAR SIR:—Under date of February 7, 1914, you inquire:

"Where there is only one paper published in a municipality, and that paper insists in charging the highest maximum legal rate, which rate is from two to three times higher than its regular commercial rate, what remedy, if any, has that municipality?"

This question might be answered without going into a discussion of the laws generally applicable to publication of ordinances and the like in municipalities, but so many questions are being presented that it is thought best to deal in detail with the matter at this time.

In an opinion to the bureau of inspection and supervision of public offices, dated October 11, 1911, and found on page 314 of attorney general's report 1911-1912, I called attention to the fact, that section 1536-621, now section 4227, General Code, prior to the revision contained the following language:

> "Ordinances of a general nature, or providing for improvements *shall be published in some newspaper of general circulation in the corporation, if a daily, twice; if a weekly, once before going into operation.*"

By the codification the words italicized above were left out and the sentence was made to read:

> "Ordinances of a general nature or providing for improvements *shall be published as hereinafter provided before going into circulation.*"

In that opinion I held that in order to prevent a great deal of confusion it was necessary that the words found in section 1536-621, and omitted in the codification should be restored, which authorizes publication of the classes named to be published in a newspaper of general circulation, once if a weekly and twice if a daily, thus doing away with the difficulty arising from the fact that no provision is made in the code for the publication of ordinances and the like, where only one newspaper is published in the municipality, which conclusion is not out of harmony with section 4229, G. C., which required publication in two newspapers of opposite politics, *"if there are such in the municipality."*

The sections of the General Code in reference to publication of ordinances and the like are the following:

Section 4227, which reads:

> "Ordinances, resolutions and by-laws shall be authenticated by the signatures of the presiding officer and clerk of council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 4228, which reads:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4230, which reads:

> "When ordinances are revised, codified, rearranged and published in book form and certified as correct by the clerk of council and the mayor,

such publication shall be a sufficient publication, and the ordinance or several ordinances so published in book form, under appropriate titles, chapters and sections, shall be held the same in law as though they had been published in book form, which has not been published according to law, and which contains entirely new matter shall be published as heretofore required by law. Such revision and codification may be made under appropriate titles, chapters and sections and in one ordinance containing one or more subjects."

Section 4232, which reads:

"In municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by this title to be published, to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof. Advertising for bids for the construction of public improvements shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks. Notices of the sale of bonds shall be published in such manner and for such time as is provided in this title for the sale of bonds by a municipal corporation, when not sold to the sinking fund. The clerk shall make a certificate of such posting and the times when and places where done, in the manner provided in the preceding section, and such certificate shall be prima facie evidence that the copies were posted up as required."

Section 4676, which reads:

"When in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for."

Section 6255, which reads:

"For sufficient publication of a notice or advertisement, required by law to be published for a definite period, at least one side of the newspaper in which such publication is made shall be printed in the county or municipal corporation in which such notice or advertisement is required to be published."

With the language restored to section 4227 as above shown, I am of the opinion,

1. That where there are two newspapers of opposite politics in a municipality, publication must be made in both. Section 4228, G. C.

2. Where there is only one newspaper published in a municipality, and it is of general circulation therein, publication may be made in it under favor of the restored language of section 4227, G. C.

3. When the ordinances are codified, revised or rearranged and published in book form, *such* publication is sufficient. Section 4230, G. C.

4. Where there is no newspaper published in the municipality, publication may be made by posting as provided in section 4232, General Code.

5. Where there is one newspaper published, and it refuses to publish on tender of the usual charge made in such newspaper for a similar notice, publication may be made in a newspaper of general circulation in such municipality under the provisions of section 4676, General Code.

6. The fact that only one side of a newspaper is printed in the municipality will not deprive it of the right to make required publications, provided it is of general circulation in the municipality and publication therein, in the manner and for the times specified will be sufficient under section 6255 of the General Code.

I am of the opinion, coming now to specifically answering your question, that if the newspaper refuses to publish notices upon being tendered the usual price for publication of similar notices in such paper, publication may lawfully be made in a newspaper of general circulation in your city under section 4676, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

926.

BOARD OF EDUCATION—RABE CASE.

The decision in the case of Rabe et al. vs. Board of Education, does not in any way affect the rights of the board of education under section 5656, *General Code.*

COLUMBUS, OHIO, May 11, 1914.

HON. R. M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 21st, wherein you inquire respecting the effect of the decision of the supreme court in the case of Rabe et al. vs. Board of Education of Canton school district, recently decided, upon the power of the board of education to issue funding or refunding bonds under section 5656, General Code.

The full text of the decision referred to appears in recent issues of the current legal publications, and I assume that you have had an opportunity to examine them.

This case arose under the law as it existed in the year 1912, and its conclusions are to be limited to the state of the law as it then existed. So much is apparent from the following paragraph of the opinion of Donahue J., which appears at page 277 of the Ohio Law Bulletin Supplement (issued March 23, 1914):

> "At this time under the amendment to the constitution (section 11, article XII) which provides that no bonded indebtedness of the state or any political subdivision thereof shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed provision is made for levying and collecting annually by taxation an amount sufficient to pay said bonds and provide for a sinking fund for their final redemption at maturity, it is of the utmost importance that at the time of the incurring of such indebtedness the other needs of the political subdivision proposing to issue the bonds should be taken into account, for this levy must continue during the term of the bonds in an amount sufficient to pay the interest and provide a sinking fund for their final redemption, even though the amount should exhaust the entire income available from

taxation and without regard to the current expenses. In other words, under this provision of the constitution, the payment of interest and the retirement of bonds are to be provided for first, and the current expenses become a secondary consideration. This amendment, however, has no application to this case."

Article XII, section 11 of the constitution provides that:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their redemption at maturity."

As interpreted by Judge Donahue this amendment has the effect of creating a preference among tax levies within the limitations prescribed by law in favor of those for the retirement of bonds issued subject to its provisions and against those for current expenses. Accordingly, if section 5656, General Code is still in force, and was not repealed by implication when the Smith law was enacted, it would appear that the power to borrow money under its provisions would not in any way be limited or affected by the ability of the taxing district to provide, within the limitations of the latter, sufficient revenue for its current expenses.

In this particular, then, the Rabe case is to be distinguished from a case arising under the constitutional amendment, and so much of the decision therein as holds, or seems to hold, that levies for the retirement of bonded indebtedness are to be postponed to levies for current expenses does not apply to such cases.

In my judgment, there is nothing in the Rabe case which would support the conclusion that sections 5656, et seq., General Code, were repealed by implication when the Smith law was passed. The reasoning of the court respecting the implied repeal of the sections involved in that case, viz., 7630 and possibly 7629 may be abstracted as follows:

Section 7630 refers by name to the limitations of sections 7591 and 7592, General Code. These limitations were certainly repealed by implication when the Smith law was passed, because the latter imposed other limitations upon the levying power of boards of education. Therefore, section 7630 must be regarded as also repealing by implication, and the effect upon section 7629 is problematical.

Sections 5656, et seq., are as follows:

"Section 5656. The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time, and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually.

"Section 5657. When it appears to the trustees of a township, board of education of a school district or commissioners of a county, to be for the best interests of such township, school district or county to renew, refund or extend the time of payment of any bonded indebtedness which has not matured and thereby reduce the rate of interest thereon, they may issue, for that purpose, new bonds, and exchange the bonds with the holder or

holders of such outstanding bonds, if such holder or holders consent to make such exchange and to such reduction of interest.

"Section 5658. No indebtedness of a township, school district or county shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such township, school district or county by a formal resolution of the trustees, board of education or commissioners thereof, respectively. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest.

"Section 5659. For the payment of the bonds issued under the next three preceding sections, the township trustees, board of education or county commissioners shall levy a tax, in addition to the amount otherwise authorized, each year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature."

It will be observed that there is no reference in any of these sections to any specific limitations although there is a general reference in section 5656 to the "limits of taxation of the district." Therefore in my opinion the reasoning of the court in the Rabe case cannot be applied in considering the effect of the adoption of the Smith law upon these sections.

In my opinion, then, the decision in Rabe vs. board of education does not in any way affect the rights of a board of education under section 5656, General Code.

I may state, however, that in my judgment the board of education may not issue either funding or refunding bonds under section 5656 in the face of the limitations of the Smith law, and the requirements of section 11, of article XII of the constitution, unless at the time the bonds are issued it can be anticipated that the annual sinking fund and interest requirements thereof can be provided for within the limitations of the Smith law without reference, however, to the probable needs of the district for current expenses. That is to say, the Smith law and article XII, section 11 of the constitution, are both to be applied when any bonds are issued, whether under section 5656, General Code, or under any other section authorizing the issuance of bonds by any subdivision of the state. The situation, then, is similar to that which exists in certain states whose constitutions contain both provisions limiting tax rates and provisions requiring coincidental tax levies for the retirement of bonds. The states in question are Texas and Louisiana.

As to the joint effect of provisions like these Dillon on Municipal Corporations, volume 1, section 212, says:

"* * * In these constitutions there is * * * not only a requirement that provision shall be made for the levying of a tax for the payment of the principal and interest of the indebtedness, but the *amount of the tax* which may be levied is also limited. The direct requirement is that the tax shall be 'sufficient' to pay the debt, and this requirement carries with it a correlative prohibition against incurring any debt greater than such amount as may be satisfied and paid by the levy of a tax within the limit of the constitution. In other words, the constitution requires not only that no debt shall ever be created above such a sum as the levy directed will pay, but also that when and before the debt is created it shall be ascertained whether the maximum amount of the tax permitted by the constitution will annually pay the interest and provide for the principal or for the sinking fund required by the constitution. The debt is not to go beyond what a tax can be levied to pay. If at the time when the debt is incurred a tax

is levied which is not sufficient in amount to pay the interest and to create the prescribed sinking fund, the debt will be sustained up to the amount which is justified by the tax directed to be levied and will be held to be invalid as to the excess. The law contemplates that the provision should appear to be sufficient, based on existing valuations when made, and unless it is so the issue of bonds or the debt incurred would not be authorized. * * *."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

927.

MUNICIPAL CORPORATION—WATERWORKS IMPROVEMENT—MANNER IN WHICH CONTRACT FOR SUCH IMPROVEMENT SHALL BE ENTERED INTO—LIABILITY INSURANCE—PREMIUM NOT TO BE PAID FROM BOND ISSUE.

A certain city is engaged in the construction of a dam in connection with its water supply; the work is repeatedly advertised and no bids received; the director of public service enters into a contract with a construction company whereby the company was to install and operate certain devices and equipments and thereby to construct the improvement, while the city through the department of public service was to furnish all the material and all the labor. This arrangement is illegal. The payments that have been made for the work done under this arrangement should not be disturbed, but a contract should be entered into according to law for the construction of this work.

In December, 1913, *there was no authority for the city to insure itself against liability to its employes on account of injuries received by them in the course of their employment. Payments made for said insurance from the proceeds of a bond issue are invalid.*

COLUMBUS, OHIO, May 11, 1914.

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

GENTLEMEN:—Under date of December 13, 1913, you requested my opinion upon four certain questions. I have been unable to answer one of these questions because it involves consideration of a decision of a court of appeals which has not, to the best of my knowledge, been reported, and I have been striving to procure a copy of this decision without success so far.

At your further request I have separated two of the questions asked in your letter referred to from the others therein and make them the subject of a separate opinion. These questions are as follows:

"1. A certain city is engaged in the construction of a dam in connection with its water supply at a very large cost. After repeated advertisements for bids and successive failures to receive any bids, the director of public service entered into a contract with a construction company, by the terms of which the company was to install and operate certain devices and equipments and thereby to construct the improvement, while the city,

through the department of public service, was to furnish all the material and all the labor, presumably, other than that of a managerial nature. Your request is as to, 'what, if any, recommendation should be made by this department in regard to the methods employed in said construction work.'

"2. The city is also paying a casualty company liability insurance to the extent of $4.00 per $100.00 in protection of the city's employes on said work, said insurance being paid out of the bond issue. Is the same legal?"

You are familiar, of course, with the provisions of section 4328, General Code. As its provisions require careful analysis in connection with the question at hand however, I venture to quote it: It is in full as follows:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The enclosed opinion to Hon. G. W. Adams, city solicitor of Wellsville, places upon this section an interpretation which affects the answer to your question. You will observe that in that opinion I hold that if the *work* contemplated in making an improvement involves a gross or aggregate expenditure of more than five hundred dollars in addition to the services of regular employes of the service department, the necessary contract must be authorized by council and let upon competitive bids.

In connection with this opinion I refer you to my opinion under date of February 3, 1911, volume 2, opinions of attorney general for that year, page 1510. In that opinion I cite the case of Lancaster vs. Miller, 58 O. S., 558, upon the proposition that where the total cost of an improvement exceeds $500.00, it is not competent under section 4328 to divide it into parts so as to make the cost of each part less than $500.00 and to contract separately for the construction of each part thus avoiding the statute.

I also call attention to an opinion under date of July 12, 1913, to the city solicitor of Lima, a copy of which I think you have. In this opinion I held that it is not lawful for the director of public service to employ day laborers to perform public work without advertisement and receiving bids, and to pay such laborers from moneys arising from the sale of bonds, where the cost of the whole improvement will exceed $500.00. These conclusions taken together furnish a complete answer to your question.

Without holding whether or not a director of public service might lawfully enter into a series of contracts through competitive bidding, etc., looking to the completion of an improvement which when done will constitute a single public work, I am satisfied that it is not lawful for such a director of public service to furnish labor other than that regularly employed in the department on a large improvement of this kind. In furnishing such labor he would not be inviting competitive bids and yet he would be contracting for public work, the cost of which exceeds $500.00; so that even though he might advertise for bids for the furnishing of all materials as needed by the contractor who was conducting the work, he would be evading section 4328 to the extent of the cost of the labor involved.

In the case which you submit the improvement is a single one, and has evidently been so regarded by the director of public service who has repeatedly sought to

secure bids for the doing of the entire work, and the furnishing of all necessary labor and materials, but without success. The effort made by the director to meet the emergency, while ingenious, constitutes a violation of the statute just as much as if the work had been separated into different parts, each costing less than $500.00, and no competitive bids had been invited as to any part of it.

The purpose of the statute is to provide competition, and the competition must cover the entire work. This does not mean that the work must be let in a single contract, at least when the total of the improvement exceeds $10,000 (see section 2362 to section 2364, inclusive, General Code); but it does mean that competitive bids must be invited so as to cover every branch of the work *including the furnishing of labor.*

I take it that in the case mentioned by you, the labor furnished by the director of public service is not the regular force of the city, and that the laborers are compensated out of the proceeds of a bond issue. This fact has been assumed. Therefore, though it might be competent for the city to let separate contracts *at the same time* for different branches of the entire work, or for different kinds of material, it is not competent for the city to dispense with contracting for any part of the necessary labor when the burden of paying that labor rests upon the bond issue, i. e., when the labor to be furnished is not that of regular employes of the department.

For these reasons I conclude that the arrangement to which you refer is illegal.

You ask me to advise what recommendation should be made by your department.

Whether the demonstrated impossibility of getting the work done in any other way than that chosen by the director of public service may influence your department in its action or not, I should certainly advise that the recommendation be that a contract to cover the entire work remaining undone be now entered into, but that payments already made on account of work done under the arrangement above described be left undisturbed.

As to your second question, I beg to state that in December, 1913, there was no authority for a city to insure itself against liability to its employes on account of injuries received by them in the course of their employment. A municipal corporation has such powers and such only as are expressly conferred upon it by law and those which flow therefrom by necessary implication. I note that it has been held that power to insure buildings is incidental to the power to erect and maintain them. French vs. Millville, 66 N. J. L., 392.

It might, therefore, be urged that the power to insure against liability on account of injury to employes results from the power to employ. I would be of a contrary opinion on this point, but do not deem it material because, as already held, in answer to your first question, there is no power to employ laborers in the manner in which they have been employed for the purposes stated.

In addition to what has already been said, I notice that the premiums on account of the liability insurance have been paid from the proceeds of a bond issue for the construction of the improvement. This is clearly invalid.

Your second question would, therefore, be answered, generally, in the negative.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

928.

SCHOOL EXAMINERS—SCHOOL EXAMINATION—COMPENSATION.

Where an examination for the granting of a teacher's certificate is not held on the date advertised, school examiners who attend such meeting and issue temporary certificates are not entitled to any compensation therefor.

COLUMBUS, OHIO, May 11, 1914.

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

GENTLEMEN:—Under date of January 17, 1914, you submitted to this department the following request for an opinion:

> "If for any reason an examination for the granting of teachers' certificates be not held on an advertised examination date, may the school examiners who attended said meeting and issued one or more temporary certificates legally receive the compensation provided for their services by section 7834, General Code?"

In reply thereto section 7811 of the General Code provides for the appointment of a county board of examiners by the probate judge, said board to consist of three competent persons, and further specifies the qualifications of the members of such examining board.

Section 7817 provides that each county examining board shall hold public meetings on the first Saturday of every month of the year unless Saturday falls on a legal holiday, in which event such examination shall be held on the succeeding Saturday; and further that notice thereof shall be published in two weekly newspapers of different politics, printed in the county, if two such papers are published. If not, then publication in one only is required.

Section 7834 provides for the compensation of the members of such board, as follows:

> "Each member of the county board of school examiners is entitled to receive ten dollars for each examination of fifty applicants or less, fourteen dollars for each examination of more than fifty applicants and less than one hundred, eighteen dollars for each examination of one hundred applicants and less than one hundred and fifty, twenty-two dollars for each examination of one hundred and fifty applicants and less than two hundred, and four dollars for each additional fifty applicants or fraction thereof, to be paid out of the county treasury on the order of the county auditor. Books, blanks and stationery required by the board shall be furnished by the county auditor."

It is to be noted that under section 7834 the compensation of the members of the county examining boards is based upon the number of examinations only and not upon the number of certificates that may be issued by such board. The fact that the board of examiners attend a meeting on a date that was advertised as being a day for holding such examination and also issued one or more temporary certificates at that time, in no wise affects the provision contained in section 7834, supra, regarding their compensation. The members can only be compensated in accordance with said section 7834, General Code, supra, and that amount of com-

pensation depends upon the number of persons examined. Inasmuch as no examination was held at all, I am of the opinion, in direct answer to your question as stated in your request, that the school examiners are not entitled to any compensation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

929.

STATE FIRE MARSHAL TAX—FRANCHISE TAX—METHOD OF CALCULATION OF SUCH TAX.

The state fire marshal tax not being a franchise tax, the method prescribed by section 841 for calculating the same on gross premium receipts being explicit, and never having been changed since the original enactment of section 5432, et seq., has no bearing whatever on the question. The proper method of calculation is one-half of one per cent. of the gross premium receipts.

COLUMBUS, OHIO, May 22, 1914.

HON. R. M. SMALL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On May 8, 1914, you made the following request for my opinion:

"In behalf of the insurance department of the state of Ohio, I request that you kindly give your opinion on that part of section 841, General Code, which is as follows:

"'For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the superintendent of insurance in the month of November, each year, in addition to the taxes required by law to be paid by it, one-half of one per cent. on the gross premium receipts of such companies on all business transacted by it in Ohio during the year next preceding as shown by its annual statement under oath to the insurance department.'

"Section 5433 of the General Code provides another source of revenue to this department, and is, in part, as follows:

"'If the superintendent of insurance finds such report (as referred to in section 5432, G. C.) to be correct prior to the month of November in each year, he shall compute an amount of two and one-half per cent. on the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, as shown by the next preceding annual statement and charge them to such company as a tax upon the business done by it in this state for the period shown by such annual statement.'

"The state fire marshal department was first organized in accordance with an act passed April 16, 1900 (Laws of Ohio 94, page 386), which act was amended by an act passed May 9, 1902 (Laws of Ohio 95, page 471), which act was amended by an act passed April 25, 1904 (Laws of Ohio 97, page 418).

"The law as found in section 841, General Code, as quoted above, is in exact accord with its relative part of section 409-56, of the above act, passed April 25, 1904, and its relative part of section 409-56 of the above act, passed May 9, 1902, and only differs with its relative part of section 7 of

the above act passed April 16, 1900, in this—that in said act passed April 16, 1900, the month of December is the month designated in which taxes as provided therein are to be paid, while in the other enumerated sections providing for a fire marshal tax the month of payment thereof is November of each year.

"The two and one-half per cent. tax, as provided in that part of section 5433, General Code, quoted above, became a law by an act passed April 29, 1902 (Laws of Ohio 95, page 290), and the basis of calculation of such tax as therein provided is in strict accord with the basis of calculation of such tax, as provided by said section 5433, General Code.

"Prior to the passage of the act (Laws of Ohio 95, page 290), the basis of calculation of the two and one-half per cent. tax by this department was in accordance with an act passed March 27, 1894 (Laws of Ohio 91, page 91), i. e., the two and one-half per cent. was charged upon the *gross premium receipts,* and the basis of calculation of the fire marshal tax was also on the *gross premium receipts.*

"Since the passage of said act, passed April 29, 1902 (Laws of Ohio 95, page 290), the basis on which this department has calculated both the two and one-half per cent. tax and the fire marshal tax has been the *balance of such gross premium receipts after deducting such return premiums and considerations received for reinsurance, as shown by its next annual preceding statement,* in accordance with the said act passed April 29, 1902, and in accordance with its relative part of said section 5433, General Code.

"I have no question to raise concerning the method of calculating the two and one-half per cent. tax since the act passed April 29, 1902 became a law, but I do question the method of calculating the one-half per cent. fire marshal tax since the above date of April 29, 1902.

"If it was logical to levy one-half of one per cent. fire marshal tax on the *gross premium receipts* as provided by said act (Laws of Ohio 94, page 386), the original act to establish the office of and to prescribe the duties and powers of the state fire marshal, and which has continued to be the law from the date of its passage to the present time, as prescribed in said section 841, General Code, prior to said date of April 29, 1902, why is it not logical to use the same basis of calculation for the one-half per cent. fire marshal tax since the said date of April 29, 1902, the law never having been changed?

"If you should decide that the method of calculation for the one-half per cent. fire marshal tax is based on the *gross premium receipts* and not on the *balance of such gross premium receipts after deducting such return premiums and considerations received for reinsurance,* what effect would the act passed April 18, 1913 (Laws of Ohio 103, page 713), have on the method of calculation for fire marshal tax relative to mutual fire insurance companies authorized to do business under the laws of this state?"

Your request goes into the matter so thoroughly that it is unnecessary for me to again restate the history of the statutes to which you refer, as I find, upon examination, that your statements in regard to the same are correct.

Section 841 of the General Code, the portion of which is necessary to this inquiry is quoted by you, was originally passed, as you state, April 16, 1900, 94 O. L., 386. This particular section being contained in section 7 of said act at page 388. The material words of the section as it was passed were,

"one-half of one per cent. of the gross premium receipts of such companies on all business done in Ohio the year next preceding * * *."

This language was carried verbatim in the amendments of the act found in 95 O. L., 471 and 97 O. L., 418. The only change whatever was made by the codifying commission in codifying this section, so that this particular portion now reads,

> "one-half of one per cent. of the gross premium receipts of such companies on all business transacted by it in Ohio during the year next preceding * * *."

I think it will be admitted that this is simply a change in the form of the language and does not change the substance or the meaning at all.

The section as it was actually passed and as it stands now was a part of the act establishing the office and prescribing the duties and powers of the state fire marshal. It is entirely independent of the other provision of our Ohio laws relative to insurance and insurance companies, and I can conceive of no analogy whatever between it and sections 5432, et seq., of the General Code providing a tax upon foreign insurance companies for their right to do business in this state.

I am, therefore, compelled to entirely disregard sections 5432, et seq., as having any bearing whatever upon this question. As the method prescribed by section 841 for calculating the so-called fire marshal tax is explicit, and as it has never been changed since the original enactment, and is now the law, I can conceive of no reason why it should not be followed in computing this tax; and it seems to me that so long, as said section is in force the duty is absolutely enjoined upon you to compute said tax upon the basis prescribed by said section, viz., upon the gross premium receipts of such companies on all business transacted by them in Ohio during the year next preceding.

As to your further question as to what effect the act passed April 18, 1913, 103 O. L., 713, has on the method of calculating this tax, my answer is, none whatever. The act to which you refer is entitled, "An act defining, for the purpose of taxation, the term 'gross premiums' as applied to mutual fire insurance companies receiving premium deposits in excess of the cost of insurance to the insured, and returning such excess ratably to their policyholders."

But the very first section of this act shows that it relates only to *franchise taxes,* said first paragraph being as follows:

> "For the purpose of computing franchise taxes, on gross premiums, to be paid under any law of this state now or hereafter in force, by any mutual fire insurance company authorized to do business under the laws of this state, the amount of premium deposits received by such company upon any risk within this state in excess of the net cost of insurance to the insured, shall not be included where such excess deposit is returned ratably by such company to its policyholders; but the amount of gross or aggregate premiums received by any such company shall be deemed to be the balance remaining after deducting from the gross amount of premium deposits received or collected by it on risks in the state during the preceding calendar year ending on the thirty-first day of December, that portion of gross premium deposits returned by it to policyholders during said preceding calendar year, upon the cancellation or expiration of risks upon property situated within this state. In addition to the matters of return required to be made by insurance companies for the purpose of computing taxes, any such company shall also return for such purpose in its annual statement:
>
> "(a) The total gross amount of premium deposits received or collected by it on risks in this state during the preceding calendar year ending on the thirty-first day of December.

"(b) The total amount of gross premium deposits returned to policyholders during such preceding calendar year upon cancellation and upon expiration of risks upon property situated within this state."

The state fire marshal tax, so-called, is not a franchise tax, and as this act only refers to franchise taxes, it can have no effect upon the method of calculation provided by section 841.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

930.

JUDGE OF THE JUVENILE COURT—HOW DESIGNATED—LENGTH OF TERM OF SUCH JUDGE.

In a county where there is one common pleas judge and one probate judge and said judges have designated the probate judge to act as judge of the juvenile court, but have not specified the time; when such designation is once made, it should continue until the judge has retired from office, unless there was unanimous agreement by the judges to designate someone else to act.

In a county where there is only one common pleas judge and one probate judge, the one already chosen should continue to act as judge of the juvenile court until such time as the judges can mutually agree upon a change of designation.

COLUMBUS, OHIO, May 19, 1914.

HON. CHARLES E. CAPPLE, *Probate Judge, Chillicothe, Ohio.*

DEAR SIR:—Under date of March 7th, you request opinion of this department upon a question stated by you as follows:

"In a county where there is one common pleas judge and one probate judge, and said judges have designated the probate judge to act as judge of the juvenile court, but for no specified time, when in the opinion of your department does such time cease? Would such time cease when such judge saw fit and a new designation as to whom should serve as juvenile judge was made? And supposing the common pleas judge when they, the probate and common pleas judges, came to designate one of themselves to act as juvenile judge, the present designated one feeling it was time for the other fellow to take his turn, designated the probate judge, and the probate judge at the same time for the same purpose designated the common pleas judge to act as such judge, who would have to assume the authority of such juvenile judge? In other words, when a designation has been made of one judge to act as juvenile judge for a time not specified, and he now feels it is the other follow's time to be juvenile judge, what is the opinion of your department as to how he may terminate such designation, and make the other fellow do part of the work that should necessarily belong to him? Again in other words, when a designation has been made for no specified time, if each one of the aforesaid judges, when the one designated thinks it is the other follow's turn, designate the other one to act as juvenile judge, then what?"

Section 1639 of the General Code, 103 O. L., 868, provides 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 conferred in this chapter. The judge of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. *When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.* The words 'juvenile court' when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction."

This section has been amended in 104 O. L., 176, but insofar as it pertains to your situation the language of the section quoted and of the amendment thereto is similar.

The common pleas and probate court of your county are, under the general terms of the statute, given concurrent jurisdiction in matters calling for the exercise of the powers of the juvenile court, and it is probable that in case no designation had been made each would have jurisdiction over juvenile cases, but, according to the statement of facts presented by you, the two courts designated one as juvenile judge, but specified no length of time within which those powers should be exercised by him. The statute is silent as to the time such power should be exercised, unless the word "term" as used in the foregoing italicized language, be construed to mean the term for which the judge was elected as probate or common pleas judge. If such construction may be placed upon the statute, the provision governing your case would be that when a judge has been designated to transact juvenile business, he shall continue so to exercise such jurisdiction until his term of office terminates. Even if that interpretation should be correct, it would not follow that he could not be divested of his authority provided he and the other designating judges were to agree, as, if they should mutually decide to make a change in the designation, the acting judge of the juvenile court would, by concurring in such action, be treated as having resigned, and the second designation would, no doubt, then be valid. Therefore, it would follow that when the designation was once made it should continue until the judge has retired from office, unless there was unanimous agreement by the judges to designate someone else to act. If, on the other hand, the word "term" as used in the italicized sentence, be construed to mean the time fixed by the judges within which the designated judge should act as juvenile judge, then it would seem to follow that if the designation was for an indefinite period, that judge would continue to act as judge of the juvenile court until his successor has been selected.

As you and the common pleas judge have failed to agree upon this question, and as you and he are the only judges in your county having jurisdiction to decide this matter, I am of the opinion that he already chosen should continue to act as judge of the juvenile court until such time as you can mutually agree upon a change of designation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

931.

CHILDREN'S HOMES—ASSIGNMENT OF CHILDREN FROM SUCH A HOME—FUNERAL EXPENSES.

Where a child is received by assignment from a county children's home and kept in accordance with such assignment until the death of the child, the board of trustees of the children's home have a legal right to defray a portion of the funeral expenses in such a case.

COLUMBUS, OHIO, May 19, 1914.

HON. FRED W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your letter of January 14, 1914, was received and is as follows:

"I desire to ask your opinion on the following question submitted to me by the president of the board of trustees of the Meigs county children's home to wit:

"On March 1, 1909, Mr. John V. Davis received by assignment from the Meigs county children's home, a boy whose name was Edgar Nelson Manley, then past ten years of age, and kept him in accordance therewith until his death in the year 1913. Mr. Davis defrayed all expenses, both medical and funeral, and now asks the board of trustees of the said home to reimburse him in part in the funeral expenses, which amounted to about $70.00. Has the board of trustees a legal right to defray a portion of the funeral expenses in this case? A copy of said assignment being as follows, to wit:

THE CHILDREN'S HOME.

"The undersigned, John Davis, Langsville, Ohio, has this day received by assignment from the Meigs county children's home, subject to the laws of the state of Ohio, under which it acts, the entire charge, management and control of Edgar Nelson Manley, a minor child, born August 24, 1898, at Middleport, Ohio, and I do hereby agree to take the said Edgar Nelson Manley into my family, to treat him kindly and as my own child, to clothe, feed and educate him to the best of my ability, and will have him attend each year the regular terms of the district school, for at least six months in the year; and train him up, so far as I am able, in the precepts of virtue and the Christian Religion, and so as to be able to engage creditably in the ordinary business of life."

Sections 3093 and 3096 of the General Code, in force at the time Davis entered into the agreement, read as follows:

"Section 3093. All inmates of such 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 such home, until they are eighteen years of age, and if such child is placed out, indentured or adopted, such control shall continue until such child becomes of lawful age.

"Section 3096. The trustees shall require an agreement in writing to be entered into, that such child so placed out shall be furnished with good

and sufficient food, clothing and a public school education, and the payment to it of a reasonable amount, to be named in the agreement, upon his or her becoming of age, provided he or she remains in such foster family until becoming of age and not otherwise. For the purpose of securing the well-being and progress of such children, and the enforcement of the agreement, the trustees shall have the control and guardianship of such children until they become of age."

But the agreement entered into by Davis with the trustees, and quoted above, must be presumed to contain every provision and arrangement entered into between them. No contingency is specified or provided for in the memorandum signed by Davis, either authorizing any enlargement or waiver of its terms. Mr. Davis' obligation in this matter certainly did not extend beyond the terms of the agreement and I can see nothing in the agreement that thrusts upon him the burden of meeting the burial expenses of the child. The child's death was not anticipated nor provided for when the agreement was written and it follows that the expense of its burial should have been cared for as if no agreement had been executed.

Under section 3096, General Code, the trustees "shall have control and guardianship of such children until they become of age." When a child dies in the children's home, it is the duty of the trustees to provide for its burial. Nothing in the agreement of Mr. Davis in the case of the Manley child relieved the trustees of this duty and the expense of the burial should have been defrayed by them. However, Mr. Davis saw fit to pay the burial expenses and it is now asked whether the trustees of the home may reimburse him in part for such expenditure.

In Rockel's Complete Ohio Probate Practice, volume 1, I find the following note to section 649:

"The immediate duty of burying the body rests upon the husband or the wife, or other relative of the decedent, *or may rest upon a stranger under whose roof the death occurred.* He cannot keep the body unburied, or by exposing it to violation, offend the feelings or endanger the health of the living. By whomsoever the duty is performed, the estate of the deceased is ultimately liable to defray the necessary reasonable expenses of the burial. It is analogous to the duty and obligation of a father to furnish necessaries to a child and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits to do."

This, it seems, justifies the conclusion that it is now the legal duty of the trustees of the children's home to reimburse Mr. Davis for the funeral expense of the Manley child; but even if this is not conceded and the trustees cannot be compelled to reimburse Mr. Davis, I do not think that any one will doubt that a moral obligation rests upon the trustees to meet this expense and this conceded, it follows that the trustees may allow the claim. See Elliott on Municipal Corporations, page 43, section 40; McQuillen on Municipal Corporations, section 2168.

Therefore, answering your question directly, I am of the opinion that the board of trustees of the Meigs county children's home have a legal right to defray a portion of the funeral expenses in the case submitted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

932.

COUNTY CHILDREN'S HOME—BOARD OF TRUSTEES—RECORD OF NAMES TO BE KEPT IN COUNTY CHILDREN'S HOMES.

The county commissioners should appoint a board of trustees under section 3081, *whose duty it will be to see that a separate record of each inmate of county children's homes is kept. It is not proper to keep the names of inmates of children's homes in the same record as the names of inmates of the county infirmary.*

COLUMBUS, OHIO, May 19, 1914.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 23rd, wherein you state:

"In one county of this state there exists a condition relative to the care of children, concerning which we desire your opinion as to the legality of the arrangement.

"On the infirmary farm there is a separate building, known as the children's home, located approximately three hundred yards from the building in which the adult poor are housed. Both institutions are under the management of the county commissioners, who succeeded the former infirmary board of directors on January 1, 1913. One superintendent is the resident officer of both. No attempt is made to keep a separate record of the inmates, but their names appear upon the same book as if actual residents of the infirmary proper.

"It appears to us that this arrangement which was begun about 1888 is contrary to the policy expressed in the second sentence of section 3091 of the General Code. Prior to 1898 this section then known as R. S. 931b, provides that the children could be kept at a county infirmary if they were in separate appartments, but in 1898 this condition was stricken out of the law.

"As there will have to be some radical changes made in the present arrangements to meet the minimum standard of this board for approval, we wish to know whether in your opinion the present arrangement is in accordance to law."

The statute cited and commented upon by you is not directly in point because the children in question are maintained in a building separate and apart from the county infirmary and not in the infirmary proper. It is of importance only insofar as it discloses the changed policy of the law with respect to the maintenance of children in county children's home instead of in county infirmaries.

Section 3081 of the General Code and section 3097 as amended (103 O. L., 864), furnish a complete answer to your questions. These sections are as follows:

"(3081) When the necessary site and buildings are provided by the county, the commissioners shall appoint a board of four trustees, as follows: One for one year, one for two years, one for three years and one for four years, from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until his successor is appointed and qualified.

"(3097) Full and complete records of the inmates shall be kept in the children's home and they shall be uniform throughout the state. It shall be the duty of the board of state charities to secure uniformity by providing a standard form of blanks and records for the guidance of such institutions wherein shall be recorded the full name, age, place of residence, name of parent or other relatives, so far as obtainable, and other information as the board of state charities requires, which records shall not be open to inspection unless on special permission of the trustees. The name and place of residence of the person with whom a child is placed or by whom adopted shall be recorded together with the terms of the agreement in a separate record, which shall not be open to inspection except by special permission of the trustees, having regard at all times to the well-being of the child, except that duly authorized representatives of the board of state charities, may see such record at any time."

I am clearly of the opinion that the system of management of said home is illegal. In order to comply with the law, the county commissioners should appoint a board of trustees under section 3081, whose duty it will be to see that a separate record of each inmate of the county children's home is kept in accordance with section 3097, as amended, and that the other provisions of statute for the government of such institutions are observed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

933.

ARSON—POWER OF BOARD OF ADMINISTRATION TO PAROLE A PRISONER CONVICTED FOR ARSON FROM THE MANSFIELD REFORMATORY.

Where a person is convicted of arson and sentenced under section 12433 *to the Mansfield reformatory, the board of administration may release him any time after he begins his sentence, since the statute provides the maximum term of imprisonment for this crime, but does not provide for the minimum sentence.*

COLUMBUS, OHIO, May 19, 1914.

HON. J. GUY O'DONNELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your letter of March 24, 1914, as follows:

"I am writing to inquire as to what construction you have or will place upon section 12433 as to the minimum sentence. A conviction was had of a party in our court for arson and sentenced under this section to the Mansfield reformatory. The question arises: Can the board of managers in discharging its duty release this party on parole within a less period than one year?"

Section 12433 of the General Code reads in part:

"Whoever maliciously burns or attempts to burn a dwelling house, kitchen, * * * or other building * * * if the value of such building * * *

is $50.00 or more, *shall be imprisoned in the penitentiary not more than twenty years.*"

Section 2131 of the General Code, as amended (103 O. L., p. 885) reads in part:

"* * * Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary."

Under this latter section the court was empowered to sentence the prisoner in question to the Ohio state reformatory instead of the Ohio penitentiary.

Section 2132 of the General Code as amended (103 O. L., 885) reads:

" Courts imposing sentences to the Ohio state reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment of prisoners shall be terminated by the Ohio board of administration as authorized by this chapter, but the term of such imprisonment shall not exceed the maximum term, nor be less than the minimum term provided by law for such felony."

Section 2141 and 2142 of the General Code, as amended in 103 O. L., p. 887, reads as follows:

"Section 2141. The Ohio board of administration shall establish rules and regulations under which prisoners may be allowed to go upon parole in legal custody, under the control of the Ohio board of administration and subject to be taken back into the enclosure of the reformatory. A prisoner shall not be eligible to parole, and an application for parole shall not be considered by the board, until such prisoner has been recommended as worthy of such consideration by the superintendent and chaplain of the reformatory.

"Section 2142. Before consideration by the Ohio board of administration notice of such recommendation shall be published for three consecutive weeks in two newspapers of opposite politics in the county from which the prisoner is sentenced, or in the county of the residence of the prisoner. The expense of such publication shall not exceed one dollar for each paper. A prisoner shall not be released upon parole unless, in the judgment of the board, there is reasonable ground to believe that, if so released he will be and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society. Such judgment shall be based upon the record and character of the prisoner in the reformatory, his previous record, the nature and character of the crime committed and other facts which the board may be able to obtain bearing upon the advisability of such parole. A prisoner shall not be paroled without receiving the votes of all members of the board present at a regular or special meeting, and when a prisoner so paroled, has during such parole, performed all the conditions imposed, the Ohio board of administration may finally release and discharge him."

Section 2132 gives the Ohio board of administration the power to release prisoners sentenced to the Ohio state reformatory in the manner provided in sections 2141 and 2142. Nothing is said about the maximum or minimum term in section 2141 or section 2142. Section 2132, however, provides that

"The term of such imprisonment shall not exceed the maximum term or be less than the minimum term provided by law for such felony."

and the question is when, if at all, can the Ohio board of administration parole a prisoner when no minimum term is provided by law for the crime for which he was convicted?

Under section 2132 the general power to terminate sentences of prisoners in the reformatory, as provided in sections 2141 and 2142, is conferred on the Ohio board of administration and that power is then qualified by the further provision that

"The term of such imprisonment shall not exceed the maximum term nor be less than the minimum term provided by law for such felony."

This clause limits the general power of the board only when a minimum or maximum term, or both, are provided by law. In the case before us, the prisoner was convicted of the crime of arson. The statute provides that the maximum term of imprisonment shall be twenty years, but provides no minimum. Therefore the power of the Ohio board of administration to terminate the imprisonment is limited only in this one respect, that it cannot detain the prisoner beyond the maximum term and it is my opinion that the board may release him on parole at any time after his incarceration in the reformatory.

This opinion is to be distinguished from the opinion of this department to the Ohio board of administration under date of March 4, 1912, in which it was held that a prisoner sentenced for life could not be paroled when the statute read "whoever, is guilty * * * shall be imprisoned for life." In that case the court could impose no sentence other than life and the life term was the minimum as well as the maximum term. Owing then, to the provision of section 2169, G. C., that a parole could not be granted until the minimum term was served, it is evident that the prisoner in that case could never become eligible for parole.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

934.

DEPUTY SHERIFFS AND DEPUTY CLERKS MAY ACT IN PLACE OF SHERIFFS AND CLERKS.

Under the provisions of section 11426, *General Code, the duties of sheriff and clerk are purely ministerial; the deputy sheriff and deputy clerk may act in the place of such sheriff or clerk.*

COLUMBUS, OHIO, May 19, 1914.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of April 10, 1914, as follows:

"Under section 11426, General Code, (103 O. L., 514), in the absence of either the clerk or sheriff, or both, may the deputy clerk or deputy sheriff, or both deputies, act in the place of such clerk or sheriff?"

Section 11426, General Code, as amended, 103 O. L., page 514, reads:

"When by order of a court of record or judge thereof in any county, except a police court or judge thereof, the clerk of the common pleas court is directed to cause the summoning of persons to serve as grand or petit jurors in such court, in the presence of the sheriff, judge and the jury commissioners, he at once shall turn the jury wheel several times until the pieces of paper therein are thoroughly mixed, then draw from it the number of names specified in the order, and unless otherwise therein directed, forthwith shall issue a venire facias to the sheriff commanding him to summon the person whose names were so drawn, to attend as jurors at the time and place in the order stated. Except as otherwise provided by law, all grand and petit juries shall be impaneled from persons so selected and summoned. Should the jury commissioners be unable to attend because of sickness or absence from the county, the judge before whom the drawing is had shall designate two persons of opposite political parties to act as jury commissioners for the purpose of drawing the requisite names."

Section 2830, General Code, reads in part:

"The sheriff may appoint in writing one or more deputies * * *."

Section 2871, General Code reads in part:

"The clerk may appoint one or more deputies to be approved by the court of common pleas, if in session, or by one of the judges thereof, if not in session. * * *"

Section 9 of the General Code, reads in part:

"A deputy, when duly qualified, may perform all and singular the duties of his principal. * * *"

In volume 7 of Cyc. page 248, the following rule is stated:

"In the absence of any statutory provision, or implication to the contrary, a deputy clerk is authorized to perform any official or ministerial act that may be done by his principal, except to make a deputy."

and on page 1516 of volume 35 of the same work, the following rule is stated:

"While the judicial functions of a sheriff cannot be delegated to another the ministerial duties of the office may be performed by a deputy sheriff or under sheriff."

In the case of Willingham vs. The State, 21 Fla. p. 761, it was held:

"The duty imposed by statute upon the clerk of the circuit court to draw from the box the names of persons to serve as grand jurors at the term of court, may be performed by a deputy."

In that case the statute provided that:

"The clerk of the circuit court, in the presence of the sheriff or deputy sheriff and the county judge, or in his absence a justice of the peace of

the county, shall proceed to draw from the box the names of not less than fifteen nor more than eighteen persons to serve as grand jurors at such court."

The court at page 776 said:

"There is nothing in the duty or function of drawing the pieces of paper or the names from the box that is judicial in its character or involves an exercise of discretion or personal skill. Nothing could be more ministerial. The measure of ability or skill which its performance requires, is the smallest. The language of the statute does not indicate that the personal judgment of a clerk himself is relied on. Ordinary intelligence and simple honesty are all that are required by the nature of the duty."

And again at page 778:

"It seems to us that as a general rule, all purely ministerial functions can be performed by a deputy and that such is the character of the drawing in question. * * * Any authority seeming to conflict with our conclusions will be found, on careful examination, to involve the exercise of a discretion or personal judgment."

In accordance with the views taken by the court in the case just cited, I am of the opinion that the duties imposed upon the clerk of the court and the sheriff by section 11426 of the General Code, as amended in 103 O. L., p. 514, are purely ministerial in their character and may therefore be discharged by the deputy clerk and deputy sheriff in the absence of their principals.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

935.

PROBATE JUDGE—EXAMINERS OF THE COUNTY TREASURY—APPOINTMENT OF SUCH EXAMINERS.

Under the provisions of section 2700, General Code, it is mandatory upon a probate judge to appoint examiners of the county treasury once every six months; it is discretionary with him to do so oftener, if he deems it necessary.

COLUMBUS, OHIO, May 19, 1914.

HON. EDWARD W. PORTER, *Probate Judge, Marysville, Ohio.*

DEAR SIR:—Under date of March 19th, you request a construction of section 2700, General Code, as to whether it is mandatory upon a probate judge to appoint examiners of the county treasury at intervals of six months. Said section provides:

"On the day and at the time the county treasurer turns over his office and its effects to his successor in office, once every six months or oftener, if he deems it necessary, or whenever requested in writing so to do by one or more bondsmen of the county treasurer, without notice to anyone, the

probate judge shall appoint in writing under the seal of such court two competent and trustworthy accountants of opposite politics to examine the treasurer's office."

Before the adoption of the report of the codifying commission in 1910, the foregoing provision appeared as part of section 1129, Revised Statutes, in the following form:

"* * * the probate judge shall, once every six months, or oftener, if he deems it necessary or whenever he is requested so to do in writing by one or more of the bondsmen of the treasurer; and on the day and at the time the treasurer turns over his office and its effects to his successor in office, without notice to any one, he shall appoint, in writing, under the seal of said court, two competent and trustworthy accountants of opposite politics, * * *."

It will be observed that but for a difference in punctuation and in the arrangement of the phraseology, this section is identical with section 2700.

It is well settled in Ohio that codification is not presumed to change the meaning of a statute unless such intention is clearly manifest. There is no doubt that under section 1129 it was mandatory upon the probate judge to appoint two persons to examine the county treasury every six months. The only justification for placing a construction on section 2700 different from that given to section 1129 Revised Statutes, would be the change in the punctuation. In section 1129 a comma was inserted after the word "months and this comma has been omitted from section 2700.

The province of punctuation in the interpretation of statutes, is discussed in section 361 of Lewis Sutherland Statutory Construction, as follows:

"The questions in court relating to punctuation or affecting construction have generally arisen on the presence, omission or misplacing of commas.

"In Ewing vs. Burnet, the court says: 'Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by the four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it.'

"Where effect may be given to all the words of a statute by transposing a comma, the alternative being the disregard of a material and significant word, or grossly straining and perverting it, the former course is to be adopted. Courts, in the construction of statutes, for the purpose of arriving at or maintaining the real meaning and intention of the lawmaker, will disregard the punctuation, or transpose the same, or substitute one mark for another, or repunctuate. When the intent is uncertain, punctuation may afford some indication of the true intent and may be looked to as an aid, and may even determine the construction, but it is never allowed to have a controlling effect."

The language of this statute is certainly entitled to greater weight than its punctuation.

If it was the intention to change the meaning of the statute, the codifying commission, at least, would have employed such language as would have clearly indicated such intention, but as this was not done, I am constrained to hold that the present statute should be construed in accordance with its meaning before codification.

I am of the opinion, therefore, that it is mandatory upon the probate judge, under section 2700, General Code, to appoint examiners of the county treasury once every six months.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

936.

STATE SEALER OF WEIGHTS AND MEASURES—AUTHORITY TO TEST GAS METER PROVERS—AUTHORITY OF PUBLIC UTILITIES COMMISSION TO TEST SUCH METERS.

The state sealer of weights and measures has authority to test gas meter provers under section 3398, *General Code, before the same can be used, but thereafter, the public utilities commission may test such meters to see that they are still correct, or upon request of the consumer as provided in sections* 614-36 *and* 614-37, *General Code.*

COLUMBUS, OHIO, May 19, 1914.

HON. S. E. STRODE, *Commissioner in Charge, Dairy and Food Division, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 23, 1914, as follows:

"The question arises whether this commission as state sealer of weights and measures, has authority to test gas meter provers as provided in sections 9326, 9327, 9328, 9329, 9330, 9338 and 7970 of the Ohio food and drug laws. Sections 614-36 and 614-37 of the General Code, public utilities act, seem to confer such authority upon that department, in that it is provided that the public utilities commission may test such provers. We wish also to call your attention to the agricultural commission act, passed April 15, 1913, sections 7965 and 7965-1, conferring the authority of state sealer upon the agricultural commission or its deputies.

"The claim has been made that the public utilities law was later than the sections conferring upon the state sealer the duties of testing meter provers. That may be true, but the Agricultural commission act, which re-enacted all of these sections is a still later law than the public utilities act. Further the testing of such meter provers is optional with the public utilities commission, while it is mandatory with the agricultural commission."

Section 9338 General Code, provides:

"All gas companies supplying the public with illuminating gas, either natural or artificial, which are not supplied with such apparatus forthwith shall provide for their use a meter-prover, the holder of which must contain not less than five feet, such prover to be tested, stamped, and sealed by the state sealer of weights and measures, at the Ohio State University, before being used; and a photo-meter for the comparison of the lights of gases and candles by means of a disk. The failure on the part of any person, firm or corporation supplying the public with illuminating

gas to comply with the provisions of this section shall cause said person, firm or corporation to forfeit and pay to the state not less than twenty-five dollars nor more than one hundred dollars, to be recovered upon the complaint of any such consumer, in the name of the state, before any court of competent jurisdiction."

This section when read literally means but one meter prover for each company and one test for each meter prover by the state sealer of weights and measures. Compliance with it is a condition precedent to the installation of meters by a gas company; and any company violating this section (that is installing and selling gas measured by a meter not previously tested by a meter prover as provided), is subject to a penalty from $25.00 to $100.00, to be recovered in a suit brought by any consumer in the name of the state in any court of competent jurisdiction.

Sections 614-36 and 614-37 (sections 38 and 39 of the public utilities act) read:

"The commission may ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply or quality or the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurements thereof. It may establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto.

"The commission may provide for the examination and testing of any and all appliances used for the measurement of any product or service of a public utility. Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commission. The commission may declare and establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fees to be paid by the consumer or user at the time the request is made, but to be paid by the public utility and repaid to the consumer or user if the appliance is found commercially defective or incorrect to the disadvantage of the consumer or user."

These sections are very general in their terms and while meter provers are not named in section 9338, yet I think them included, for the reason that if it be ascertained that a gas meter is not measuring the gas correctly it is because there is something wrong with, or defect in the meter, and if it had been tested by the meter prover provided by the company, and found sufficient, then it would follow either that a mistake had been made in testing the meter, or the meter prover was itself inaccurate.

Under section 9338, the duty of the state sealer is plain and easily understood, while under section 614-36 and 614-37, the duty of the utilities commission is equally clear, although not so clearly expressed. The question of which of these is the later enactment is not at all controlling. A gas company before installing meters for measuring gas for consumers must provide itself with a meter prover and have it tested by the state sealer before using the same. This is mandatory on the gas company, and there is no other or further provision in the statutes in regard to testing meter provers. However, it does not necessarily follow from this that no other or further test may be made.

The public utilities law (so named) described certain activities as public utilities, among which are:

"* * * when engaged in the business of supplying artificial gas for lighting, power or heating purposes to consumers within this state as a gas company.

"* * * when engaged in the business of supplying natural gas for lighting, heating, or purposes to consumers within this state as a natural gas company."

Under this act, gas companies and natural gas companies are public utilities and as such are under the control and supervision of the public utilities commission, whose duty it is to see to it that each utility furnishes proper and adequate service; that its customers get what they bargain for and are charged with, and that all means and appliances by it used are correct, and that consumers are neither asked nor required to pay for more than they receive.

In carrying out this object, the powers of the commission are much broader than those of the state sealer. While there is no power in the state sealer to require a meter prover to be submitted to a second test, it is not merely within the power, but clearly a duty upon the part of the public utilities commission to ascertain whether meters are or are not correct, and if they are not, to learn why, and if it should develop that the meter had not been properly tested, or the meter prover was out of order, to take such steps and make such orders as would cure the difficulty, regardless of the fact that the meter prover had received its initial test as required by section 9338, General Code.

I am of the opinion that there is no inconsistency nor conflict between these sections nor in the duties of the state sealer and the public utilities commission, however it may look to some that it is unnecessary to have two boards, officers or bodies looking after the same matter and apparently performing the same duty.

It will be remembered all the time that the meter prover is to be used by the gas company. When it provides itself with a prover and has it tested, its duty to the state is fulfilled. It may permit the prover after its inspection and return to get out of order; it may place the use of it in the hands of an incompetent or careless person, one who may not use it at all before installing a meter. The detection of any of these things it beyond the power of the state sealer, but clearly within that of the public utilities commission, so that it is clearly seen that while the power of the utilities commission is greater, broader and more effective in securing the direct result than that of the state sealer can possibly be claimed to be, there is no conflict of power. The state sealer should enforce section 9338 the same as if the utilities act had never been passed, and the public utilities commission should see to it that all gas meters measure correctly, regardless of the fact that the terms of section 9338 had or had not been complied with, not only by the state sealer, but by the gas company.

The paramount duty of the public utilities commission in this regard is to see to it that consumers of gas burn what they are asked to pay for and no more. A further discussion of this subject might be entered into, but it is believed unnecessary at this time.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

937.

CIVIL SERVICE DEPARTMENT—LEGISLATIVE REFERENCE DEPARTMENT—UNCLASSIFIED SERVICE—DISCHARGE OF EMPLOYES FROM PUBLIC LIBRARY—OFFICES COMPATIBLE, CLERK OF THE HOUSE AND DIRECTOR OF LEGISLATIVE REFERENCE DEPARTMENT.

1. *Since the legislative reference department is in effect a legislative reference library and was so recognized when the first act on the subject was passed, placing the department under the state librarian, the employes thereof would be considered as in the unclassified service within the term "library staff of any library in the state, etc."*

2. *Since the employes of the department are appointed by the director, subject to the approval of the board of library commissioners, the director of the legislative reference library would have the right to discharge employes of the department, subject to the approval of the board of library commissioners.*

3. *There is no statutory inhibition that will prevent the clerk of the house of representatives from accepting the position of director of the legislative reference department, providing it is physically possible for him to perform the duties of both positions.*

COLUMBUS, OHIO, May 19, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 21, 1914, Hon. John R. Cassidy, acting director of the legislative reference department submits the following inquiries:

I wish you to advise me:

"First. If in your opinion the employes of the 'legislative reference department' created under the provisions of 103 Ohio Laws page 8 are included in the unclassified service of the state as prescribed in section 8 of the act found in 103 Ohio Laws page 698 and especially in subdivision a (6) of said section 8.

"Second. In the event that it becomes necessary to reduce the number of the employes of such legislative reference department, does the director have full power to discharge and, if not, in whom does such power of discharge rest?"

Under date of April 27, 1914, he further inquires:

"Can the clerk of the house of representatives continue to serve during the year 1914 as such clerk and receive compensation as such and at the same time accept the position of director of the legislative reference department and serve as such without compensation?"

As the first question concerns the civil service law this opinion is addressed to the state civil service commission.

The legislative reference department is provided for by act of 103 Ohio Laws 8, and said act is known as sections 798-1 to 798-8, inclusive, of the General Code.

A similar department was created by act of 101 Ohio Laws 221, to be known as the legislative reference and information department and was to be maintained in connection with the state library. Under this act the person in charge of the

department was designated as "legislative reference librarian," and he had charge of the department under the supervision of the state librarian. These features have been changed by the new act.

Section 1 of the act of 103 Ohio Laws 8, section 798-1, General Code, provides:

> "There is hereby created and shall hereafter be maintained a department to be known as the 'legislative reference department,' for the use and information especially of the members of the general assembly, the officers of the several state departments and the public. The department shall be under the direction and supervision of the state board of library commissioners who shall provide suitable quarters in the state capitol for said department."

Section 2 thereof, section 798-2, General Code, provides:

> "The state board of library commissioners shall employ a director and fix his compensation. He shall have charge of such department and shall be an expert in political science, economics and public law. The salary and appointment of the director shall be approved by the governor and the director shall be removed by the board only for misconduct, incompetency or disability. Upon the recommendation of the director such board shall make rules for the direction of the department and its service as it deems necessary.

Section 3 of the act, section 798-3, General Code, prescribes the duties of the director, as follows:

> "It shall be the duty of the director to collect and compare the laws of this and other states pertaining to any subject upon which he may be requested to report by the governor or any committee or member of the general assembly; to collect all available information relating to any matter which shall be the subject of proposed legislation by the general assembly; to prepare or advise in the preparation of any bill or resolution when requested to do so by the governor or by any member of the general assembly; to preserve and collate all information obtained and carefully index and arrange the same so that it may be at all times easily accessible to the members of the general assembly, other state officials and to the general public for reference purposes; to collect such books, pamphlets, periodicals, documents and other literature as may be of use to the general assembly or other state officials, and to keep the same on file in the quarters of the department, temporarily or permanently, according to the time for which such literature may be needed. It shall further be the duty of the director to collect, compile, classify and index the documents of the state, including senate and house journals, executive and legislative documents and departmental reports of this and other states; to keep on file all bills and resolutions printed by order of either house of the general assembly; to accumulate data and statistics regarding the practical operation and effect of statutes of this and other states."

Section 4 of the act, section 798-4, General Code, provides for the employment of assistants, draftsmen and clerical help, as follows:

> "Subject to the approval of the board, the director may employ and fix the compensation of such assistants, draftsmen and clerical help as may

be necessary to effect the purpose of this act and to incur necessary and incidental expenses in the conduct of the department, which expense may include costs of traveling of the director or assistants. The compensation of the director and employes and such expenses shall be paid out of the state treasury upon the warrant of the auditor of state upon vouchers approved by the director of the department and paid out of the appropriations made. All vouchers for expenses shall be itemized and sworn to by the director."

The employes of this department are appointed by the director subject to the approval of the board of library commissioners.

Section 8 of the civil service act, section 486-4, General Code, places ten classes of positions in the unclassified service. Only one of these classes need be considered.

Subdivision (a) 6 of said section 8 provides:

"All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; *the library staff of any library in the state supported wholly or in part at public expense.*"

Is the department in question to be considered a library within the meaning of the above provision?

The legislative reference department as created by act of 103 Ohio Laws 8, is under the direction and supervision of the board of state library commissioners.

The department has varied purposes. It is created to collect and compare laws of this state and other states; to collect information relating to proposed legislation; to prepare or advise in the preparation of bills; to collect books, pamphlets, periodicals, documents and other literature for the use of the general assembly, other state officials, and of the general public; and to collect, compile, classify and index the documents of the state and other similar duties. This information is to be gathered upon subjects pertaining principally to legislation or proposed legislation.

Many of the duties performed by this department are similar to duties performed by a library. Its purposes are to secure books, pamphlets and information for the use and reference of the general assembly and state officials and of the general public. A library gathers information, books and pamphlets on these and other subjects for the use and reference of its patrons.

This department is in effect a legislative reference library, and the legislature recognized it as such when the first act was passed, placing the department under the state librarian. The fact that it has now been made a separate department does not change its character. Its principal characteristics are those of a library.

Subdivision (a) 6 of section 8 of the civil service act places in the unclassified service the "library staff of any library in the state supported wholly or in part at public expense."

The employes of the legislative reference department would come within the above class and are in the unclassified service.

By virtue of section 4 of the act of 103 Ohio Laws 8, supra, the employes of this department are appointed by the director subject to the approval of the board of library commissioners. The act does not provide for the discharge or removal of the employes.

Where the manner of removal is not fixed by law it is held that the right of removal is incident to the power of appointment. The appointments are made by the director with the approval of the library commission and removals should be made in the same way.

Therefore the director of the legislative reference department has the right to discharge the employes of this department subject to the approval of the board of library commissioners.

The next inquiry involves the compatibiliy of the positions of director of the legislative reference department and that of clerk of the house of representatives.

The rule of incompatibility of office is stated by Dustin J. at page 275 of State ex rel. vs. Gebhart, 12 Cir. Ct. N. S., 274, where he says:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

The duties of the director of the legislative reference department have been above given. He acts under the direction and supervision of the board of library commissioners.

Section 6 of the act creating this department, section 798-6, General Code, provides:

> "At the close of each session of the general assembly the clerk of the senate and the clerk of the house shall deliver to the director copies of all bills, joint resolutions, important petitions, memorials, and other legislative documents passed or presented during such session of the legislature."

The compensation and duties of the clerk of the house of representatives are prescribed in the following sections:

Section 51, General Code, provides:

> "The clerks and sergeants-at-arms of the senate and house of representatives, and their assistants, shall each be paid five dollars for each day's attendance during the session. For services rendered at the organization of the general assembly, each of the officers named in section thirty-three, unless re-elected to his position, shall be paid five dollars for each day, for not exceeding ten days."

Section 53, General Code, provides:

> "The clerks of the senate and house of representatives shall be paid five dollars per day, each, for the time employed after the adjournment of the general assembly in making indexes to the recorded and printed journals, and reading the proof sheets of the printed journals. The bills therefor must be approved by the commissioners of public printing or a majority of them. Such clerks shall have no other allowance or compensation for services after the adjournment of the general assembly, except as provided by law or resolution."

Section 71, General Code, provides:

> "Each clerk shall make an index to the journal kept by him, and an index of its appendix, and deliver them to the printer, who shall print them at the close of the proper volumes. Each clerk shall make an index to the recorded journal and deliver it to the secretary of state, who shall preserve it with the recorded journal."

Sections 73, 74, 75 and 76, General Code, prescribe certain duties upon the clerk of each house pertaining to the papers and documents laid before the house of which he is clerk as to their preservation and printing.

The duty of the clerk of the house of representatives to turn over to the director of the legislative reference department copies of bills and joint resolutions, important petitions, memorials and other legislative documents does not make these positions incompatible.

The two positions are not a check one upon the other, and they are not subordinate one to the other. Whether or not it is physically possible for the same person to perform the duties of each position is a question of fact to be determined by the time required to perform the duties of each position.

As the clerk of the house of representatives is paid upon a per diem basis, a question would arise as to his right to draw compensation as director of the legislative reference department for the days he draws pay as clerk of the house of representatives. This question is not now considered as it appears that the present clerk of the house of representatives is to serve as director of the legislative reference department without compensation.

I am of opinion that the same person may at the same time hold the two positions in question, provided it is physically possible for him to perform the duties of both positions.

The clerk of the house of representatives would be entitled to pay as such clerk if he performs the duties thereof, even though he also performs the duties of director of the legislative reference department.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

938.

TOWNSHIP WARRANTS—TO BE ENDORSED BY TOWNSHIP TREASURER BEFORE BEING PAID.

Township warrants are required to be endorsed by the township treasurer before being paid by the township depository of township funds. The treasurer proceeds as if no depository had been provided for and his signature should appear on the warrant before being honored by the depository.

COLUMBUS, OHIO, May 19, 1914.

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

GENTLEMEN:—Under date of March 24th, you asked my opinion as to whether or not township warrants are required to be endorsed by the township treasurer before being paid by the township depository of township funds.

The sections of the Code providing for the establishment of a township depository are sections 3320 to 3326, inclusive. A perusal of these sections will show that the depository was not intended to supplant the treasurer or to perform his duties, but that thereby provision was made for a township treasury. Nowhere in any of said sections is there anything changing the duties of the treasurer or enlarging the powers of the other township officers.

Consequently, the treasurer proceeds as if no depository had been provided for and his signature should appear on the warrant before being honored by the depository.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

939.

RAILROAD COMPANIES—EXPRESS COMPANIES—SALE OF STEAMSHIP OR RAILROAD TICKETS TO AND FROM FOREIGN COUNTRIES—PERSONALLY CONDUCTED PARTIES.

1. *The agents of express companies when acting within the scope of their agencies are not required to give the bond required by sections 290-294 by reason of the exemption of express companies in section 295, General Code.*

2. *Individuals organizing personally conducted parties for foreign travel are not within the provisions of such sections for the reason that they are not selling railroad tickets to the parties organized by them, but are buying the railroad tickets as agents of such parties.*

COLUMBUS, OHIO, May 19, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your inquiry of April 6th asking me for opinion as to the interpretation of sections 290-295, G. C., is before me; also the enclosures you submit.

The sections above mentioned read as follows:

"Section 290. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.

"Section 291. Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or both if to be engaged in both of such businesses.

"Section 292. The bond shall be executed by such person, firm or corporation as principal, with at least two good sufficient sureties, who shall be responsible and owners of real estate within the state. The bond of a surety company may be received, if approved, or cash may be accepted in place of surety. The bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction.

"Section 293. The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds

received by him, the date of receipts, the name or names of the principals and place or places of residence, and place or places of transacting their business, the names of the surety upon the bond, and the name of the officr before whom the bond was executed or acknowledged. Such record shall be open to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed.

"Section 294. A person, firm or corporation which engages in such business, contrary to the provisions of the second and third preceding sections, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.

"Section 295. Nothing herein shall apply to drafts, money orders or travelers' crecks issued by trans-Atlantic steamship companies or their duly authorized agents or to national banks, express companies, state banks or trust companies."

As I understand it, your first question is as to whether or not the agents of an express company are required to comply with sections 290-294, supra. In answer, I would say that express companies do their business through their agents, the nature of such business making any other method impracticable. While section 295, G. C., provides that express companies are exempt from the operations of sections 290-294, and does not specifically mention agents of express companies, yet I hold that the agents of the express company are included under that term, and consequently are not required to give bond.

However, should the agent of an express company also desire to act in his individual capacity, in that event he must give bond as provided by sections 290-294, supra. Of course your department has no means of knowing whether or not an agent will endeavor to act part of the time as the agent of the express company, and part of the time as an individual. If he should simply use the fact that he was the agent of the express company as an excuse to evade the giving of the bond, and then attempted to act as an individual, such agent would make himself liable to the penalties imposed by section 294, G. C.

Your other question, as I understand it, is as to whether or not individuals who are organizing personally conducted parties from whom they collect deposits and finally furnish transportation and steamer tickets, are within the provisions of sections 290-295, G. C., inclusive, these parties claiming that they get no profit or commission out of the tickets sold, but do collect a fee for arranging the tour, route, etc.

I do not believe these parties come under the statute and consequently they should not be required to give bond. From your statement it will appear that they are not engaged in selling the tickets but simply act as agent for the purchasers.

I trust the above furnishes you the information you desire.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

940.

ESTABLISHMENT OF FIREMEN'S PENSION FUND—ABOLITION OF FIREMEN'S PENSION FUND—ORDINANCE.

The council of a city having an established firemen's pension fund may abolish the same by ordinance when all that has been done in regard to the establishment of such fund is the passage of an ordinance declaring the necessity of establishment and maintenance of a police fund and levy made the same year and no persons are drawing payment from such fund.

COLUMBUS, OHIO, May 20, 1914.

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

GENTLEMEN:—Under date of April 7, 1914, you ask for my opinion upon the following question:

> "May the council of a city, having an established firemen's pension fund, by ordinance abolish fund?"

Supplementary to this request the following statement of facts has been received from the city solicitor of Chillicothe, Ohio:

> "On March 6, 1905, council passed an ordinance declaring the necessity of establishment and maintenance of a police relief fund and a levy was made accordingly the same year. It is said a board of trustees of the police relief fund were elected and rules adopted, but since the organization of the board as stated, nothing else has been done to administer this fund. In fact at the present time no one knows who the members of the board of trustees of said fund were, nor is there any copy of the rules adopted obtainable. Subsequent to the above levy no levies were made, no meetings were held by the board of trustees, no elections were held for their successors, and in fact, nothing has been done with this fund except that the money has remained in the hands of the city treasurer who has obtained a small interest for it. The same facts as here stated are true of the firemen's pension fund of this city."

I shall assume the city solicitor has stated all the facts, and therefore this opinion must be taken as based upon his statement. You will note that he has not stated that there were ever voluntary contributions to the fund, or that there were any moneys placed therein, excepting that received from a tax levy; consequently this opinion does not deal with circumstances which might arise where there had been premiums paid by foreign insurance companies, donations, or other augmentations of the fund derived from sources other than by virtue of a tax levy.

The law with reference to firemen's pension funds is embodied in sections 4600-4615 of the General Code, and its purport may be briefly stated as follows:

Any municipal corporation having a fire department supported at public expense, may, through its council, declare the necessity for the establishment of a firemen's pension fund. When this is done trustees are to be elected who shall serve for a term prescribed by the statute, which board of trustees shall organize as provided in section 4604. In each municipality availing itself of these provisions council may levy a tax of not to exceed three-tenths of one mill in addition to other levies authorized by law. In case of the failure of the trustees to act in the manner re-

quired by law, such failure shall not limit the power of council to make the levy, and if it fails to make the maximum levy, there shall be passed to the credit of the fund such portion of the annual tax on the business of trafficking in intoxicating liquor, as when added to the amount realized from the levy, will equal what would be realized from a full levy of three-tenths of a mill, or such part as is necessary to meet the pension payroll. The portion taken from the intoxicating liquor tax shall not exceed sixteen-thirtieths of the amount of such tax required to be passed to the credit of the general fund in the municipality.

As the statement of facts does not show any levy since the passage of the "Smith one per cent. law," I shall not discuss the bearing of that upon the firemen's pension fund tax. In addition to this tax, all fines imposed upon the members of the fire department and the proceeds of all suits for penalties for violation of statutes or ordinances, with the execution of which the fire department is charged, and license fees, shall be credited to the pension fund. The trustees are also authorized to receive donations.

The treasurer of the municipality is made custodian of the fund, and is to pay it out on the proper order of the trustees. These trustees may invest moneys as prescribed in section 4611, and may make all rules and regulations for the distribution of the fund "including the qualification of those to whom any portion of it shall be paid and the amount thereof;" but no rules shall be enforced until approved by the director of public safety or the fire chief of the municipality.

The section last referred to can have no bearing here because I have assumed that there are no persons drawing pensions from the fund in Chillicothe. At this point I also desire to call attention to the fact that this obviates a discussion of the question of vested rights in a fund after the happening of the contingency upon which the pension vests.

Prior to the happening of the contingency upon which the pensioner is to receive compensation it is fundamental that such pensioner has no vested right to any part of such fund.

22 Am. Eng. Enc. of Law, 2d Ed. 658.
8 Cyc., 904.

Mr. Dillon in section 431 of the 5th edition of his work on "Municipal Corporations," says:

> "The fund from which municipal pensions are paid is usually created by setting aside certain sources of public income, and frequently provision is made that a stated sum per month shall be retained or deducted from the compensation of each or the officers in the department who may become entitled to a pension. Although the sum so deducted from the officer's compensation is called a part of the officer's compensation in the statute, yet the officer never receives it or controls it, and he cannot prevent its appropriation to the fund in question. He has no power of disposition over it such as always accompanies ownership of property. A statute providing for such a deduction in legal effect says that the officer shall receive as compensation each month the net amount payable to him, and that in addition thereto the state or municipality will create a fund by appropriating the amount retained each month for that purpose, from which, upon his resignation for bad health or bodily infirmity, or dismissal after long and meritorious service, a certain sum shall be paid to him, or at his death to his widow and children where the statute so provides. Being a fund raised in that way, it is entirely at the disposal of the government until, by the happening of one of the events stated—the resignation, retirement, or death of the officer—

the right to the specific sum becomes vested in the officer or his representative. In making a change in the disposition of a fund of that character previous to the happening of one of the events mentioned, the state impairs no absolute right of property in the officer. The direction of the state that the fund should be one for the benefit of the officer or his representative under certain conditions is subject to change or revocation at any time at the time at the will of the legislature. There is no contract on the part of the state that its disposition shall always continue as originally provided. Until the particular event should happen upon which the money, or a part of it is to be paid, there is no vested right in the officers to such payment. His interest in the fund is, until then, a mere expectancy created by the law and liable to be revoked or destroyed by the same authority. But when the particular event has happened upon which the money or a part of it is to be paid, the beneficiary of the pension under the pension system acquires, it has been held, a vested right and it is not competent for the legislature or any other authority to deprive him of that vested right. But the existence of a vested right is dependent upon statutory provisions conferring the pension without qualification and without any reserve right to terminate it. If the statute reserves the power to the local authorities to discontinue the pension in their discretion, the beneficiary does not acquire a right in it."

The gist of the matter may be thus stated where the funds are derived solely from taxation; it is a matter of bounty given or withheld at the pleasure of the municipality, and may be repealed at any time, before the happening of the contingency upon which the right to the pension vests.

State vs. Trustees, 121 Wis., 44.
Cohrn vs. Henderson, 124 Pac., 1034.
Pennie vs. Bois, 132 U. S., 454.
Head vs. Jones, 150 S. W., 349.
Eddy vs. Morgan, 216 Ill., 437, 449.

The following language is taken from the case of Price vs. Parley 22 C. C., 48:

"It is within the power of the legislature wholly to abolish or to change a law granting pensions to disabled members of a fire department, and no such member is entitled to any other or different pension than that provided by the existing statute."

From this it seems to me to be clear that the city council has the right to abolish the firemen's pension fund in the case in question, as it is optional with the municipality to create a fund and provide for the pensioning of the firemen, and under these circumstances the power to create carries with it the power to destroy.

You also ask what disposition should be made of the money remaining in this fund in case of the repeal of the ordinance establishing firemen's pensions.

It has been suggested that under section 5654 of the General Code, as amended 103 O. L., 521, council may transfer the moneys to the sinking fund. That part of this section which is claimed to be in point reads thus:

"When there is in the treasury of any city, village, county, township or school district, a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied or the loan made, or the

bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

It will be observed that this section has reference to the disposition of the surplus of a special tax or the proceeds of a loan or bond issue which cannot be used. These funds are, of course, not derived from a loan or bond issue, and therefore if section 5654 is to obtain it must be because the moneys in question are the proceeds of a special tax. It is extremely difficult to ascertain what was in the legislative mind when it used the term "special tax."

In Zimmerman vs. Canfield, 42 O. S., 462, 469, the supreme court had under discussion a ditch assessment law. Section 4449, R. S., provided for assessment on benefited lands to raise the amount of compensation and damages, and the court held that section 2834, R. S. (now 5654) provided for the transfer of *these special funds* so raised to the general fund. This would carry with it the implication that the court regarded a special assessment as a special tax. This construction may not be entirely warranted by the provisions of section 3799 of the General Code, (103 O. L., 522), which provides for a transfer by a vote of the council. Any fund may be so transferred except the proceeds of a special levy, bond issue or loan, and there shall be no transfer except among funds raised by tax upon all the real and personal property in the corporation. As a special assessment is not levied upon all real and personal property in the corporation, it would be unnecessary to insert this exception if the proceeds of a special levy were the same thing as money derived from special assessments, and we cannot assume that the legislature inserted meaningless language. Again, section 2296 (103 O. L., 522) provides for transfer of certain funds, excepting *balances of special levies* by the board of education. As the board of education has no authority to levy special assessments, the general assembly must have intended to refer to something other than a levy for a special assessment, by the use of the words "special levies." Be this as it may, I am, nevertheless, inclined to the opinion that the fund here in question is not the proceeds of a special tax, within the meaning of that term as used in section 5654. This section as originally enacted (75 O. L., 132) provided for the transfer of the balance of funds derived from a special act. It was subsequently amended (92 O. L., 77) to read, insofar as it is pertinent here, very similarly to section 5654. From this it is apparent that the general assembly originally had in mind some unusual or extraordinary fund, while the firemen's pension fund is recognized as one for a proper municipal purpose, and as providing for the covering of an ordinary municipal expense. Funds of this character have almost universally been sustained upon the ground that they are incident to the general powers reposed in municipalities, and the general assembly when it provided for a levy to take care of this expenditure did not provide a special levy, but rather provided an additional levy of those theretofore recognized as being proper for general revenue purposes. A special tax is a particular one—that is limited in contra-distinction to general or ordinary. Here the authorization contemplates continual duties, perpetual powers, and involves no unusual matter, but, on the contrary, is a recognition of an ordinary municipal function. In drawing the law in the way in which it appears, the general assembly recognized these principles and gave the fund its characteristic of one derived for a general rather than a special purpose. In my judgment a special fund is one designed for a particular and limited purpose, which has not the element of perpetuity or continuity involved therein. Here continuity is an essential element and there may be perpetuity.

For these reasons it is my judgment that this money may not be transferred by virtue of section 5654. Sections 2296, et seq., provide for the transfer of funds

under court procedure, and section 3799 authorizes council by the vote of three-fourths of all the members elected thereto, and the approval of the mayor, to transfer all or a portion of one fund, with certain exceptions, within which the fund here under discussion does not come, to the credit of another fund. There shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned.

As the fund here has been raised by taxation upon all the real and personal property in the corporation, according to the statement of facts, and as the object of the fund has been abandoned, I am of the opinion that by compliance with this section the money in question may be transferred to such other fund as council deems proper. The method provided by sections 2296, et seq., is in addition to the method just outlined, and may be taken advantage of if the municipal authorities desire so to do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

941.

STREET RAILWAY—FRANCHISE—PAVING BETWEEN THE RAILS.

When the franchise of a street railway company requires it to pave between the rails, the city cannot give to such railway company the option of paying the cost of such paving in annual deferred installments for the reason that if the railroad company does not do the paving itself, the city may do the paving and recover from the railroad company the amount so expended, and any agreement to accept repayment of the installments disbursed by the municipality on behalf of the railroad company would be without consideration.

COLUMBUS, OHIO, May 20, 1914.

HON. C. L. SHAYLOR, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 20th, requesting my opinion upon the following question:

> "The franchise of a street railway company requires it to pave between rails whenever the city paves the street in which such rails are located. May the city give to the street railway company the option of paying the cost of paving between the rails in annual deferred installments like an assessment in the event that the city does the work and charges its cost to the railroad company?"

I enclose herewith copy of an opinion to Hon. C. C. Crabbe, prosecuting attorney, London, Ohio, in which you will observe that I held that a city is without authority to assess street railway property for the cost of paving between the rails on the theory that the property is specially benefited by the improvement. In this opinion I discussed the case of Cleveland vs. Cleveland Ry. Co., 4 Ohio Decisions, Reprint 315, cited by you. I adhere to the judgment expressed therein, which is to the effect that a technical assessment cannot be made against the railway company.

The test upon such a question would arise if the county auditor should refuse to extend an alleged "assessment" of this sort upon the county duplicate so as to

charge the treasurer with the collection thereof. In my judgment the county auditor could not be compelled to do this, so that in all events an "assessment" against the railroad company on this behalf could not be collected like other assessments.

But in my opinion it is immaterial for the purpose of your question whether the charge be called an "assessment" or not; for you inquire, not whether the charge can be collected on the county tax duplicate, but merely whether the city can give to the railroad company the option of paying it in deferred installments.

The question is, therefore, to be determined by the application of general principles of law. If the franchise, of which the railroad is enjoying its occupancy of the municipal streets, itself contains the requirement that the railway company pave between the rails whenever the city paves the street in which the rails are located, which is the case concerning which you inquire, it follows that the obligation of the railway company to pay arises immediately upon the doing by the municipality of the thing contemplated by the franchise, viz., the paving of the street. As a necessary implication it is, of course, properly held that should the railway company fail to pave between the rails, the municipality may as a part of the improvement lay the pavement between the rails, in which event there arises a liability on the part of the railway company to the municipality. Columbus vs. Railroad, 45 O. S., 98.

In other words, the liability is created by the acts of the parties under the contract incorporated in a franchise ordinance. Should the municipality, then extend the time of payment of such liability and agree upon special terms thereof, its action would be without consideration, and for that reason not binding, for the relation between the parties is contractual merely. Ry vs. Columbus, 3 N. P. n. s., 438.

The contract is executed and the liabilities fixed. Any further arrangement between the parties is, therefore, nugatory.

In another view of the case, where bonds have been issued by the municipality to pay for the improvement, and the railroad company owes the city on account of the transaction, like that about which you inquire, the city meantime owing the holders of the bonds, the extension of credit, by deferred payments, to a railroad, might be said to constitute a loaning of the municipality's credit to the company, which is prohibited by positive constitutional provision.

For all of the above reasons, I am of the opinion that the arrangement about which you inquire may not lawfully be entered into.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

942.

RECEIVER—ASSIGNEE—TRUSTEES IN BANKRUPTCY—LISTING OF PROPERTY FOR TAXATION.

1. *The receiver of the business of an individual who is conducting such business in the manner ordinarily followed by such receivers must list the property in his charge for taxation.*

2. *Trustees in bankruptcy of individuals, firms or corporations are not required to list the property in their possession for taxation.*

3. *An assignee for the benefit of creditors of an individual is presumptively not required to list the assets in his possession for taxes, but if he is preserving the corpus of the estate, and managing it for the benefit of all concerned, rather than proceeding to sell and distribute it, while technically an assignee, he has become virtually a receiver and should make return in accordance with principles laid down in French vs. Bobe, 64 O. S., 323.*

4. *The duty of an assignee for the benefit of creditors of a partnership is the same as an assignee for an individual.*

5. *If the primary purpose of a receiver of a corporation is not the dissolution thereof, the receiver is required to list the assets in his possession for taxation, providing said receiver has not as yet been ordered to wind up the business, convert the assets into cash and distribute them, but that if he has been so ordered he has ceased to be a receiver and has became a trustee for the benefit of the creditors of a corporation and is not required to list such assets. A receiver appointed in proceedings to dissolve a corporation is not required to list property in his possession for taxation.*

6. *An assignee of a corporation, whose affairs are being wound up under order of the court is not required to list the assets in his possession for taxation.*

COLUMBUS, OHIO, May 20, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 27, 1914, in which you request my opinion upon the following question:

> "Are receivers, trustees in bankruptcy, and assignees in charge of the assets of individuals, partnerships or corporations which are being wound up under order of court required to make returns of such assets for taxation?"

Your question impresses me as somewhat ambiguous and I, therefore, take the liberty of defining the exact questions which I shall consider. I shall assume that you are inquiring concerning the duty of the following persons in their representative capacity to make return of the personal property in their possession in such capacity, viz.:

"1. A receiver of the business of an individual.
"2. A trustee in bankruptcy.
"3. An assignee for the benefit of the creditors of an individual.
"4. An assignee for the benefit of the creditors of a partnership.
"5. A receiver of a corporation which is being wound up under order of court.
"6. An assignee of a corporation whose assets are being wound up under order of court."

If I fail to cover all the questions you had in mind in submitting your request for an opinion, I shall be pleased to consider such other questions as are intended to be contemplated therein.

Section 5370, General Code, is the only section of the taxation laws which imposes any specific duty to list for taxation property held in a representative capacity. Its pertinent provisions are as follows:

> "* * * the property of a * * * person for whose benefit property is held in trust, by the trustees; * * * of corporations whose assets are in the hands of receivers, by such receivers."

It is true that section 5369, General Code in prescribing the form of oath to be taken and subscribed by the person listing the property requires that such oath, being adapted in form to the capacity in which the person making the return acts, shall state that the return contains, among other things "a true account of all taxable personal property, moneys, credits and investments in bonds, stocks, joint stock companies, annuities or otherwise, owned or controlled by such person * * * as trustee * * * receiver, * * * agent or otherwise, and also of all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, held for him, or any one residing in this state, * * * and every interest and right, legal or equitable, of the person listing and of those for whom he is required by law to list in bonds, etc., which he is required by law to list for taxation."

However, this statute of itself does not impose the duty to list in a representative capacity, and its provisions cannot be in my opinion looked to for the purpose of enlarging in any way the positive requirements of section 5370. A similar observation may be made with reference to section 5379, the purpose of which is to fix the time as of which personal property shall be listed.

In addition to these substantive statutes certain provisions found in the laws relative to the duties of assignees, etc., are to a certain extent material. Thus it is provided in section 11138 with reference to assignees for the benefit of creditors that,

> "Taxes of every description assessed against the assignor upon personal property held by him before his assignment must be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claim against the assignor."

I find no other positive requirements of statutory law applicable in the premises, although other statutes are, of course, to be considered in the application of the principles which the courts have laid down in cases which I shall hereinafter cite.

In McNeill vs. Hagerty, 51 O. S., 255, the syllabus is as follows:

> "Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor whose estate is being settled in the probate court, is not subject to taxation, and it is not the duty of such assignee to make return of the assets of such estate to the county auditor for taxation."

The facts in that case were pleaded in the petition which is abstracted at pages 255, et seq. It appears therefrom that the plaintiff was assignee of a corporation for the benefit of its creditors; that at the date of listing personal property he had in his possession assets consisting of notes, accounts and money in bank, which assets were insufficient to pay the costs of administration and the claims against the assignor.

In the opinion of Spear, J., pages 262, et seq., is found the following language:

"Our statutes * * * place the disposition of insolvent estates within the control of the probate court, and direct the duties of the assignee, and the procedure in the administration of the trust. * * * Necessarily that court * * * upon the filing of the instrument of assignment, acquires control of all the property and estate embraced therein, subject, of course, to all liens and just claims then existing upon the property, whether by the state or by creditors. It is made the duty of the assignee to convert the assigned property into money and * * * file an account, as a step preliminary to an order distributing the money to creditors * * *. The effect of the assignment is to devote the property absolutely to the satisfaction of the debts of the assignor, just as they existed at the time of the assignment, subject, necessarily, to be depleted by the expenses of the trust.

* * * * * * * * * * * *

"Provision is made for the payment by the assignee * * * of taxes in preference to any other claim against the assignor. The language in this regard is significant: (here follows a quotation of what is now section 11138). Nowhere is it in terms provided that the assignee shall list the property for taxation, nor is provision made for the payment of any taxes save those existing against the assignor. This omission seems to us significant when contrasted with the duty enjoined by other sections of the statute upon other trustees. * * * (Here follows a quotation of the taxation statutes above cited and of the statutes applicable to executors and administrators.) If we apply the familiar rule *expressio unius exclusio alterius,* it would seem that those are the only taxes, payment of which may properly be included in his accounts.

"The omission referred to would seem also to suggest a distinction between the relation of an assignee to creditors of the assignor and to the trust property held by him, and the relation sustained by a guardian, an administrator, or a receiver of a corporation, to beneficiaries interested in the trust property, as well as to the property itself; and, we think a distinction is observable between the relation sustained by creditors of an insolvent assignor to the assigned property, and that of beneficiaries of property in charge of the other functionaries above named.

"The relation of guardian to the ward is, while it lasts, a permanent one. He manages the estate for the benefit of the ward, and it is his duty to so manage as to make profit and interest for the ward. As to the property, the ward has no power over it, nor duty respecting it.

"As to administrators, it is true that property in their hands is subject to the payment of the debts of the decedent, and that creditors are expected to list their claims as credits, and often it happens that the debts consume the entire assets. But usually there is in fact, as well as in contemplation, a residue going to widows and legatees or heirs, and they are not required to list for taxation any amount until it is actually received.

"The duty enjoined upon receivers to list is confined to receivers of corporations. Such receivers are usually empowered to prosecute the business for the benefit of the parties interested. This carries the idea of a continuance of the business as by the corporation, and its eventual surrender to the corporation again. Receivers for partnerships, concerns whose affairs are to be wound up and dissolved, are not named. Certainly this omission is also significant. Such receivers perform duties similar, in many ways, to the duties of assignees of insolvent, and had it been intended to enjoin them the duty of listing property in their hands for taxation, one would

suppose that the discrimination found in the statute would not have been made."

Again at page 267, Judge Spear says:

"To hold that property in possession of an assignee, as in these cases, must be listed and taxes paid on it is, in effect, to hold that the creditors must be taxed twice on the same value. While the legal title to the property is in the assignee, it is so only for the purpose of facilitating the settlement of the trust. Equitably, the property is vested in the creditors. Every dollar paid in taxes by the assignee reduces by that amount the dividend which the creditors will receive. To say it is the duty of creditors, under the law, to list their claims as creditors, admits, we suppose of no doubt, and, we submit, that it is no answer to say that creditors cannot know the value of such credits. Such condition attaches to a very large proportion of credits held by the commercial, and especially the mercantile, world. Nor, is it any answer to say that, as matter of fact, they will not list the claims. No good reason why they should not exist, unless it would be furnished by a requirement compelling the assignee to do so. A statutory construction which, to use the language of Judge Cooley, 'requires that one person, or any one subject of taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once,' is to be avoided, because, in the judgment of that author, it is duplicate taxation, and is not permissible under a constitution which requires equality and uniformity. This proposition seems to be applicable to the present cases, as our constitution requires both equality and uniformity. It is not necessary to hold that the legislature might not include assignees in the class of trustees who are required to list property in their hands, even though duplicate taxation results; it is enough, for the disposition of the present cases, if the purpose to do so has not been expressed.

"The assignee is in every essential particular, an officer of the court. The fund is in his hands as such, and he is bound to do with it just what the court directs. The fund, therefore, is really in the custody of the court, and as before stated, the beneficial interest is in the creditors. They cannot, it is true, receive their own at once, but that is because it requires some time to reduce the assets to money, and for the adjustment of the debts and claims. To require the listing of any of the property thus held by the assignee, and the payment of taxes on it, would manifestly interfere with the orderly execution of the trust. And if, as is claimed in argument, in case payment of taxes so levied is not voluntarily made by the assignee, distraint might be resorted to by the tax collector and the property seized and taken forcibly from the possession of the assignee, thus taking it from the control of the court, so much the more apparent is it that the construction claimed by the defendant in error is inadmissible because it would result in unreasonable interference with the rightful exercise of authority by the probate court. It cannot have been the purpose of the legislature, by one statute to lodge exclusive jurisdiction and dominion over property in a court, and by another statute, authorizing a taxing officer to cast contempt upon the court by ousting its jurisdiction and over-riding its powers.

"If the clause of section 2734, relating to the listing of trust property by trustees, requires a listing of property by the assignee of an insolvent whose estate is being settled in the probate court, no reason can be given why the same duty would not devolve upon receivers of partnerships, clerks

of courts, sheriffs or master commissioners, as to funds which may chance to be in their hands on the day preceding the second Monday of April, subject to payment upon order of court. To state such a proposition is to refute it. And this because it is unreasonable to assume that, in the absence of express authority, the duty to list embraces property which the law has taken into its own hands simply to collect and distribute, and of which it has designated a temporary trustee for the better accomplishment of its work."

However in the case of French vs. Bobe, 64 O. S., 323, the rather broad statements found in the opinion and syllabus of the case from which quotation has just been made, are somewhat limited. The syllabus in the case just cited is as follows:

"Personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated, under the orders of the insolvency court, and at the joint request of the creditors of the assignee, in the conduct of a going business being conducted as it had been theretofore by the corporation itself, is subject to taxation, and it is the duty of the assignee to list such property for taxation."

The facts involved in the French case are sufficiently disclosed in the language of the syllabus as quoted. Speaking of the McNeill opinion, Spear, J., who writes both opinions, says at page 338 in French vs. Bobe:

"We are of opinion * * * that the case at bar is so clearly distinguishable from the case cited, that its decision is not controlled by that case. * * * There the indebtedness largely exceeded the value of the assets, and the assignee was proceeding strictly under section 6346, Revised Statutes, and following, to reduce the assigned property to money and close out the estate by a distribution of the proceeds among the creditors. He sold all the property and held only its avails; he was neither holding the property of the assignor, or any of it, nor operating the business. Here the appraised value of the property exceeds the indebtedness. The assignee is not selling, and has not attempted to sell, any of the assigned property but is proceeding * * * to operate the plant * * * the corporation having ceased to do business because insolvent, and the property thus being held in trust for the benefit of creditors, they—the *cestuis que trustent*—have, in effect invested the property in a scheme to continue the business, and the assignee has advanced his own personal funds in the venture. * * * Thus the business has been conducted like any other business of similar character and has proved a source of profit apparently to all concerned, and yet has yielded to the state no taxes during all these years. A controlling distinction between the case cited and the present case at bar is that in the former the assigned property had been sold and the estate was, in substance as well as form, being settled in the probate court, while in this case the assigned property is being held and operated in the management of a manufacturing business, and the estate is thus being continued as before, but is not being settled. Hence, the rule of law applied to the McNeill case has no application to the present case.

"In substance and in all essential particulars, the position of the assignee in this case is much like that of a receiver. He is clothed with the legal title to the property of which he has possession (which cannot be

said as to a receiver), but in no other particular is there any real difference, He has held and is holding property, not for the purpose of operating the same for profit. Indeed the very order which directs him to operate in effect forbids him to sell. It may be conceded that in form, and from the strict legal standpoint, the estate is in the court of insolvency for settlement, but in reality it is not being settled, but, on the other hand, the arrangement amounts to an investment of the creditors' money in the management of a going concern. There is no present effort nor purpose to sell, but simply a purpose to hold and operate. As a receiver, if directed by the court, manages the property in the interest of creditors, so this assignee manages under the order of the court for the benefit of creditors; and as a receiver, where all debts and expenses have been paid, may be ordered by the court to turn over the remaining property to the original debtor, so may the assignee in case all of the debts of this corporation, including the expenses of the trust, are satisfied, be required to reconvey the remaining property of the assignor. Each is equally an officer of the court and bound to carry out its behests. As a general rule it may be stated that there is no sound principle upon which the property of a person or corporation in the hands of a receiver to be managed for the interests of those concerned, can be regarded as exempt from the burden of taxation; and this principle is distinctly recognized in our statute by the requirement of section 2734, defining by whom property shall be listed for taxation: 'Of corporations whose assets are in the hands of receivers, by such receivers.' In spirit this requirement applies to the case at bar."

As far as I know these two decisions constitute the only ones by which any light can be thrown upon the questions which you present. The supreme court of this state has not dealt further with any of these questions, and as the questions themselves arise, in part at least, under the peculiar language of our statutes, it is at once apparent that the decisions from other states are not of service.

While I do not know that I can add anything to what judge Spear has said in the language above quoted, it seems to me that a clearer statement of the rule laid down by the court is as follows:

Where a person acting in a representative capacity is converting the assets of the original owner of personal property into money for the purpose of distributing the fund among his creditors and it appears that the amount of the estate is not sufficient to satisfy the creditors' claims, it is not the duty of such representative to return the personal property so held for taxation, but the creditors are to list their separate interest in the fund as creditors. Where, on the other hand, the representative is making no effort at distribution, but is managing the estate for the benefit of the creditors, and the amount of the estate exceeds the aggregate claims of the creditors, the representative must list as a trustee or agent of the creditors, even though he be an "assignee," an officer not mentioned in section 5370.

Of course this rule is not complete; it does not furnish disposition for a case where the person, acting in a representative capacity, is proceeding to wind up, but has not sold the property; or for a case where the estate has been converted into money, and the fund exceeds the aggregate claims of the creditors. The supreme court has merely left cases like these in doubt.

A further investigation, amounting possibly to speculation, must be indulged before a complete rule can be laid down. In this connection it seems to me that the two cases can be still further harmonized by giving effect to what Judge Spear speaks of in the McNeill case in referring to the exact language of section 5370. He points out that the statutes do not require an assignee to list property in his possession for taxation, nor to pay as a preferred claim personal property taxes other

than those assessed against the insolvent debtor before the assignment, yet in the face of these remarks he holds in the French case that an assignee must, under certain circumstances, list the property held by him in such capacity. In order to affect a complete reconciliation of the two opinions, then, it seems to me that it is necessary to accept all that Judge Spear says relative to the effect of the omission of the word "assignee" from section 5370, and to hold as to an assignee, that *presumptively* he is not required to list the property in his possession, whether in the form of specific items turned over to him by his assignee, or in the form of cash and credits; but that, when it appears that by reason of the adoption of a policy with respect to the management of the estate other than the mere winding up of its assets, and the distribution thereof among the creditors, the assignee, though technically continuing to act in the same capacity, has acquired the special aspect of a receiver, i. e., a mere manager of an estate or a business rather than a distributor thereof, the presumption is overthrown, and the technical assignee is to be held for taxes as if he were in name what he is in fact.

Such a hypothesis of reconciliation renders immaterial, perhaps, the facts respecting the relative amount of the aggregate claims of creditors as compared with the assets in the hands of an assignee or other representative; for although Judge Spear adverts to such facts in both opinions it hardly seems likely if the issue were squarely raised, a court would hold that the question of the assignee's duty to list, could be dependent upon such a fact.

The underlying principle found in these two cases, then, appears to me to be that section 5370, General Code, is to be given a substantial rather than a formal interpretation, so that the words "trustee" and "receiver," as therein used, are to include all persons acting in a representative capacity, who are in point of fact dealing with the property of another as trustee or receiver. Thus, in the French case, not as the representative of the insolvent corporation was the assignee held for taxes, but rather as the representative of the creditors who had elected to have him continue the business for their benefit instead of requiring him to distribute the assets of the insolvent.

It seems to me that this underlying principle, based, as it is, upon such fundamental reasons as those advanced by Judge Spear cannot be applied in any other way to the interpretation of section 5370. It seems to me clearly logical to hold that if one acting in a representative capacity, technically as a "trustee" or "receiver" of a corporation is actually proceeding to wind up the assets in his possession and distribute them in the manner in which an assignee of an insolvent person or partnership would legally act he would be held excused from the duty to list the property controlled by him. That is to say, being a trustee or receiver of a corporation he would be prima facie charged with the duty of listing the property in his possession in that capacity. But the presumption would be overthrown as in the case of the assignee in the French case by a showing that he was dealing with the assets like an assignee, i. e., was proceeding to convert into cash and to distribute.

I believe that the statement which I have just made would be held to be the law if a strictly logical application of the two cases which I have been discussing were made.

Coming now to the specific questions asked by you, which must be answered in the light of the two decisions above cited, with such inferences as can be drawn therefrom, I beg leave to submit my conclusions as follows:

1. The receiver of the business of an individual who is conducting such business in the manner ordinarily followed by such receivers must list the property in his charge for taxation. Primarily a receiver is appointed for the purpose of conducting the affairs of a party and preserving the assets pending the determination of legal rights affecting such assets. The receiver of a business is of this character

and is to be distinguished from certain kinds of corporate receivers to which I shall hereafter allude.

2. The question as to the duty of trustees in bankruptcy to list property in their possession is extremely doubtful. The bankruptcy law vests in the trustee complete legal title to the property of the bankrupt. Section 64a of that law specifies what taxes shall be paid as preferred claims by the trustee, and is almost identical in purport with section 11138 of the General Code above quoted. Had this section of the bankruptcy law received no interpretation in the federal courts, then the interpretation of the similar state statute found in McNeill vs. Hagerty, supra, would indicate that the trustee is not liable for taxes, and therefore, should not list the property in his possession. However, the federal courts have taken a view of the federal statute entirely different from that taken by the state supreme court with respect to the statute cited, and in the cases of In re Conhaim, 100 Fed., 268; In re Keller, 109 Fed., 131 and In re Sims 118, Fed., 356, all of which have been approved by the supreme court of the United States in Swarts vs. Hammer, 194 U. S., 144, it has been held that despite the strict and literal meaning of section 64a, it should not be interpreted so as to relieve the trustee in bankruptcy from listing the property in his possession as well as paying taxes previously assessed against the bankrupt.

The question thus made being a doubtful one, I am disposed to follow the view of the federal courts whose interpretation of the federal statute is binding upon the state courts, and to assume that the state court, if called upon to decide the question, would hold that section 5370, General Code, in speaking of a "trustee" applies to a trustee in bankruptcy. Therefore I am of the opinion that trustees in bankruptcy should list property in their possession for taxation.

3. As perhaps sufficiently indicated by the general discussion in the earlier portion of this opinion, I am of the opinion that an assignee for the benefit of the creditors of an individual is presumptively not required to list the assets in his possession for taxation; but if in accordance with the statutes and by agreement of the parties, and the order of the court, he is preserving the corpus of the estate and managing it for the benefit of all concerned rather than proceeding to distribute it, then, while technically an assignee, he has become virtually a receiver and should make the return in accordance with the principles laid down in French vs. Bobe, supra.

4. The question respecting the duty of an assignee for the benefit of the creditors of a partnership to return the assets in his possession, can be answered in the same manner as the similar question respecting the assignee of an individual which has just been answered.

5. Perhaps the most difficult question which you submit is that respecting the duty of a winding up receiver of a corporation to make return of the assets in his possession. The statute, section 5370, expressly requires the property of corporations whose assets are in the hands of a receiver to be returned by such receiver. As, perhaps already suggested a receivership is an ancillary remedy, receivers being appointed for various purposes in connection with other proceedings. The receiver of a corporation who is merely in control of its assets and business for a temporary purpose to prevent the waste of assets or mismanagement of business, or the doing of illegal acts or the like, merely stands in the place of the corporation, and is clearly, within the statute, required to make a return. However, a receiver of a corporation which is being wound up stands, in my mind, in an entirely different situation. Such a receiver is appointed for the very purpose of winding up the corporation, and has no power to do anything else. His appointment is provided for by sections 11938, et seq., General Code. These sections provide a method for the dissolution of corporations. I quote section 11943 General Code, as follows:

"When the report is made, if it appears to the court that the corporation is insolvent, or that its dissolution will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects. The corporation thereupon shall be dissolved, and cease."

It appears from this section that the corporation, as such, is defunct before the receiver is appointed. I quote also section 11945.

"Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of filing the security required by law, be trustee of such estate for the benefit of the creditors of the corporation and its stockholders, and have all the power conferred by law upon trustees to whom assignments are made for the benefit of creditors."

These considerations would seem to bring a dissolution receiver of a corporation within the class of those receivers so-called, who are in reality assignees, and under the strictly logical doctrine which might be deducted from the two cases above discussed, would excuse him from the duty of listing the assets in his possession for taxation. However, in the case of In re Patent Wood Keg Co. 13 N. P. n. s., 321, the contrary has been held by Judge Dickson of the Hamilton county common pleas court. Judge Dickson finds obvious difficulty in reconciling his decision with the Hagerty case. I confess that I experienced the same difficulty. I learn that the Patent Wood Keg Co. case was not taken to a higher court. Being disposed, however, to follow the decisions of our courts wherever possible, and finding that the case last cited was decided in full view of the two supreme court decisions already discussed I hold in accordance therewith, that a winding up receiver of a corporation, appointed in dissolution proceedings, is required to list the property in their possession for taxation.

I know of no case of corporate receivership in which the functions of the receiver fall more clearly within the rule of McNeill vs. Hagerty, supra, than such a receiver as was involved in the Patent Wood Keg Co. case. If such a receiver must list for taxation then, in my opinion, every receiver of a corporation, whatever be the status of the receivership, is obliged to list the assets in his hands for taxation.

6. Insofar as your question relates to the duty of an assignee of a corporation whose affairs are being wound up under order of court, it seems to me that the case of McNeill vs. Hagerty, supra, furnishes an explicit answer to the effect that such an assignee is not required to list the assets in his possession for taxation.

In passing, I beg leave to point out a consideration which is not directly involved in answer to your questions, viz., that under the first part of section 5370, General Code, every person is required to return all "*moneys* invested, loaned or otherwise controlled by him * * * on account of any other person or persons, company or corporation." This part of the section is not, in my opinion applicable to the case of any officer of a court, or any one acting under orders of a court, because it is essential to its application that the moneys be invested, loaned or otherwise controlled by the person required to list: whereas an assignee, for example, of the kind involved in the case of McNeill vs. Hagerty, supra, possesses on his own part no "control" whatever over the funds in his possession except that of custody, subject to the order of the court.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

943.

ARTICLE XII, SECTION 11 OF THE CONSTITUTION AS APPLIED TO BONDS ISSUED BY A MUNICIPAL CORPORATION.

1. *Article XII, section* 11 *of the constitution applies to bonds issued by a municipal corporation, in anticipation of a special assessment, and requires the inclusion in the bond issuing ordinance of a provision for the annual levy and collection of taxes on the general duplicate sufficient to pay the interest and create the necessary sinking fund for the retirement of such bonds in the event and to the extent that the assessments themselves, balances, premiums, etc., available for payment of interest and creation of a sinking fund are insufficient for such purposes.*

2. *There being no necessity for any new relation between the assessing ordinance and the bond issuing ordinance under article XII, section* 11 *of the constitution, it is not necessary because of that provision or for any other reason to have the assessing ordinance published.*

COLUMBUS, OHIO, May 20, 1914.

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

GENTLEMEN:—I have your letter of January 6th, in which you submit for my opinion what amount, inferentially at least, to two questions, viz.:

> "1. How is the self-executing provision of article XII, section 11 of the constitution, as amended, to be applied when bonds are issued by a municipal corporation in anticipation of the collection of special assessments?
>
> "2. Assuming that the assessing ordinance must contain a provision for the levying of a general tax, sufficient for the purpose of the bond issue, in the event of deficit in the collection of special assessments, would such a requirement make necessary the publication of such assessing ordinance?"

Article XII, section 11 of the constitution, as amended provides as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The supreme court in the recently decided case of Link vs. Karb, so far interpreted this provision as to establish the following conclusions:

1. The section is self-executing and requires no legislation by the general assembly or the people of the state.

2. Its effect is to require the borrowing authorities to incorporate in the measure *authorizing* the issuance of bonds a provision substantially in the language of the constitution itself and not necessarily more detailed than such language.

3. Such provision cannot be adopted by the borrowing authority subsequently to the authorization of the issuance of bonds and before the actual incurring of the indebtedness, by the issuance and sale of bonds.

All of these conclusions are quite clearly established in the syllabus and opinion of the above cited case. The supreme court, in the case cited, did not have before it any question respecting the application of the constitution to the issuance of bonds in anticipation of special assessments; nor in fact did the court consider or pass upon in the syllabus or opinion the question as to how the constitution is to be applied to the issuance of bonds to be paid for from any sources of revenue other than general taxation.

The first question, subsidiary to your general questions, which is encountered then, is as to whether, in the event special assessments are levied and bonds issued in anticipation thereof, the levy of the assessment constitutes "provision for the annual levy and collection by taxation of a sufficient amount," etc., within the meaning of the constitution?

This question suggests other questions even more fundamental: Thus, does the constitutional provision apply at all when bonds are issued in anticipation of specific revenues—either taxes or assessments—and it is apparent from the statutes that the money to pay the bonds is to be limited to such revenues; i. e., that the bonds are really not general indebtedness of the subdivision but rather evidences of indebtedness to which specific revenues only are pledged? Or has the constitutional amendment the effect of rendering such statutes (of which there are several) unconstitutional?

Fortunately this question which is very difficult of solution, and upon which the case of Link vs. Karb sheds no light whatever, is not necessarily involved in answering your specific question.

There is no doubt whatever in any mind that the constitutional provision applies to the issuance of all bonds which are an "indebtedness of a political subdivision," to use the language of the section. I observe a wide distinction between bonds of the kind just referred to, viz., those, the security for which, consists of special revenues, and bonds for the payment of which the subdivision, as such, is primarily or ultimately liable, so that the holder of the bonds upon default is entitled to a judgment which can be enforced against the tax duplicate of the subdivision. The one class might correctly be deemed an indebtedness of a special taxing district or assessing district, as distinguished from an indebtedness of a political subdivision; the other is, in the most exact sense an indebtedness of the subdivision itself.

I have had occasion to consider the application of the constitutional amendment to bonds of the first class in an opinion to Hon. William H. Vodrey, prosecuting attorney of Columbiana county, a copy of which I think you have. I did not reach any definite conclusion therein as to the application of the constitution to such bonds, the question not being exactly material to the query submitted. However, I am satisfied, as I have already stated, that questions like that involved in the opinion referred to are distinguishable from the one which you submit. Bonds issued by municipal corporations in anticipation of special assessments constitute a general obligation of the municipality for the payment of which it is answerable as a "political subdivision." The purpose of making street improvements and other improvements, the cost of which is to be partly charged upon owners of specially benefited property on the part of a municipal corporation, may be characterized as a municipal function in the most exact sense. The municipality relies for its revenue upon the assessments which it levies, but those who deal with it in making the improvement, i. e., those to whom it becomes indebted on that behalf, such as the contractors on the one hand, and those who lend it money for such a purpose on the other hand, are not obliged to rely exclusively upon such sources of revenue. The rule as I have stated it, is not, perhaps, a universal one, but it certainly obtains in Ohio.

Many statutes might be cited and commented upon to establish this conclusion. The following, however, will be sufficient for all purposes:

> "Section 3914. Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

This section, it will be observed, imposes upon the issuance and sale of special assessment bonds all the restrictions and limitations which govern municipalities in the issuance and sale of other bonds. While it provides that the assessment as paid shall be applied to the liquidation of the bonds it does not limit the means of liquidation to the assessments.

Section 3918, General Code, provides as follows:

> "Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance."

Compliance with this section notifies the holder of the bond, of course, that it is issued in anticipation of the collection of special assessments; but of itself it is insufficient to establish the conclusion that the bondholder's exclusive remedy for the enforcement of his claim is the collection of such assessments.

Section 3932, General Code, provides as follows:

> "Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied to by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no other."

The latter portion of this section, insofar as it requires a specific application of the premium and accrued interest received by the corporation from the sale of special assessment bonds, tends, perhaps, to support the view that the bonds are not to be treated as general obligations of the corporation, but it is not of itself sufficient to establish such a conclusion.

Section 3804, General Code is as follows:

> "When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied to the payment of the bonds."

I quote this section merely to complete the legislative idea as to the sources of revenue for the payment of special assessment bonds, although the section itself imposes no different rule with respect to assessment bonds than is laid down for all other bonds.

Section 4506, General Code, is as follows:

> "Municipal corporations having outstanding bonds or funded debts shall, through their councils and in addition to all other taxes authorized

by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts for the payment of all judgments final except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever."

Section 4512, General Code, is as follows:

"Upon demand of the board, the city auditor or village clerk, shall report to it balances belonging to the city or village, to the credit of the sinking fund, interest acounts, or for any bonds issued for or by the corporation, and all officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select."

Section 4517, General Code provides as follows:

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

These sections relating to the powers and duties of the trustees of the sinking fund show conclusively that it is the duty of such trustees to provide absolutely for the payment of all bonds issued by the corporation. The necessary inference from these provisions is that if the special revenues applicable to the payment of any bonds and which are to be turned over to the sinking fund trustees are not sufficient for their sinking fund purposes the deficiency shall be made up by the general tax levy for sinking fund purposes, which the sinking fund trustees are authorized and directed to make.

In this connection I mention the fact that in Link vs. Karb, *supra,* Judge Donahue delivering the opinion of the supreme court said that the municipal sinking fund statutes are consistent with article XII, section 11 of the constitution.

If it were not sufficiently apparent from the statutes that they not only authorize but require the levying of a general tax sufficient in amount to provide for the interest and sinking fund requirements of special assessment bonds issued by a municipal corporation in the event that the assessments themselves together with the other special revenues applicable thereto, are insufficient for such purposes. The principles laid down in State vs. Commissioners 37 O. S., 597, and Chamberlain vs. Cleveland 34 O. S., 551, would establish such a conclusion.

Now from the nature of the constitutional provision itself and in the light of the decision in Link vs. Karb, it seems to me that the following principle may be deduced:

Whenever the law of the state *authorizes* the levy of a general tax in a political subdivision for the payment of bonds issued by or on behalf of such subdivision the constitution *compels* such a tax to be provided for in the legislation under which the indebtedness is incurred.

That is to say, if a general tax levy is authorized the indebtedness is in the exact sense that of the political subdivision. To all such indebtedness original or

renewal when bonded, the constitution applies, and requires provision for the taxes which shall meet the obligation to be made in the legislation under which the indebtedness is incurred.

A paraphrase or corollary to the above stated principle may be stated thus:

The constitutional requirement is that the exercise of the taxing power of the subdivision, to the extent that it is to be exercised in the premises be provided for at the time mentioned in the section. That is to say, I do not believe that the provisions of the constitution are to be so interpreted as to require bonds to the payment of which special revenues are applicable, to be provided for in the first instance by tax levies sufficient to take care of the entire sinking fund and interest requirements thereof. This would necessitate a double exercise of the taxing and assessing power so as to leave at the end of the process an unexpended balance of public funds for which the law provides no use. Furthermore, such an interpretation would repeal by implication that provision of section 3914, supra, which is to the effect that the assessments as paid shall be applied to the liquidation of the bonds. Such an interpretation would not, I think, be viewed with favor nor do I think any such hard and fast rendition of the language "by taxation an amount sufficient" is to be given thereto. On the contrary, I do think, as I have already indicated that the exercise of the taxing power which the constitution requires to be provided for is precisely that exercise thereof which in the nature of the case, under the statutes authorizing the incurring of the bond indebtedness, must be otherwise asserted by the political subdivision and no other.

Applying this principle to the case at hand it appears that under the sinking fund statutes the exercise of the taxing power of the municipality, which is required, is that which the constitution contemplates, viz., the levying of sufficient taxes to meet the interest and sinking fund requirements of the bond issue to the extent that such requirements are not met by the special revenues applicable to the payment of bonds. Inasmuch as the constitutional provision as interpreted in Link vs. Karb, is to require that the exercise of this power be provided for in the legislation under which the indebtedness is incurred it is in my judgment, sufficient if the ordinance authorizing the issuance of bonds contain a requirement to this effect. The question which you ask necessitates consideration of the relation of the assessing power to the taxing power. If "provision for a sufficient amount"—language of the constitution—contemplates the enactment of "legislation" (in the constitutional sense) respecting all revenues which are to be applied to the interest and sinking fund requirements of the bonds then it would follow that the assessment would have to be provided for in the same "legislation" in which the provision for the levy of taxes must be included.

Putting it in another way, if special assessments constitute "taxation" within the meaning of the constitution, then "provision" for such assessments must be made at the same time and in the same place with the provision for the levy of the tax. Stated still more concretely, such a view would necessitate the combining of the assessing ordinance and the ordinance providing for the issuance of the bonds, the supreme court having held that the bond issuing ordinance must contain the tax levy provision.

I have rejected this view for the reason that the constitution deals solely with the taxing power and its provisions are not by forced interpretation to be extended so as to require municipal legislation with reference to special sources of revenue. For example, the Municipal Code requires certain waterworks revenues to be applied to bonds issued for the purpose of constructing or enlarging a waterworks plant. The application of such revenues could in no sense be regarded as taxation and I do not believe that the makers of the constitution intended that when waterworks bonds are issued the ordinance authorizing them should make provision for the application of such revenues. So, while the power of assessment is sometimes re-

garded as a branch of the taxing power, though inaccurately I do not believe that such assessment constitutes "taxation" within the meaning of the constitution; and I am of the opinion that the word "taxation," as used in the constitution, is to be limited to its exact and technical sense, viz., a general levy on all the taxable property of the subdivision or some other exercise of its general taxing power as distinguished from its power to levy exactions upon limited territory or otherwise to create revenues applicable to the payment of the bonds.

I reach the conclusion, therefore, that the assessing ordinance bears no necessary relation to the ordinance providing for the issuance of bonds, by reason of the provisions of article XII, section 11 of the constitution; that the section does not require the assessment to be levied prior to or at the time bonds issued in anticipation of its collection are authorized; and that the section is satisfied if the sinking fund tax levy, which is authorized by statute to be made for the purpose of providing for the bonds in the event and to the extent that the special revenues applicable thereto prove insufficient, "is provided for" in the bond issuing ordinance.

Having considered in connection with your question communications received from the solicitor of Fostoria and from Messrs. Peck, Shaffer & Peck, attorneys of Cincinnati, in which inquiry was made as to the proper form of the provision, such as is required by the section of the constitution above cited, I beg leave to submit for the guidance of those who are interested therein, my judgment as to such form:

> "There shall be levied and collected annually, during the period for which said bonds are to run, by taxation on all taxable property on the tax duplicate of the city of _____, an amount sufficient to pay the interest thereon as herein provided, and to provide a sinking fund for the payment of said bonds at maturity; provided that the amount of such annual levy shall be such as to provide for and make up any deficiency in the revenues of said city available for the payment of such interest and the creation of such sinking fund, from the collection of said special assessment or any special assessment hereafter levied in lieu thereof, or otherwise; and the proper taxing authorities shall compute the amount of such general tax levies and certify the same for collection as other taxes are certified and collected."

Of course this form is suggestive merely, but it appears to me that the substance of it should be in every ordinance issuing bonds in anticipation of the collection of special assessments by a municipal corporation.

In direct answer to the first question as I have phrased it, I beg to state that article XII, section 11 of the constitution does not, in my opinion, in any way affect the form of assessing ordinances, nor does it require such an ordinance to be passed before, or together with, that authorizing the issuance of special assessment bonds.

Answering your second question, I beg to state that in my opinion the adoption of article XII, section 11 has not effected any change in the law relative to the necessity for publishing the assessment ordinance.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

944.

INCUMBENTS—MAYOR—TEMPORARY APPOINTMENT—STREET COMMISSIONER—MARSHAL—INCUMBENCY.

1. *A mayor cannot make a temporary appointment of a street commissioner.*

2. *Confirmation by council is an essential element of the appointment, under section* 4363, *and until appointment and until confirmation, a person appointed by the mayor cannot assume office.*

3. *A street commission temporarily appointed, since the appointment is invalid, will not hold until a successor is appointed and qualified.*

4. *A mayor has no power arbitrarily to remove a street commissioner from office, and can only prefer charges under section* 4263, *to be heard by council under section* 4264.

5. *Under sections* 4363 *to* 4365, *General Code, confirmation of council being necessary to the appointment of a street commissioner, it can, by refusing to confirm, keep the person so appointed by the mayor from serving.*

6. *Under section* 4363, *the marshal is made eligible to the appointment of street commissioner, and council is without power to combine the two offices into one. It is the prerogative of the mayor to appoint and of council to affirm.*

7. *The appointment of a marshal to the office of street commissioner by the mayor is necessary notwithstanding that the incumbent of said office is also to hold the office of street commissioner.*

8. *Under section* 4669, *a person appointed to the office of street commissioner must before entering upon his duties give bond in the amount prescribed by ordinance of council; if such person takes office before giving bond, the incumbency is illegal.*

COLUMBUS, OHIO, May 23, 1914.

HON. W. J. TOSSELL, *Solicitor, Village of New London, Norwalk, Ohio.*

DEAR SIR:—Under date of February 12th, you requested the opinion of this department upon the following questions:

"(1) Has a village council under section 4216, General Code, at a called meeting to organize and confirm the mayor's appointments, power to confirm the temporary appointment of the marshal as street commissioner (in this case for a month)?

"(2) Is confirmation by the council a prerequisite to the appointment and 'qualification' of such officer under section 4363, General Code?

"(3) Does a street commissioner temporarily appointed and confirmed for a month hold office until his successor is appointed and qualified?

"(4) Has the mayor power, arbitrarily and without cause on the part of a street commissioner, to remove him from office and appoint his successor to fill, without confirmation by the council the vacancy thus caused?

"(5) Do sections 4363 to 4365 make the office of street commissioner the particular agent of the council rather than that of the mayor, and as such give the council in effect a veto power on the mayor's appointment?

"(6) Has a village council power under the last clause of section 4363, to combine the office of marshal and street commissioner, thereby excluding appointment of a street commissioner by the mayor?

"(7) Given the custom of combining the offices of marshal and street commissioner, in the person of the marshal, the election of the marshal, upon a general and popular understanding of the combination of such offices,

and the acceptance of his candidacy with such understanding by the marshal elected; is an appointment of the marshal, by the mayor, as street commissioner, necessary?

"(8) Does failure of a marshal so elected, having given bond and qualified as marshal, to give bond as street commissioner for more than a month after his appointment, confirmation and service as such, affect his rights to hold such office until his successor is appointed and qualified?

"(9) Given a marshal elected as such and to serve as street commissioner, under the respective salaries of ten and fifty dollars per month, provided by ordinance, and no provision made for other compensation, his appointment for a month, refusal of the council to confirm the appointment of another person as street commissioner, can the mayor legally appoint the latter, after such refusal to confirm, to serve temporarily?

"(10) Should the mayor, in the first instance, appoint a commissioner for less than a year?"

The sections of the statutes, cited by you, provide:

"Section 4216. At the first meeting in January of each year, the council shall immediately proceed to elect a president pro tem. from their own number, who shall serve until the first meeting of the council in January next after his election. From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council. When the mayor is absent from the village or is unable for any cause to perform his duties, the president pro tem. of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor.

"Section 4363. The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner.

"Section 4364. Under the direction of council, the street commissoner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and shall perform such other duties consistent with the nature of his office as council may require.

"Section 4365. Such street commissioner or engineer shall have such assistants as council may provide, who shall be employed by the street commissioner and shall serve for such time and for such compensation as is fixed by council."

Section 4363 fixes the term of a street commissioner at one year and until his successor is elected and qualified.

As there is no statutory authority for the making of temporary appointments to this office, I am of the opinion that the mayor has no power to make and council has no power to confirm an appointment for a period of time less than the term fixed by the statute, and a temporary appointment, even if made and confirmed, would be of no effect. The council has no power of appointment in such case; it can only confirm the appointment made by the mayor.

The power of council to appoint employes of the village, under section 4216, does not give to council the power to appoint a street commissioner, because his appointment is specifically provided for by section 4363.

The answer to this question also answers the ninth and tenth questions.

(2) Confirmation by council is, by the express and positive provisions of section 4363, made a prerequisite to the qualification of a street commissioner. Without the favorable action of council, a person appointed by the mayor to the office of street commissioner could not assume the office.

(3) From the answer given to your first question it necessarily follows that a person appointed to the office of street commissioner for one month, or for any other time short of the statutory term, does not hold office until his successor is appointed and qualified. Such an appointment, as heretofore stated, would be null and void.

(4) The mayor, by virtue of section 4263, may file written charges with council against an officer or head of a department who "has been guilty, in the performance of an official duty, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness," when the removal of such officer is not otherwise provided for.

Section 4263 provides that such charges shall be heard by the council, and that the judgment of council shall be final; but before any officer or head of a department can be removed from office, two-thirds of all the members elected to council must vote in favor of such removal. The removal of a street commissioner from office is not otherwise provided for, and, therefore, he can be removed only by council in accordance with the provisions of section 4263 and 4264.

The mayor has no legal right or authority to remove a street commissioner for cause or otherwise, not to appoint a successor except when the office is legally vacant. The arbitrary removal of a street commissioner, by the mayor, would not create a legal vacancy in the office that the mayor could fill under section 4363.

(5) Section 4364 requires of the street commissioner, the performance of certain well defined duties, under the direction of council. The council, not only in effect but in fact has a veto power over the mayor's appointment to the office of street commissioner.

(6) Under the last clause of section 4363, the marshal is made eligible to appointment to the office of street commissioner, but council is without any power to combine the two offices into one; it is the prerogative of the mayor to appoint and of the council to confirm. An ordinance which purports to combine these two offices so as to deprive the mayor of his power to appoint a street commissioner, is void.

(7) An appointment of the marshal to the office of street commissioner by the mayor is necessary, notwithstanding the acceptance of the office of marshal with the understanding that the incumbent of said office is also to hold the office of street commissioner. Popular understanding and custom will not suffice to change the statutes.

(8) Section 4667, General Code, provides that the bonds of municipal officers, except as otherwise provided, shall be in such sum as council, by ordinance, may prescribe and shall be subject to the approval of the mayor. The amount of bond of a street commissioner is not "otherwise provided" for by statute; consequently section 4667 applies as to the amount of such bond. Your letter does not cover the point as to whether the village of New London has an ordinance prescribing the amount of the bond to be given by the street commissioner, but I will assume that such an ordinance is in force.

Section 4669, General Code, provides in part:

> "Each officer required by law or ordinance to give bond shall do so before entering upon the duties of the office, except as otherwise provided in this title. * * *"

I am of the opinion that before a person appointed to the office of street commissioner can enter upon his duties, he must give bond in an amount prescribed by ordinance of council. If he takes possession of the office without giving such bond, his incumbency is illegal and he has no right to continue to exercise the functions of the office until a successor is regularly appointed and qualified.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

945.

COMPENSATION—DEPUTY STATE SUPERVISORS OF ELECTIONS AND THEIR CLERKS.

Neither the deputy state supervisors of elections nor their clerks are entitled to compensation for holding special elections, the compensation fixed by section 4822 being for all services required to be performed by them.

COLUMBUS, OHIO, May 23, 1914.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrolton, Ohio.*

DEAR SIR:—Your favor of April 28, 1914, is received is which you inquire:

> "The Carrolton village school directors passed a resolution to submit the question of the issuing of bonds of the village school district in the sum of $12,000.00 to the voters of said district to be voted on on the 13th day of April, 1914, at a special election. And in accordance with the statute certified their resolution to the board of deputy state supervisors of elections.
>
> "The deputy state supervisors of elections, in compliance with said notice, held a special election on the question of issuing the bonds, on the 13th day of April, 1914.
>
> "The deputy state supervisors of elections propounded the question to me whether they, together with their clerk, were entitled to, and could collect, compensation for holding said special election."

Section 4822, General Code, fixes the compensation to be paid the members and clerk of the board of deputy state supervisors of elections. This sections reads:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

This section does not provide that the compensation provided for therein shall be paid only for services in conducting general elections. It fixes a yearly compensation based upon so much per precinct for their services in performing the duties required of them in conducting elections.

The statutes do not authorize an additional compensation for conducting special elections, and without such authority no such additional compensation can be paid.

Therefore, the members and clerks of the boards of deputy state supervisors of elections are not entitled to any additional compensation for conducting a special election.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

946.

SECTION 4505, GENERAL CODE, NOT REPEALED.

Section 4505, General Code, was not repealed by implication and is not inconsistent with the state civil service law.

COLUMBUS, OHIO, May 23, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 22, 1914, the Hon. Daniel P. Conway, assistant city solicitor of Youngstown, Ohio, inquires:

> "Whether or not section 4505, General Code, is inconsistent with the provisions of the act as enacted in 103 Ohio Laws, 698, or whether it is repealed by implication."

This department in an opinion addressed to you has held that section 4505, General Code, was not specifically repealed by the new civil service act.

Section 4505, General Code, provides:

> "Any person in the police or fire department who is suspended, reduced in rank or dismissed from the department by the director of public safety may appeal from the decision of such officer to the civil service commission within ten days from and after the date of such suspension, reduction or dismissal, in which event said director shall, upon notice from the commission of such appeal, forthwith transmit to the commission a copy of the charges and proceedings thereunder, and the commission shall hear such appeal within ten days from and after the filing of the same with it, and may affirm, disaffirm or modify the judgment of the director of public safety, and its judgment in the matter shall be final. The commission, in all hearings or appeals before it, shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred in this chapter upon the mayor."

This section provides for an appeal to the civil service commission in case of a discharge, suspension or reduction of any person in the police or fire department.

Section 2 of the new civil service act, section 486-2, General Code, provides in part:

> "* * * and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Section 17 of this act, section 486-17, General Code, provides for reductions, suspensions and removals, as follows:

> "No person shall be discharged from the classified service reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced, or suspended with a copy of the order of discharge, lay off, reduction, or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission.
>
> "Nothing in this act shall limit the power of an officer to suspend without pay, for purposes of discipline a subordinate for a reasonable period, not exceeding thirty days; provided, however, that successive suspensions shall not be allowed."

Section 19 of the act, section 486-19, General Code, provides in part:

> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

This part of section 19 was taken verbatim from the old municipal civil service law. It applies only to the positions of chief of police and chief of the fire department.

Section 4505, General Code, provides for a hearing before the civil service commission. The new act does not provide for an appeal or hearing, except as to the positions of chief of police and chief of the fire department, and it does not prohibit such a hearing.

The provisions of section 4505, General Code, may be complied with and followed without conflicting with any of the provisions of the new civil service act, and it is not, therefore, inconsistent, with any of the provisions of the new civil service act.

Section 4505 General Code, is not repealed by implication.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

947.

AUTHORITY OF BOARD OF ADMINISTRATION TO ADOPT RULES RELATIVE TO PAROLING PRISONERS FROM THE OHIO PENITENTIARY.

The board of administration has authority to adopt rules relative to the time of making application for paroles of those serving indeterminate sentences in the Ohio penitentiary.

COLUMBUS, OHIO, May 23, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—We have your letter of May 5, 1914, as follows:

"I am directed by the board of administration to request your opinion as to whether or not they have the authority to adopt the following rules for prisoners serving an indeterminate sentence in the Ohio penitentiary.

"Under the indeterminate sentence law, first offenders, that is, those who have not been convicted of a felony or served a term in a penal institution, may make application for parole at the expiration of the minimum time fixed by law for the offense for which they were committed; but no application for parole will be considered until the applicant has served twelve full months.

"All applications for parole must be advertised in accordance with the provisions of the law, and the full minimum must have been served prior to the meeting at which the application for parole is to be heard.

"No prisoner in the Ohio penitentiary committed under the indeterminate sentence law, except a first offender, is eligible for parole. Others than first offenders who have been committed under the indeterminate sentence law must serve the maximum time, unless sooner released by the Ohio board of administration after a hearing. (Section 2160, General Code).

"A prisoner to be eligible for a hearing for release must have a perfect record and be recommended by the warden and chaplin.

"On recommendation, a hearing for release will be granted to second offender after serving twice the minimum; to third offenders after serving three times the minimum; to fourth offenders after serving four times the minimum for the offense for which they were committed."

In reply to your letter, it is my opinion that your board has the authority to adopt the rules set forth therein.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

948.

AMENDING BONDS FOR SEWERAGE SYSTEM—ENACTING ORDINANCE ON SAME—BOND ISSUE.

1. *If council desires to amend plans for a sewerage system after the various ordinances and resolutions leading up to the making of the contract for the improvement have been enacted, the safer plan would be to begin all over again.*

2. *Council may proceed with necessary legislation leading up to an election to authorize the issuing of bonds to cover the share of the village in the cost of the improvement and also the election thereon at the same time that it is carrying on the election for the improvement itself.*

3. *If the people vote for the bonds in any one year, there is no reason why the bonds should not be issued in the following year.*

COLUMBUS, OHIO, May 23, 1914.

HON. CHARLES L. FLORY, *Solicitor of Granville, Newark, Ohio.*

DEAR SIR:—I have your letter of March 4, 1914, in which you inquire:

> "During the year 1913, the village council passed the necessary legislation for the installing of a general sewerage system, but for various reasons the contract was not let. Including the plans for the system was a sewerage disposal plant. It will be necessary to have an election to authorize the issuing of bonds to cover the share of the village in the cost of the improvement. It is now desired to alter the plans, adopted and approved by resolution of the council, by reducing the size of the disposal plant, and changing the location of the same.
>
> "1. May the council now amend the adopted plans, in the respect above mentioned, without again enacting all the various resolutions and ordinances leading up to the making of the contract for the improvement? In other words, will it be necessary to alter the plans and then adopt the resolutions of necessity and ordinance to proceed, etc., or may the already existing legislation stand with an ordinance modifying, in the respect mentioned, the adopted plans?
>
> "2. May the council proceed with the necessary legislation leading up to the election, also the election, on the question of issuing the bonds at the same time that it is carrying on the legislation for the improvement itself?
>
> "3. If the people vote in the year 1914 to issue such bonds, may such bonds, although thus authorized in 1914, be actually issued and sold in the year 1915?
>
> "4. May the cost of the sewage disposal plant be included in the village's share of the cost of the improvement to be paid for by general taxation?"

In answer to your first question, if I understand your statement the change of location and size of the disposal plant is a substantial and material change from the original plans and specifications of the system, and, to my mind, it would be much safer and better to commence anew and re-enact all legislation necessary to the installation of the system, than to attempt to proceed by amendment and modification of past legislation.

In answer to your second question, I desire to say that I can see no reason why legislation going to the question of issuing bonds and for an election upon the

subject may not proceed at the same time with the preliminary legislation inaugurating the improvement, but of course no contract might be entered into until after the bonds had been sold so that sections 3806-3810 might not be violated.

In answer to your third question, I can see no reason why, if the people vote in favor of the issuing of bonds in the year 1914, they may not be so issued and sold in the year 1915. In fact, I think an examination into the history of like transactions will find that it has been a very common occurrence to authorize bonds in the fall of one year and issue and sell them in the winter or spring of the year following.

Assuming from your letter that the sewer is being constructed on the assessment plan, that the village is paying at least 1/50 and the cost of intersections under section 3820, I desire to say: In Close vs. Parker, 11 C. C., n. s., 85 it is held that the provisions as to payment of "cost of intersections" has no application to the crossing of a street by a sewer for purposes of local sanitary drainage, for which reason, and because assessments are against abutting owners, and the further fact that a disposal plant is not an improvement affecting abutters in any way different from the general public, I make no specific answer to your fourth question, but will do so if you so request after considering Close vs. Parker, supra, and the fact that it has been affirmed by the supreme court without opinion, 79 O. S., 444.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

949.

STATE OIL INSPECTOR—CERTIFICATE TO BE PLACED ON THE WAGON FROM WHICH THE OIL IS SOLD.

Section 862, General Code, should be read as an exception to section 863, therefore, a wagon bearing a certificate issued by the state inspector of oils or his deputy would cover all the oil sold from the wagon, whether the same be contained in one large tank or in gallon cans.

COLUMBUS, OHIO, May 23, 1914.

HON. WILLIAM F. MASON, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 23, 1914, submitting substantially the following:

> "The Standard Oil Company in Cleveland, has tank wagons which deliver oil to consumers about the city. A duplicate certificate is placed on these wagons under section 862 of the General Code, covering the contents of the tank wagon and guaranteeing to all consumers that the oil purchased from the wagon has been taken from a storage tank which was duly inspected. Now the Standard Oil Company also delivers oil to consumers in wagons loaded with gallon cans which have been filled from the storage tank. These cans are left with the consumer. The wagons bear a certificate to the effect that the oil on the wagon has been taken from a storage tank which was duly inspected. Is this sufficient or must each of these gallon cans also bear a certificate under section 863? The practice has been to make the one certificate on the wagon cover the contents of all the gallon cans."

Section 862 of the General Code reads:

"Wagons from which oil intended for consumption for illuminating purposes within this state is delivered to consumers or dealers, shall bear a certificate in duplicate with that issued by the inspector or his deputy, covering the contents of the car last emptied into the storage or receiving tank from which such wagon was filled. Such duplicate certificate shall be issued without additional fee. Whoever, being a driver of such wagon, violates this provision shall be fined ten dollars for each day of such violation."

Section 863 reads:

"Barrels or packages filled from such storage or receiving tank with oil intended for illuminating purposes within this state shall be branded by the inspector or his deputy without additional fee. Whoever offers for sale to dealers or consumers for illuminating purposes within this state such oil not so branded, shall be fined ten dollars."

While section 863 provides that a package must bear a certificate of inspection and while the word "package" as used in this section is broad enough to include "cans," yet I do not believe that section 863 applies to oil sold from the wagon. On the contrary, to my mind section 862 must be read as an exception to section 863 and covers all oil sold from wagons, whether the wagon carries but one large tank or a number of smaller receptacles, such as gallon cans. The oil on the wagon in either case is taken from the storage tank and the duplicate certificate placed on the wagon covers all the oil so transferred from the tank to the wagon. This certificate is a guarantee to all who purchase from the wagon that all the oil sold therefrom has been duly inspected and answers fully the purpose of the statute.

I am therefore of the opinion that when the wagon from which the gallon cans are sold bears a certificate, as provided by section 862, it is not necessary that each gallon can be labeled with such certificate.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

950.

SUPERINTENDENT OF PUBLIC PRINTING—THE WORD "DOCUMENT" AS USED IN SECTION 749, GENERAL CODE, DEFINED—PRESERVATION OF DOCUMENTS IN THE OFFICE OF PUBLIC PRINTER.

The word "document" used in section 749, General Code, will not include all pieces of printing done for the several departments in the state, but only such as would ordinarily and generally be considered as documents. The words "or items" left out in the codification of section 312, Revised Statues, should be read into said section. The supervisor of public printing should audit all accounts of both documents and items, but he should only preserve documents in his office.

COLUMBUS, OHIO, May 23, 1914.

HON. FRANK HARPER, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 22, 1914, as follows:

> "Will you please render this department an opinion as to the scope of the word 'document' as used in the second sentence of section 749, Page & Adams Annotated Ohio General Code—'A copy of each document with the cost endorsed on it shall be filed and preserved in his office.' Does the word 'document' in the section mentioned include all pieces of printing done for the several departments of the state, such as cards, letter heads, blanks, etc., or is 'document' a distinct class? What I desire to know is whether a copy of each piece of printing done for the departments shall be filed and preserved in this office?"

Section 749, General Code, reads:

> "The supervisor of public printing shall audit the accounts for printing and binding and keep a record of the cost thereof, the amount of paper used, and the expense of each document. A copy of each document with the cost indorsed on it shall be filed and preserved in his office."

The New Standard Dictionary gives the following definition of the word "document:"

> "A manuscript or piece of printed matter regarded as conveying information or evidence; as legal or political documents."

To read this definition of the word "document" into section 749, would compel the conclusion that the state printer would not only be relieved of the task of filing letter heads, blanks, cards and other small items of printing, but also of the duty of auditing and keeping a record of the cost of printing them. This conclusion is inconsistent with the other provisions of the statute, concerning the duty of the superintendent of printing and beclouds the wording of the section with such doubt as to justify our resorting to the Revised Statutes for assistance in arriving at the proper construction of the section before us.

Section 749 of the General Code, was formerly part of section 312 and reads in part:

> "He shall audit all accounts for printing and binding and keep a record of the cost of printing and binding, the amount of paper used, and the entire

expense of each *document or item;* and *a copy of each document* shall be duly filed and preserved by him with the cost endorsed upon it."

From a reading of this section of the Revised Statutes, it is clear that under that section it was the duty of the state printer to keep a record of the entire expense of each "document" or "item" printed, but to file and preserve only the "documents." In other words, the statute then did not oblige him to burden his files with a copy of every letter head, blank, card or other small item printed, and I do not think that the omission of the word "item" from the statute by the codifying commission is such a change as to indicate a legislative intention of effecting a change of meaning, nor does it make the present language of the statute so read as to plainly require such change of construction to be made. It follows then that section 749 of the General Code must receive the same construction as would have been placed upon the former section before revision, and it is therefore my opinion that it is your duty to file and preserve only such printed matter as would come within the ordinary and generally accepted definition of the word "document," such as the one above quoted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

951.

TAXES AND TAXATION—WHEN STATE HIGHWAY COMMISSIONER MAY USE ANNUAL HALF-MILL TAX LEVIED FOR ROAD IMPROVEMENT.

The state highway commissioner may, after the annual half-mill tax has been levied and in process of collection, enter into contracts for road improvements for the total amount that will become available from the proceeds of such levy for the year without waiting until all of said money is in the treasury. He should exercise great care that contracts are not let for an amount in excess of the sum that will come into the treasury from this source.

COLUMBUS, OHIO, May 23, 1914.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 30th, wherein you state:

"Your interpretation and opinion is respectfully asked in re section 6859-2 and section 1222 of the General Code.

"After the collection of the taxes and the settlement by the respective counties with the state auditor, in compliance with the law governing the same, that officer certifies to this department, a lump sum, three-fourths of the half-mill levy, which he terms, 'the state road building fund.' Whereupon, we divide this gross sum by eighty-eight, the number of counties in the state, and regard such amount as set aside for use in each county.

"Some of the counties, which are at times delinquent, do not make use of this particular allotment during the year in which it is appropriated; while other counties wish to anticipate the collection of the June taxes, and enter into contracts for road improvement.

"Would it be proper for this department to contract for the aggregate amount of money that has been levied for the entire calendar year to construct roads, while the last half of such levy is in the process of collection, taking into account the fact that such amount has been levied and placed on the tax list and is due the state from the respective counties?

"In other words, this department desires to enter into contracts at present, the money to pay same being due the state, and which will be paid into the state treasury immediately following the August settlement."

Section 6859-2 as enacted in 1913 (103 O. L., p. 155) provides:

"Seventy-five per cent. of all money paid into the treasury of the state by reason of said levy shall be applied to the maintenance of the state highway department and for the construction, improvement, maintenance and repair of an intercounty system of highways in the state, in the manner designated in the act of the general assembly, entitled, 'An act creating a state highway department, defining the duties thereof, and providing aid in the construction and maintenance of highways, and to repeal certain sections of the General Code,' approved June 9, 1911 (102 O. L., pages 333-349), and acts amendatory thereof and supplementary thereto."

Section 1222, as amended, (103 O. L., p. 458) provides:

"Moneys appropriated by the state for the purpose of carrying out the provisions of this chapter, shall not be used in any manner or for any purpose, except as provided herein. Moneys so appropriated shall be equally divided among the counties of the state, except such moneys as are appropriated for the use of the department and for surveys, plans and estimates, and the maintenance and repair of state highways."

Section 6859-2 above quoted is incorporated in what is popularly termed the Hite act. Section 1 of that act provides for the levy of "a tax of one-half of one mill on all the taxable property within the state, to be collected as are other taxes due the state and the proceeds of which shall constitute the state highway improvement fund."

Section 3 provides for the setting aside of twenty-five per cent. of the money paid into the state treasury, by reason of said levy, the same to be used for the construction, improvement, maintenance and repair of the main market roads established by said section. No part of this portion of the half-mill levy can be used for any other purpose than that specifically mentioned, to wit, construction, improvement, maintenance and repair of main market roads.

Section 1222 is a part of the law providing for the improvement, maintenance and repair of intercounty highways.

It will be observed that the cost of the maintenance of your department must first be taken out of the seventy-five per cent. of the half-mill levy and when this is done the remainder is to be divided equally among the counties of the state for the use of construction, etc., of intercounty highways.

Before the enactment of this legislation, it was customary for the legislature to make an appropriation out of the general revenue fund of a specific amount to the state highway commissioner for state aid in road building. This enabled the state highway commissioner to know, before letting any contracts, exactly how much money would be available for each county.

Under the present order, the legislature makes an appropriation to the state highway commissioner of the proceeds of the fund arising from the half-mill levy

and motor vehicle license fees. The exact amount is not stated because it cannot be definitely ascertained at the time the appropriation is made. The act providing for this half-mill levy was declared by the supreme court, in the case of State of Ohio ex rel. Donahey, Auditor vs. R. E. Edmondson, Auditor of Hamilton County, Ohio et al., No. 14406, decided November 18, 1913, to be constitutional and this removed all legal obstacles to the bringing of the money into the state treasury. The first installment of this levy for the tax year 1913, is now in the state treasury and the amount that will come into the treasury in the August settlement is, therefore, not difficult of determination. Of course you must pay the expenses of conducting your department out of this fund before it can be used for the construction of roads in the several counties of the state, but as such expenses for the year may be estimated with reasonable accuracy in advance, I see no reason why you should not apportion to the respective counties the amount that will be due them, without waiting until all of the money is in the state treasury.

I am of the opinion that it would be both proper and legal for your department to contract for the aggregate amount of money that has been levied for the entire tax year, less the expenses of the department, even though the second installment of the tax will not come into the state treasury until August, because it is now in process of collection and will be in the state treasury before it is actually needed and before the fund arising from the first installment will have been exhausted in payment to contractors on estimates.

You should exercise great care that contracts are not awarded in excess of the amount of money that will probably become available to your department for the improvement of roads in each county in the state.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

952.

BOND—WHEN NOT TO BE CLASSED AS COUNTY BONDS UNDER SECTION 9778, GENERAL CODE.

The bond of the county of Marion, Fairmont magisterial district, permanent road improvement bond, state of West Virginia, is not to be classed as a county bond under section 9778, General Code.

COLUMBUS, OHIO, May 23, 1914.

HON. J. P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of February 4th, in which you make the following request for my opinion:

> "I herewith hand you copy of bond, 'County of Marion, Fairmont magisterial district, permanent road improvement bond. (State of West Virginia.)'
>
> "I would be pleased to have you give me your opinion as to whether or not the treasurer of state may accept bonds of this issue for faithful performance of trusts as provided for in section 9778 of the General Code."

Section 9778 of the General Code is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of a least three per cent. on its common stock."

The question to be determined is whether the issue of bonds, a copy of one which is submitted by you, can be classed as bonds of the county of Marion, West Virginia, and so accepted by you as a deposit under said section 9778?

The bond which you submit is entitled as follows:

Number 383.

"United States of America, State of West Virginia, County of Marion, Fairmont Magisterial District, 5 per cent. Permanent Road Improvement Bond, $1,000.00. Dated September 1, 1913. Due September 1, 1943. Optional September 1, 1933. Interest payable March 1st and September 1st.

"Principal payable at the office of the county court of Marion county, Fairmont, West Virginia, or at the National City Bank, New York, N. Y.

"Interest payable at the office of the county court, Marion County, Fairmont, West Virginia, or at the Guaranty Trust Company, New York, N. Y."

And from the face of the bond it appears that it is one of an issue of $400,000 permanent road improvement bonds, issued by the county court of Marion county, a corporation in Marion county, West Virginia, for and on behalf of, and in the name of, the magisterial district of Fairmont in said county of Marion. It is certified in said bond, among other things that,

"* * * the amount of this bond, together with all other indebtedness of said county of Marion, and of the said district of Fairmont, does not exceed any limit prescribed by the constitution and laws of said state."

The case of Neal et al. vs. County Court of Wood County, et al., 43 W. Va., 90, has been cited as deciding that bonds of this character are county bonds. The second paragraph of the syllabus in this case is as follows:

"A magisterial district court, by subscription to works of internal improvement, become indebted up to five per cent. of its taxable property, and, in addition, the county up to five per cent. of its whole taxable property; but such district subscription, for the purposes of the limitation upon county indebtedness fixed by section 8, article X, of the constitution, is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation."

The decision is quite lengthy, and the court holds in this case that a magisterial district has no authority as a separate body to create a debt, and, hence, has no

power, independently, to issue bonds, but that the bonds must be issued by the county on its behalf and are, *for the purpose of determining the total county indebtedness,* county bonds; though the only property back of them is the property within the magisterial district, and it does not decide that such bonds are to be classed as county bonds for any other purpose.

The fact remains, however, that though the magisterial district has in and of itself no power to incur indebtedness or issue bonds directly, the same purpose is implied indirectly by having the bonds issued by the county court "for and on behalf, and in the name of" the magisterial district; and such bonds are payable from a tax on the property of the magisterial district, and not from a tax on the property of the entire county; and in case of foreclosure, the property which could be subjected to the payment of the bonds would be, not the property of the entire county but only so much thereof as might be included within the boundaries of the magisterial district; all this, it seems to me, makes these bonds *in fact* the bonds of the magisterial district and not of the county; and, hence, as our statute, section 9778, expressly states that the deposit by it required instead of cash "may be bonds of the United States, or of this state, or any municipality or county therein, or in any other state * * *."

Only county bonds of the same character as county bonds issued by counties in this state can be accepted—that is—bonds for the payment of which the credit of the entire county is pledged.

I do not wish to be understood in any way as expressing any doubt as to the sufficiency of the bonds offered as security; my holding is based solely on the fact that they are not county bonds as contemplated by section 9778, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

953.

TAXES AND TAXATION—PENALTY FOR FAILURE TO PAY TAXES.

Under the provisions of section 5678, *General Code, a penalty of* 15 *per cent. may be charged for failure to pay the second half of the year's taxes, although the first half has been duly paid.*

COLUMBUS, OHIO, May 23, 1914.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Your letter of January 19th, receipt of which has already been acknowledged, requests my opinion upon the following question:

> "When the first half of the taxes charged against an entry of real estate on the duplicate of a county is paid within the time specified by law, but the second half of the taxes charged against the same entry is not paid within the time limited for the payment of such second half, what, if any, penalty may be charged and collected by the county treasurer on account of such failure to pay the second half of the taxes?"

Section 5678, General Code, gives rise to the question which you submit and is as follows:

"If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of fifteen per cent. thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law."

A somewhat over-nice reading of the second sentence of the above section would colorably support the view that the penalty for non-payment of the second half of the taxes is not chargeable unless the first half is unpaid when the second half is due. I am of the opinion, however, though authorities are lacking, that the penalty for non-payment of the June installment attaches in the case you submit. Though, as a general rule, statutes imposing penalties and statutes relating to the exaction of taxes are alike strictly construed against the exaction and in favor of the taxpayer, and though, as I have already intimated, the statute may be fairly termed ambiguous, in the respect under consideration, yet it would be an absurd interpretation thereof to limit the right to charge and collect the 15 per cent. penalty on the June installment to cases in which there has been a failure to pay the December installment.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

954.

DIRECTOR OF PUBLIC SAFETY — FIRE INSURANCE — CONTRACT.

A director of public safety who went out of office on January 1, 1914, *can become interested in a contract with the city to sell it fire insurance during the year* 1914.

COLUMBUS, OHIO, May 25, 1914.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under date of April 21st, you requested my opinion upon the following questions:

"Can a director of public safety, who went out of office January 1, 1914, become interested in a contract with the city, or sell it (the city) fire insurance during the year 1914?

"Is the director of public safety prohibited from so doing under section 12912 of the General Code or any other law?

"This man who now desires to sell fire insurance to the city was director of public safety for four years prior to January 1, 1914, when he went out of office."

Sections 12910 and 12912 of the General Code are as follows:

"Section 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a

board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

"Section 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or service for such corporation or township, or acts as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

It will be noted that section 12910 deals specifically with contracts for the purchase of property, supplies or fire insurance for the use of the subdivisions enumerated, while section 12912 prohibits interest in the profits of a contract, job, work or service for a corporation or township.

In an opinion rendered to Hon. William B. James, city solicitor of Bowling Green, Ohio, a copy of which I enclose, I held that section 12912 of the General Code does not extend to interests by an officer in a contract, after the expiration of his term of office. There can be no question that section 12910 is expressly limited to a like application. I cannot find any other statute prohibiting the form of contract referred to and therefore conclude that the director of public safety is not prohibited by the statutes from selling fire insurance to the city, after the expiration of his time of service in office.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

955.

BUDGET COMMISSION—RIGHT OF DEPUTY TO ACT ON BEHALF OF HIS PRINCIPAL—MAYOR—PRESIDENT OF COUNCIL.

The deputies of the budget commission prescribed by section 5649-3b, *General Code, involve the exercise of judgment and discretion, and consequently a deputy cannot exercise the same on behalf of his principal.*

A deputy auditor cannot act for the auditor, nor an assistant city solicitor for the solicitor. The president of council may act on behalf of the mayor for the reason that such president of council is not a deputy of the mayor and in the absence of the mayor becomes acting mayor.

COLUMBUS, OHIO, May 25, 1914.

HON. WALTER M. SCHOENLE, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—In your letter of April 15th, receipt of which has already been acknowledged, you request my opinion upon the following questions:

"Will you kindly give me your opinion as to whether, in case of disability of the mayor the president of council may, as acting mayor, under sec-

tion 4273, General Code, take the place of and perform the duties of the mayor upon the budget commission?

"Also, whether in case of disability of the auditor, the chief deputy of the auditor may take the place of and act in place of the auditor on the budget commission?

"Also, whether in case of disability of the city solicitor, an assistant city solicitor may take the place of the city solicitor on the budget commission under an ordinance of the city providing:

" 'In the absence or disability of the solicitor, or in case of a vacancy in said office, said assistants above provided shall perform the duties of the solicitor until other provision is made therefor by council.' "

And further providing:

"Said assistants and subordinates shall aid the solicitor in the discharge of his official duties and shall perform such duties as he shall from time to time assign to them respectively."

The powers and duties of the budget commission, the membership of which, in Hamilton county, consists, under section 5649-3b, General Code, as amended, 104 O. L., 237, of the mayor and solicitor of Cincinnati and the auditor of Hamilton county, are prescribed by section 5649-3c, General Code, as follows:

"The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law.

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of each township, city, village, school district, or other taxing district, returned on the grand duplicate, and place it on the tax list of the county."

I think that it will be readily agreed that these duties and resultant powers involve the exercise of judgment and discretion in the highest sense. The well established rule is that a deputy may exercise the ministerial functions of his principal, and those only, in the absence of explicit statutory authority.

Hulse vs. State, 35 O. S., 421.
Davies vs. State, 11 C. C. n. s., 209.

Measured by this test, it follows clearly, I think, that the right of the deputy county auditor to act for the auditor does not extend to service as a member of the budget commission.

The relation of the president of council to the office of mayor is established by the following:

Section 4273, General Code:

"When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of the council shall be the acting mayor. While the president of the city council is acting as mayor, he shall not serve as president of council."

Section 4274, General Code:

"In case of the death, resignation or removal of the mayor, the president of council shall become the mayor, and serve for the unexpired term, and until the successor is elected and qualified. Thereupon the president pro tem. of council shall become president thereof, and shall have the same rights, duties and powers as his predecessor. The vacancy thus created in council shall be filled as other vacancies, and council shall elect another president pro tem."

The president of council, by virtue of this section, is not a *deputy* of the mayor. He becomes, upon the happening of one of the specified contingencies, the *acting mayor,* and is at least vested with all the *executive* functions of the mayor *in his own right.* He is an elective officer. Therefore, I am of the opinion that in the absence or disability of the mayor, the president of council may act as a member of the budget commission. The absence or disability of the mayor, which will devolve his powers and duties in this behalf upon the president of council, must, however, be such as to prevent him from serving *in any respect* as mayor. It is not sufficient that the mayor be unable to attend the *meetings of the commission,* if he is able, generally, to act as mayor. The statute providing for the temporary or permanent occupancy of the office of mayor by the president of council contemplated the existence of a *vacancy in the office* as such.

I am of the opinion that the assistant city solicitor is without authority to represent the solicitor as a member of the budget commission. While it is true that the ordinance quoted by you attempts to constitute the assistant solicitor the acting solicitor *ad interim,* upon the happening of the specified contingencies, yet, without passing upon its validity for other purposes, I am satisfied that it is beyond the power of council to legislate so as to furnish a temporary successor to the city solicitor for the purpose of the statute relative to the constitution of the budget commission. That succession must be provided by *law,* operating uniformly throughout the state. The assistant is not an elective officer—a fact the hearing of which,

if any, supports the view above expressed. Insofar as the assistant may be regarded as a *deputy,* his rights in the premises are governed by the principle above outlined in dealing with the question relative to the deputy county auditor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

956.

TAXES AND TAXATION—SMITH LAW—10 MILL LIMITATION—15 MILL LIMITATION—SINKING FUND—INTEREST LEVY.

The amendment to section 5649-2, *a part of the so-called Smith law and affecting the* 10 *mill limitation, though subsequent to amendment to section* 5649-5b *imposing the* 15 *mill limitation, is to be read together with the latter so that sinking fund and interest levies necessary to provide for previously incurred bonded indebtedness, such indebtedness authorized by vote of the people is still subject to the* 15 *mill limitation.*

COLUMBUS, OHIO, May 25, 1914.

HON. FRED W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your letter of April 17, 1914, already acknowledged, invites my opinion upon the following question:

> "During the eightieth session of the general assembly of Ohio, section 5649-5b of the General Code was amended, fixing the maximum rate of taxation for any taxing district at fifteen mills (volume 103, page 57, Ohio Laws). This act was passed February 27, 1913, and approved by the governor February 28, 1913. At the same session of the general assembly, an act was passed on April 16, 1913, and approved by the governor May 6, 1913 (volume 103, page 552, Ohio Laws), which seems to have no limitation in regard to the rate of taxation that may be levied for sinking fund and interest purposes. The last act passed by the general assembly of Ohio, limits the general levy of any taxing district to ten mills, which may be increased by a vote of the people of said district, and in addition to this a sufficient levy may be made that may be necessary to provide for all indebtedness. The last act seems to conflict with the former in regard to the maximum rate of taxation that may be levied in any taxing district, as there appears to be no limitation to the amount that may be levied for sinking fund and interest purposes. Is this true or not?"

I do not think that there is any such irreconcilable inconsistency between amended section 5649-5b, General Code, and the subsequently amended section 5649-2, General Code as to work an implied repeal or amendment of the former. Prior to the amendment of section 5649-2, or, to be more exact, between the time when the two amendments took effect, the two sections, placed in juxtaposition, would have read as follows:

Section 5649-5b (as amended, p. 57):

> "If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district at

a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

Section 5649-2 (original):

"Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, for the year 1911, and any year thereafter, including taxes levied under authority of section 5649-1 of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

These two statutes, so compared, are not *inconsistent.* Their respective limitations are *cumulative;* one is a limitation upon *certain* levies, the other controls those and other levies.

Now, when section 5649-2 was amended, the only change therein was the elimination of the 1910 tax levy limitation, effected by the omission of certain words, so that the section now reads:

"Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness that may hereafter be incurred by a vote of the people."

The language creating and imposing the ten-mill limitation was not, therefore, substantially changed. Accordingly, it is my view that there is not to be imputed to the general assembly any purpose to change the scope or nature of that limitation. Therefore, it is to continue to bear to the fifteen-mill limitation the same relation borne thereto by the ten-mill limitation under original section 5649-2.

Again, if the opposite result could follow at all, it would come about through a mere inference, not warranted on the face of amended section 5649-2, viz., that there is to be *no limitation* upon levies, for interest and sinking fund purposes, excepted from the operation of that section. If anything pertaining to the amended section would be said to conflict with amended section 5649-5b, it would be the

inference, not any positive language of amended section 5649-2. Such a "conflict" would produce no implied repeal, first, because such a repeal must be founded upon an irreconcilable inconsistency, so that, if resulting from *inference* the inference must be the only one possible and second, because not only is another and an opposite inference *possible,* in the case at hand, but such other inference is clearly indicated by the legislative history.

Lastly, section 5649-2 as amended cannot be regarded as a disassociated legislative idea. The section bearing this number was, originally, part of a certain *act.* It will be presumed that it was amended with a view to its continuance as part of the same act. This presumption is raised to a certainty by the discovery, that another section of the same original act was amended by the same session of the assembly. The two amendments, so passed will be presumed to have been intended as parts of a single harmonious act, and this presumption is almost conclusive.

I conclude, therefore, that under the law as it now stands, levies for interest and sinking fund purposes, excluded from the operation of the ten-mill limitation of the "Smith one per cent. law" are subject to the fifteen-mill limitation imposed by section 5649-5b as amended.

Of course, the positive language of the last mentioned section leaves no room for doubt as to its inclusion of such levies, unless such an implied repeal or amendment as I have been discussing has occurred.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

957.

STATE HIGHWAY COMMISSIONER—RIGHT TO SEND ASSISTANTS OUT OF THE STATE TO CONDUCT INVESTIGATIONS RELATIVE TO THE BEST METHODS OF ROAD CONSTRUCTION.

The state highway commissioner has the right under section 1183, *General Code, to send assistants and division engineers outside of the state to conduct investigations relative to the best methods of road construction.*

COLUMBUS, OHIO, May 25, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—On April 9th, you requested my opinion upon the following state of facts:

> "On or about February 28, 1914, State Highway Commissioner, Hon. James R. Marker, found it expedient to send about ten of his assistants and division engineers to Chicago to attend a series of cement shows and conventions. He did this under the authority, so he claims, of section 1183 of the General Code.
>
> "We have held up the expense accounts until we can get an opinion from your department as to whether the same is a legal charge against the highway funds. Enclosed is statement of facts which you will consider in connection with the same."

Your request calls for a construction of that portion of section 1183 of the General Code, as amended in 1913 (103 O. L., page 449), which reads:

"* * * He shall make inquiry in regard to systems of road and bridge construction and maintenance wherever he may deem it advisable, conduct investigations and experiments, either in person, by deputy or engineer, in regard to the best methods of road and bridge construction and the best kinds of road and bridge materials, examine the chemical and physical character of such materials, * * *."

In his statement of facts accompanying your letter, Mr. Marker, in substance, says that he directed one deputy highway commissioner and seven division engineers to attend a series of congresses, conventions and cement shows held in connection with the national conference of state highway departments at Chicago, Illinois, from February 12 to 18, 1914. Each of these men was deputized to make inquiry on different phases of road and bridge construction, maintenance and repair, to conduct investigations and experiments in regard to the best methods of road and bridge construction and repair, the best materials therefor, and to report his findings to the state highway commission, all of which, I understand, was done.

The state highway commissioner is given a very wide discretion under section 1183. It is clear that his territorial jurisdiction in the making of such investigations, inquiries, experiments, etc., is not limited to the state of Ohio, because he is expressly authorized to make such inquiries, etc., "wherever he may deem it advisable." I find no objection to the payment of these expenses on the ground that they were incurred in traveling outside of the state.

As I understand it, the question raised by you is whether the state highway commissioner could send more than one deputy or engineer to Chicago for the above specified purpose.

It will be noted that the statute authorizes the highway commissioner to make such inquiries, etc., "either in person, by deputy or engineer." This is a grant of power merely, and the fact that the statute mentions the classes of persons that may be assigned to the making of such inquiries, etc., in the singular number, does not warrant the conclusion that not more than one of the designated persons can be assigned to such duty.

The work in the state highway department is divided into three subdivisions or bureaus, each having a separate and distinct branch of the work, viz.: the bureau of construction of roads, the bureau of maintenance and repair of roads, and the bureau of construction, maintenance and repair of bridges. In order to secure greater efficiency, the men in each of these bureaus specialize in certain branches of the work, so that while one man may be proficient in the knowledge of one type of construction, maintenance or repair of highways and bridges, he may know very little of other types.

I am informed that at the meetings to which these gentlemen were sent, a great many phases of the question of construction, maintenance and repair of roads and bridges were considered, and that the discussions resulted in material benefit to those present, and indirectly to the state, in determining the most advantageous methods of road and bridge construction, maintenance and repair, and the best materials therefor. These meetings were held simultaneously in separate sections or divisions, and it would have been physically impossible for one man to attend all of them, even if he were fully conversant with all of the subjects under consideration.

It is well to keep a distinction in mind between those cases where departments may seek merely to send men to conventions in the ordinary sense, where the benefit is more personal than it is official, and cases like this where the benefit is direct and in the first instance for the state.

Section 1183 recognizes this itself because the statute calls upon the highway commissioner to make inquiries in regard to systems of road and bridge construction and maintenance wherever he may deem it advisable, conduct experiments and investiga-

tions in person or by deputy or engineer, in regard to the best methods of road and bridge construction and the best kinds of road and bridge materials. The doctrine of good common sense is particularly to be applied in these cases, and you are to be commended in keeping a close watch on all of the expenditures that are incurred, particularly outside of the state.

I am of the opinion that in view of section 1183 of the General Code, and in view of the further fact that road construction work is new in Ohio and that much may be saved or lost to the public by reason of following a good plan or a bad one, as the case may be, that the expenses incurred by the state highway department in respect to the subject-matter about which you inquire are lawful.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

958.

CIVIL SERVICE—BOARD OF ADMINISTRATION—MANAGING OFFICERS OF INSTITUTIONS UNDER CONTROL OF THE OHIO BOARD OF ADMINISTRATION.

Superintendents or county officers of the various institutions under the management and control of the Ohio board of administration are not placed in the unclassified service. Practicability of competitive examination of applicant shall be determined by state civil service commission.

COLUMBUS, OHIO, May 28, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—The Ohio board of administration has submitted the following inquiry under date of February 18, 1914:

> "Are the managing officers of the institutions under the control of the Ohio board of administration exempt from the provisions of senate bill No. 7, being an act to regulate the civil service of Ohio (Ohio Laws 103, page 698)?"

Section 1835, General Code, enumerates the institutions which shall be under the control and management of the board of administration. Said section reads in part:

> "The board shall assume its duties on August 15, 1911, and shall have full power to manage and govern the following institutions:
> "The Athens State Hospital.
> "The Cleveland State Hospital.
> "The Columbus State Hospital.

"The Dayton State Hospital.
"The Toledo State Hospital.
"The Lima State Hospital.
"The Massillon State Hospital.
"The Ohio Hospital for Epileptics.
"The Institution for Feeble-Minded youth, which shall be known hereafter as
"The Institution for Feeble-Minded.
"The State School for the Deaf.
"The State School for the Blind.
"The Ohio Soldiers' and Sailors' Home.
"The Home of the Ohio Soldiers, Sailors, Marines, Their Wives, Mothers and Widows and Army Nurses to be known hereafter as
"The Madison Home.
"The Boys' Industrial School.
"The Girls' Industrial Home.
"The Ohio State Reformatory.
"The Ohio Penitentiary.
"The Ohio State Sanatorium."

By virtue of section 1842, General Code, the board of administration is authorized to appoint a superintendent or other chief officer of each of said institutions. This section further prescribes certain duties of such superintendent or other chief officer.

Said section 1842, General Code, provides:

"Each of said institutions shall be under the executive control of a superintendent or other chief officer designated by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act. Such chief officer shall be appointed by the board to serve for the term of four years unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, after opportunity to be heard.

"The chief officer shall have entire executive charge of the institution for which he is appointed, except as otherwise provided herein. He shall select and appoint the necessary employes, but not more than ten per cent. of the total number of officers and employes of any institution shall be appointed from the same county. He shall have power to discharge them for cause, which shall be recorded in a book kept for that purpose, and a report of all appointments and resignations and discharges shall be filed with the board at the close of each month.

"For reasons set forth in writing the board may order the discharge of any employe of any institution.

"This act shall not be construed as affecting the term of any chief officer which shall be unexpired at the organization of the board; but he shall be subject to removal as hereinbefore provided.

"The board after conference with the managing officer of each institution shall determine the number of officers and employes to be appointed therein. It shall from time to time fix the salaries and wages to be paid at various institutions, which shall be uniform, as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor."

Section 8 of the civil service act, section 486-8, General Code, places ten classes of positions in the unclassified service. All others for which it is practicable to determine merit and fitness of applicants by competitive examinations, are placed in the classified service.

Of the ten classes placed in the unclassified service only two need to be considered, as the others are clearly not applicable to the positions in question.

Subdivisions 2 and 8 of branch (a) of said section 8, provides:

> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.
>
> "8. The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

In order to come within the terms of subdivision 2, the officers must be heads of "principal departments, boards and commissions" and they must be appointed "by the governor or by and with his consent."

By virtue of section 1842, General Code, supra, the various managing officers of the institutions under the control of the board of administration are appointed by that board and not by the governor or by and with his consent. They do not, therefore, come within the terms of subdivision 2 of said section 8, supra.

Subdivision 8 of said section 8 applies to deputies. These deputies must be "authorized by law to act generally for and in place of their principals" and they must hold a fiduciary relation to such principals. Both of these conditions must exist.

It is urged that the board of administration delegates power to these managing officers to purchase supplies; to act for the board in awarding contracts; in classifying prisoners and to act for it in other matters of a general and special nature. This does not make these managing officers deputies of the board of administration. Furthermore by subdivision 8 of section 8, supra, deputies must be "authorized by law" and not by the principal "to act generally for and in place of their principals."

In volume 5, page 623 of Am. & Eng. Enc. of Law, 1st Ed., a deputy is defined:

> "A deputy is one who by appointment exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself, must act in pursuance of law, performing official functions, and is required to take oath of office before acting."

A "deputy" is similarly defined at page 1043, volume 13 of Cyc. and in volume 9, page 368, Am. & Eng. Enc. of Law, 2nd Edition.

A deputy is one who acts in the name of his principal and not in his own right. The managing officers in question act in their own right as granted by the statute. They do not act in the name of their principal, the board of administration. In many instances they may act as agents of the board, but this does not make them deputies.

The managing officers in question are not deputies within the meaning of subdivision 8 of section 8 of the civil service act.

It is further urged that it is not practicable to determine the merit and fitness

of applicants for these positions by competitive examinations. This phase of the question is covered by branch (b) of section 8 of the civil service act.

This part of said section reads:

> "(b) The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class.
>
> "1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act."

It will be observed that the competitive class, which is the classified service, shall include such positions for "which it is practicable to determine the merit and fitness of applicants by competitive examinations." A similar provision is contained in the constitutional amendment pertaining to civil service.

The question arises, who shall determine the practicability of competitive examinations as to particular positions.

This department has followed the ruling made in People vs. McWilliams, 185 N. Y. 92, wherein it is held:

> "The determination of a municipal civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion is more of a legislative or executive character than judicial or quasi-judicial, and therefore is not reviewable by certiorari.
>
> "Such determination, however, is not final, but is subject to a limited and qualified judicial control to be exercised in a proper case by mandamus. * * * If the determination clearly violates the constitution or the statute, mandamus will lie to correct it; if not, the courts should not intervene; and to this extent only should they exercise the power of review."

The state civil service commission by virtue of the provisions of section 9 of the civil service act, which grants it the power to classify positions, would be authorized in the first instance to determine whether or not it is practicable to hold examinations for positions in the state and county.

Said section 9 reads in part:

> "Within six months after the taking effect of this act, the commission shall put into effect rules for the classification of offices, positions and employments in the classified service of the state and the counties thereof * * *."

The power of the civil service commission to classify positions is subject to a limited judicial control. As to some positions it can be determined as a matter of law that it is impracticable to hold examinations therefor. Where this is doubtful it is left to the determination of the civil service commission.

Can it be determined as a matter of law that it is impracticable to hold examinations for these positions?

By virtue of section 1842, General Code, supra, the chief officer "has entire executive charge of the institution for which he is appointed." He has power to appoint the necessary employes and to discharge them for cause. These are the general duties of such officers and it cannot be said as a matter of law that it is impracticable to determine the merit and fitness of persons to perform such duties by competitive examinations.

My attention has been called to the provisions of section 1871, General Code. This section reads:

> "The board shall make rules and regulations for the strictly non-partisan management of the institutions under its control. Any member or employe of the board or any officer or employe of any institution under its control, who, by solicitation or otherwise, shall exert his influence directly or indirectly to induce any other officer or employe of any such institutions to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money or other thing of value to any person for election purposes, shall be removed from his office or position, by the board in case of an officer or employe and by the governor in case of a member of the board. And no member or officer or employe of the board shall recommend or in any other way seek to secure the appointment, employment or promotion of any person at any institution, the intent and purpose of this act being to improve the service and discipline at said institutions by entrusting the same to the managing officers thereof without interference save by the rules, regulations and orders of the board."

The provisions of this section are in keeping with the spirit and intent of the civil service act and they do not change the rule of practicability of examinations.

My attention has also been called to certain provisions of the statutes granting certain powers to certain superintendents to receive and discharge inmates without the consent of the board of administration.

The following are examples of these provisions pertaining to the superintendents of the various hospitals for the insane:

Section 1958, General Code, provides in part:

> "* * * Upon receiving the application and certificate, the superintendent shall immediately advise the probate judge whether the patient can be received, and, if so, at what time."

Section 1968, General Code, provides:

> "When the superintendent deems it for the best interests of a patient, who has no homicidal or suicidal propensities, he may permit such patient to leave the institution on a trial visit, which shall not exceed ninety days. Such patient, if necessary, may be returned at any time within such period without further legal proceedings."

Section 1972, General Code, provides:

> "A person in an incipient stage of mental derangement may apply for admission to and treatment in the state hospital for the district in which he or she resides. A person in an incipient stage of epilepsy may apply for admission to and treatment in the Ohio hospital for epileptics. The superintendent of such hospital may receive such person as a patient therein for

not more than sixty days, if from his own examination and the written statement of a reputable physician familiar with the applicant's condition, and which covers the interrogatories and answers prescribed by the state board of charities in other applications, he is satisfied that the applicant is in an incipient stage of mental derangement or epilepsy, in need of such treatment as the hospital affords, and likely to be benefited thereby."

Section 1998, General Code, applies to the superintendent of the Lima state hospital. Said section reads:

"The superintendent may discharge an inmate, not under sentence for crime, who in his judgment, is recovered, or who has not recovered, but whose condition has improved to such extent that his discharge will not be detrimental to the public welfare or injurious to him. Before ordering such discharge, the superintendent shall ascertain that some friend will properly care for him at his home."

Section 2044, General Code, applies to the superintendent of the Ohio hospital for epileptics. Said section reads:

"In the commitment and conveyance to the hospital, the care and custody while there, and the discharge therefrom, of epileptic insane or epileptics whose being at large is dangerous to the community, like proceedings shall be had, and like powers exercised by officers charged with like duties in the premises as is provided by law for the commitment and care of the insane."

These various sections prescribe certain discretionary duties upon the various superintendents concerned, which they are to exercise independent of the board of administration. These duties do not bring these superintendents within any of the ten classes of positions placed in the unclassified service by section 8 of the civil service act.

The only question of doubt as to these positions is whether or not it can be said as a matter of law that it is practicable to hold competitive examinations for these positions.

Since the decision of People ex rel. Schau, vs. McWilliams, 185 N. Y., 92, supra, referred to as the Schau case, a number of cases have been before the court of appeals for review. The court of appeals has universally, so far as I have been able to find, upheld the civil service commission when it placed a position in the classified service and required competitive examinations. The only times when the civil service commission has been overruled has been when it placed certain positions in the exempt class, and the courts have placed them in the competitive class.

The tendency, therefore, of the New York courts is not to disturb the decision of the civil service commission when it determines that it is practicable to hold competitive examinations, and since the decision in the Schau case, I find no decision by the court of appeals which holds that as a matter of law it is not practicable to hold competitive examinations.

The constitution and statutes of New York as to the practicability of holding competitive examinations are almost identical with the constitution and statutes of Ohio upon the same subject.

A further discussion of the cases in New York may be of profit.

In the case of People ex rel. Schau vs. McWilliams, supra, Cullen, C. J., says on page 98 of the opinion:

"If it should appear that there was a plain violation by the commission of its duty to classify as competitive an office which was clearly and manifestly so, there should be a remedy in the courts. But there is necessarily a large debatable field as to cases within which there will be great differences of opinion, even among the most intelligent and fair-minded men, and as to this field it seems to me that it is not reasonable that the judgment of an appellate court should be substituted for that of the commissioners."

Also on page 99 he says:

"The proper classificaion of a part of the civil service depends in no small degree on the practical operation of the classification. A priori arguments must often yield to actual experience."

On same page he further says:

"It does not at all follow that the action of the civil service commission is not in any case subject to judicial control; but that such control is a limited and qualified one to be exercised by mandamus. If the position is clearly one properly subject to competitive examinations the commissioners may be compelled to so classify it. On the other hand if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal the commission may be compelled to strike the position from the competitive examination class, though in such case redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the court may differ from the commission as to the wisdom of the classification."

The principle of this case was followed in Matter of Simons vs. McGuire, 204 N. Y., 253, wherein it was held:

"It cannot be held as a matter of law, that the position of probation officer, under section 96 of chapter 659 of the laws of 1910, is one which cannot be properly placed in the competitive class of the civil service, and for that reason the question must be left to the decision of the civil service commission."

The court through Werner, J., quotes from the Schau case, supra, and says on page 258:

"The respondent, one of the appointees, and the justices of the court of special sessions, assert that the position of probation officer is one which, by reason of its peculiar and manifold duties as defined in section 11a of the Code of criminal procedure, no less than by the express terms of the statute creating the court of special sessions and defining the duties and powers of its officers, belongs in the exempt class. This view has been sustained by the supreme court at special term and in the appellate division. The civil service commission, the probation commission, and some eminent experts who are familiar with the workings of each, contend that it is practicable to formulate workable rules for a competitive examination, for

the position of probation officer. This variance of opinion is alone sufficient to bring the case at bar within the rule laid down in the Schau case. The position is one 'as to the proper mode of filling which there is a fair and reasonable ground for difference of opinion among intelligent and conscientious officials' and, therefore, 'the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification.'"

It appears that the probation officer had varied duties. He gave advice to families and persons coming before the court and placed on probation, and the court was required to rely upon his judgment and upon the facts submitted by him, in a great measure, as to its disposition of persons under probation.

Another case wherein the civil service commission was sustained is that of People vs. Kraft, 145 App. Div., 662, which was affirmed without report in 204 N. Y., 626.

This case concerned examiners of stock transfers and the civil service commission placed the positions in the competitive class.

Smith, P. J., of the appellate division, defines their duties as follows:

"These examiners are in fact secret service men. Their sole duties are of a detective nature, involving not only thorough knowledge of bookkeeping, but a general commercial experience, which will enable them to detect the many devices by which this law may be sought to be evaded. Not only extensive business experience, but a keen acumen is a necessary qualification for the successful performance of duties which are unusually exacting."

These positions passed upon by the court of last resort of New York, required men of judgment, discretion and of varied experience, yet the courts upheld the decision of the civil service commission in placing these positions in the competitive class. The New York cases are the only ones which I find upon this question.

It appears, therefore, that the question of holding competitive examinations to determine the merit and fitness of applicants is largely a matter of fact to be determined by practical experience in the operation of the civil service law. It is more a matter of fact than a matter of law.

The legislature has placed upon the civil service commission the duty of determining whether as a matter of fact a competitive examination is practicable. The civil service commission has not passed upon the positions now in question. Their right to pass upon this question should not be precluded by the opinion of this department, unless it is clearly apparent that as a matter of law competitive examinations are not practicable.

It is not the province of this department to control the discretionary duties of the civil service commission. By virtue of section 9 of the civil service act the civil service commission is given the power to adopt rules for the classification of positions.

Section 14, paragraph 2 of the civil service act, provides:

"2. In case of vacancy in a position in the competitive class where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in such qualities, the commission may suspend the provisions of the statute requiring competition in such case, but

no suspension shall be general in its application to such place, and all such cases of suspension shall be reported in the annual report of the commission with the reasons for the same."

By virtue of this provision the civil service commission determines the facts and suspends competitive examination. This section recognizes the fact that there may be competitive examinations for positions which require scientific, managerial, professional or educational qualifications.

Section 15 of the civil service act, which requires the filling of positions by promotion, should also be considered in this connection.

Said section provides:

"Vacancies in positions in the competitive class shall be filled so far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the competitive classified service, and for making promotions in the competitive classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service; and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest of the service so to fill such vacancies. All examinations for promotion shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing power only the name of the person having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations."

It will be observed that efficiency and seniority in service is made an important factor in promotional examinations. The civil service commission is to determine what positions shall be filled by promotion, and it may determine that the positions can best be filled by promotion and the state thus benefit by the experience of the subordinate employes gained in the service of the state.

The discretionary duties required of the superintendents of the various hospitals for the insane raise a question of doubt as to the practicability of holding competitive examinations of applicants.

And as said by the court of appeals of New York, the positions are ones "'as to the proper mode of filling which there is a fair and reasonable ground for difference of opinion among intelligent and conscientious officials' and, therefore, 'the action of the commission should stand, even though the courts may differ from the commissioners as to the wisdom of the classification.'"

As to the positions now in question the civil service commission has not yet acted and this department should not preclude it from passing upon the question.

It is my conclusion, therefore, that the superintendents or other managing officer of the various institutions under the management and control of the board of administration are not placed in the unclassified service by section 8 of the civil service act, and that the practicability of holding competitive examinations of applicants for such positions shall be determined by the state civil service commission.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

959.

BUDGET COMMISSIONER—APPROPRIATION BILL—APPENDIX TO APPROPRIATION BILL.

The auditor of state is authorized under section 3 of the budget bill, 104 O. L., 64, to require all departments of the state government to conform to and follow in their disbursements, the subclassifications of the appendix to house bill No. 47, which is a part of the law, but he is not authorized to require the departments to follow the disbursements set out in their estimated budget, filed by the budget commissioner.

COLUMBUS, OHIO, May 23, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—On February 27th you requested me to advise you as to the following questions:

> "The appropriation bill for the year 1914, enacted by the special session of the general assembly, separates all grants to the various state boards, commissions and departments into two general classifications, 'Personal Service' and 'Maintenance.' Included in the bill as passed, and following the general classification, is an appendix which contains a subclassification of items for maintenance.
>
> "Is the auditor of state authorized by this act to require all departments of the state government to conform to and follow in their disbursements during the appropriation year, this appendix subclassification?
>
> "A certified copy of the detailed requests made by the various departments to the budget commissioner has been filed with the auditor of state. This gives specific amounts for each officer and employe for personal service, but this detailed matter as to personal service is not included in the appropriation bill as passed by the general assembly and certified to this department. Has the auditor of state any authority to require departments to follow this classification in their expenditures for personal service?"

I quote the following provisions of the appropriation bill referred to, found in 104 O. L., 64:

> "Section 3. A detailed and itemized budget of the several departments, institutions, boards and commissions of the state is attached hereto as an appendix. The moneys appropriated in section 1 of this act under the general headings of 'Personal Service,' 'Maintenance,' or under like designations, each department, institution, board or commission, shall be and constitute the summary controlling account, and shall be expended only in accordance with such detailed classifications as are provided in said budget, and as provided in section 5 of this act, except as hereinafter in this section provided.
>
> "Copies of this said budget shall be certified by the secretary of state and delivered, one to the governor and one to the auditor of state.
>
> "Authority to expend the moneys appropriated in section 1 of this act, otherwise than in accordance with detailed classifications of the said budget, but within the same summary controlling account, may be granted to any

such department, institution, board or commission by a board consisting of the governor, and any competent disinterested person to be appointed by him for such purpose, the chairman of the finance committees of the house of representatives and the state respectively, the attorney general, and the auditor of state. Said board may, upon the application made to it in writing by a two-thirds vote of all members, authorize moneys set aside under any detailed classification of the budget of such department, institution, board or commission, to be expended for any purpose within the purview of any other detailed classification within the same summary controlling account thereof.

"In case of any variance between the amount of any summary controlling account and the aggregate amount of the corresponding detailed classifications in said budget the board provided for herein shall, with the advice and assistance of the department, institution, board or commission affected thereby, adjust the amounts of the detailed classifications so as to correspond in the aggregate with the corresponding summary controlling account.

"The governor, or the person appointed by him, shall be president, and the auditor of state shall be secretary of the board provided herein. The secretary shall keep a complete record of all the proceedings. All actions of the board shall be certified in duplicate by its secretary to the governor and to the auditor of state.

"All meetings of the board shall be open to the public.

"The necessary expenses of the chairman of the senate and house finance committees, while engaged in their duties as such members, shall be paid from the fund for expenses of legislative committees upon itemized vouchers approved by the board.

"Section 5. No money appropriated in section 1 of this act shall be drawn except in accordance with the detailed classifications of the budget of authorized expenditures, and upon a requisition or voucher presented to the auditor, approved by the head of a department or by the trustees of an institution or by the members of a board or commission, or by an officer or employe of such department, institution, board or commission, specially designated by resolution or order to approve and present such requisition or voucher, a copy of which resolution or order shall be filed with the auditor of state. Such requisition or vouchers shall set forth, in itemized form and specify the budgetary classification of, the service rendered, or material furnished, or expenses incurred, and the date of purchase, and time of service, and showing that competitive bids were secured or that it was an emergency requiring purchase; and all institutions, boards, commissions and departments to which appropriations are herein made shall render to the auditor of state an itemized account of such receipts and expenditures, as may be required by the auditor of state; and such institutions, boards, commissions or departments shall be subject to inspection by the auditor of state; and it shall be the duty of the auditor of state to see that these provisions are complied with."

These sections, together with the general powers of the auditor of state, as fixed by statute, clearly authorize him to require all departments of the state government for whose use appropriations are made by the remaining provisions of the act to conform to and follow the subclassifications of the appendix of house bill No. 47, which is a part of the law, made so by the provisions of section 3. This statement, however, is subject to qualifications inasmuch as section 3 itself provides a method by which the detailed classifications of the budget may be changed

within the same summary controlling account on the approval of the board therein provided for. This procedure, however, is the only method by which a department may be relieved of the obligation to conform its disbursements to such subclassifications as are set forth in the appendix.

Subject, then, to the qualification above stated your first question is to be answered in the affirmative.

Your second question must be answered in the negative except insofar as the appendix to the appropriation bill makes the distinction between "Personal Service A-1," and "Personal Service B-1," that is to say between fixed salaries and wages. A department, for the use of which both classes of personal service appropriations are made, can expend for salaries only the amount appropriated for "Personal Service A-1" and for wages only the amount appropriated for "Personal Service B-1," unless the proportions of the aggregate appropriation for personal service are changed as provided in section 3 of the appropriation bill already quoted, (and in the absence, of course, of an allowance by the emergency board); but within the item for salaries, for example, the department may disburse its appropriation as the head thereof seems best until the gross amount is exhausted, except as to salaries fixed by law. It need not conform to the specific requests made to the budget commissioner. These requests are no part of the appropriation law and bind no one. Accordingly it follows that the auditor of state may not require a department to conform its salary expenditures to the budget requests referred to in your second question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

960.

DEPUTY STATE SUPERVISORS OF ELECTIONS—PRIMARY ELECTIONS—REGISTRATION CITY—COMPENSATION.

The compensation to be paid to members and clerks of the board of deputy state supervisors of elections for conducting primary elections as provided for in section 4990, General Code, shall be paid by the county in the same manner as the compensation fixed by section 4822, General Code. No part of such compensation is paid by the registration city.

COLUMBUS, OHIO, May 28, 1914.

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

GENTLEMEN:—Under date of May 11, 1914, you inquire:

> "We respectfully request your consideration of the apparent conflict in opinion rendered by your department relative to the payment of the salaries of members and clerk of the boards of deputy state supervisors of elections for their services in primary elections, as found in opinions dated February 27, 1912, and March 28, 1914. We would more particularly refer you to that portion of the opinion of February 27, 1912, found at the bottom of page 6 and on page 7 following; also the last two paragraphs of the opinion of March 28, 1914.
>
> "We now desire to know, in order to give definite instructions to our examiners, whether or not a registration city is required by law to pay

any portion of the said salaries, and if so what method is to be employed in making subdivision between the city and the county?"

Section 4990, General Code, fixes the compensation per precinct to be paid the members and clerk of the boards of deputy state supervisors of elections, and section 4991, General Code, prescribes how it shall be paid.

Section 4991, General Code, as amended in 103 Ohio Laws 510, provides in part:

"All expenses of primary elections, including cost of supplies for election precincts and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, shall be paid in the manner provided by law for the payment of similar expenses for general elections * * *."

The provision above quoted was not changed by the amendatory act of 103 Ohio Laws, 510. What expenses of general election are similar to the compensation paid the members and clerk of these boards for conducting primaries?

In the opinion to you of March 28, 1914, it was held that the compensation to be paid by virtue of sections 4990 and 4991, General Code, should be paid by the county, and should not be charged back. In this opinion no consideration was taken as to the division of this expense between a county and a registration city. The sole question was as to the authority to charge back under section 4991, General Code.

In the opinion of February 27, 1912, it was held that in counties having no registration city, this compensation was paid by the county, and as to counties having a registration city or cities, this compensation was to be prorated between the county and the registration city in the same proportion as such county and city paid the compensation to such members and clerks under sections 4822 and 4942, General Code. In the opinion of March 28, 1914, section 4942, General Code, was not taken into consideration, and it was not intended by this opinion to overrule the former holding.

However, you have pointed out the difficulties which have confronted your department in putting into operation the rule laid down in the opinion of February 27, 1914, and the question will be reconsidered.

In reaching the conclusion in the opinion of February 27, 1912, the words "similar expenses for general elections" contained in section 4991, General Code, were in effect construed to apply to the compensation authorized by section 4822 and 4942, General Code.

Section 4822, General Code, provides:

"Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant

upon the county treasurer for the amount thereof, and the treasurer shall pay it."

This section does not specifically say that this compensation is paid for conducting elections, but it is placed under the chapter entitled "Supervision of Elections," and it is applicable alike to all counties in the state. The compensation authorized by this section is apparently for services in conducting elections.

Section 4942, General Code, provides:

> "In addition to the compensation provided in section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall receive for his services the sum of five dollars for each election precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk under this section shall in no case be less than one hundred and twenty-five dollars each year. The additional compensation provided by this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board."

This section is placed under the chapter entitled "Registration of Electors," and is paid only in counties having a registration city, and only for the precincts in such registration city, while it is not so specified in the section, this compensation is evidently provided for the extra services required in registering voters.

The compensation authorized by section 4990, General Code, is for services "in conducting primary elections." This section reads:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

In the Mahoning county case, to which you refer and which is reported in the Ohio Law Reporter of April 20, 1914, as State ex rel. vs. Hogg, County Auditor, Circuit and Appeals, page 380, was an action in mandamus to require the county auditor to draw a voucher for two dollars for each precinct in the county for the members of the boards of elections. The writ was allowed and the effect of the decision was to require the county to pay the entire compensation allowed under section 4990, General Code.

Mahoning county has a registration city, but no question as to a division of this compensation between the registration city and the county was considered by the court. Therefore this opinion is not an authority upon the question now under consideration.

It is evident that the compensation paid by virtue of section 4942, General Code, is for services for conducting registrations, and that the compensation paid by section 4822, General Code, is for services in conducting elections. Section 4990,

General Code, specifically provides that the compensation therein provided is for services "in conducting primary elections." In conducting primary elections, it is necessary to make provision for registration of electors and this is specifically required by section 4975, General Code.

The holding that this compensation should be prorated between a county and a registration city, in the opinion of February 27, 1912, was upon the theory that inasmuch as registrations were required for primaries, it was just and equitable that the registration city should pay a part of the compensation for conducting primaries in such registration city. This was based upon the fact that under section 4942, General Code, the registration city pays all the compensation for conducting registrations, and under section 4822, General Code, the county paid all the compensation for conducting elections.

This division, however, is unfair to the city. The compensation per precinct for conducting primaries is the same whether registration is required in such precinct or not. As to the other compensation paid these members and clerks, that fixed by section 4822, General Code, is the same in all precincts in the county, while that fixed by section 4942, General Code, is limited to the precincts in the registration city. Under these two sections the city taxpayers pay their proportion of the compensation fixed by section 4822, General Code, and all of the compensation fixed by section 4942, General Code.

In prorating the compensation for primaries the county would be required to pay two dollars per precinct for precincts outside of a registration city, and only a part of two dollars per precinct for the precincts in the registration city, the remainder would be paid by such city. The result is that the city taxpayers would be required to pay their proportion of the amount paid by the county, and also the part prorated to the city.

The statutes are not free from doubt as to the proper construction, yet the above inequitable operations of prorating the compensation leads me to the conclusion that in applying the words "similar expenses for general elections" as used in section 4991, General Code, to the compensation of the members and clerks of the boards of deputy state supervisors of elections, they must be construed to apply to such compensation for conducting elections and not to the compensation fixed for services in registering electors.

The compensation for conducting elections is paid by the county by section 4822, General Code, and therefore, the compensation for conducting primaries as authorized by section 4990, General Code, is also paid by the county, whether such county has a registration city or not, and is not charged back to the political subdivision.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

961.

BANKS AND BANKING—ARTICLES OF INCORPORATION—BRANCH BANK.

A bank incorporated under the laws of Ohio may operate a branch bank in a particular city, village or township, named in its articles of incorporation, provided such bank is operated as an integral part of the corporation and the books of the corporation at all times show its financial situation in such manner as to make it unnecessary for an examiner of the banking department to make separate examination of the branch or branches.

COLUMBUS, OHIO, May 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have asked me to amplify my opinion rendered to you on June 16, 1913, relative to the establishment of branch banks by state banks, either within or outside of the corporate limits of the city or village named in the bank's charter as its principal place of business. In this opinion I held that branch banks could not be established, either within or without the corporate limits of the city, village or township where the bank is located, and you now ask whether this inhibition would apply to branch offices of a bank operated in the corporate limits of the city, village or township named in the articles of incorporation of the bank as the place where its business is to be transacted, such branches or branch offices having no independent capital, offices or books, and being in reality an integral part of the bank proper; controlled by the same board of directors; and the books of the main bank showing at all times the exact status of the assets, business and transactions of the bank as a whole.

Section 9703 of the General Code, which prescribes the form of articles of incorporation to be subscribed and acknowledged by persons desiring to incorporate a banking company, provides:

> "(a) The place where its business is to be transacted, designating the particular city, village or township."

This paragraph was a part of section 2 of the Thomas act, 99 O. L., 269. As originally passed it provided:

> "(b) The city, village or township where its principal office is to be located, or where its principal business is to be transacted."

Prior to the passage of the Thomas act no question had ever been raised as to the right of banks to establish branches in the cities or villages in which they were located, and in almost all the large cities of the state such branches were established and are still in operation.

Since the passage of said act, my predecessor, Hon. U. G. Denman, held that branch banks could not be established (see opinions of attorney general 1910-1911 at page 565), and I came to the same conclusion in the opinion to which I have above referred. This opinion I think is correct. The statute clearly provides that the business of a bank incorporated under the laws of Ohio must be transacted in the particular city, village or township named in its articles of incorporation; and by section 724 of the General Code it is made your duty to ascertain that such corporation is conducting its business at the place designated in its articles of incorporation. This clearly forbids the establishment of branches outside the limits of

the particular city, village or township named. But it will be noted that there is nothing in the sections which I have quoted, nor, so far as I know, in any law of Ohio, which provides that the business of such a corporation must be transacted at a particular office or banking house in such city, village or township, and nowhere else.

Therefore, if the business of the corporation is transacted within the limits of the city, village or township named in its articles of incorporation, as an entirety, controlled by one board of directors and with its assets, liabilities, earnings and expenses combined on one set of books, so that its books and assets located at one place, would at all times be accessible for the purposes of examination, and would show at all times its exact financial condition; then it seems to me the law would be complied with; and if branch banks or offices can be operated in the same city, village or township in such manner as at all times to compose an integral part of the corporate entity, and in no way a separate or distinct institution, then there is nothing in our laws to prohibit their establishment.

The certificate of organization required from persons desiring to establish a national bank, under the laws of the United States, is quite similar to the articles of incorporation required by our laws. The United States statute (section 5134) provides as to the place of location of the proposed bank.

> "(2) Place—Second—The place where its operations of discount and deposit are to be carried on, designating the state, territory, or district, and the particular county and city, town or village."

but the United States law also provides, section 5190,

> "The usual business of each national bank association shall be transacted at an office or banking house located in the place specified in its organization certificate."

Under section 5190, above quoted, and not under section 5134, it has been held that a national bank cannot maintain branches. This holding is made expressly upon the provisions of section 5190, and there is no similar provision in our law, and so far as I have been able to ascertain, it has never been held by the comptroller of currency nor by the courts, that section 5134 providing for the place where the business of a bank is to be transacted, inferentially prohibits the establishment of branch banks; the inference seems to be that were it not for section 5190, branch banks might be established.

My opinion, therefore, is that there is nothing in our laws which would prohibit a bank incorporated under the laws of Ohio from operating a branch in the particular city, village or township named in its articles of incorporation, provided such branch is operated as an integral part of the corporation; and provided the books of the corporation at all times show its financial situation in such manner as to make it unnecessary for an examiner to make a separate examination of the branch or branches; but that such banks cannot establish branches of any kind outside the limits of the particular city, village or township named in the articles of incorporation, nor within the limits of such city, village or township, if such branch in any manner, except physical location, is separate or distinct from the main institution.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

962.

SCHOOLS—TOWNSHIP BOARD OF EDUCATION—BOXWELL-PATTERSON GRADUATE—TUITION.

A township board of education not maintaining a high school is not required to pay the tuition of a Boxwell-Patterson graduate who received a diploma from said township board of education, who has moved with his parent into a village school district, provided his parents have an actual residence in such village. The mere fact that the father of the pupil holds a voting residence in the township, if he has an actual residence in the village would not require the township to pay the tuition.

COLUMBUS, OHIO, May 28, 1914.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under date of January 10, 1914, you submitted a communication to this department containing the following statement of facts:

"I desire to submit the following: A Boxwell-Patterson graduate receives a diploma from York township board of education of Van Wert county, Ohio, and before he enters a high school he and his parents move into the village of Venedocia, which village is in York and Jennings townships, Van Wert county, Ohio; the pupil and his parents reside on the York township side of the Venedocia school district, the father of the boy being the owner of a farm in York township still votes in the township, and continues to hold his residence in the township, and that he moved to Venedocia for the sole purpose of sending his boy to Venedocia high school. These circumstances took place about three years ago, the father at that time purchasing a home within the village school district of Venedocia and has since resided there, and his son who holds the Boxwell-Patterson diploma has during that time resided with the father and attended the Venedocia high school.

"During the first and second years he attended the Venedocia high school, the York township board of education paid his tuition to the Venedocia board of education under and in accordance with an opinion rendered by former prosecuting attorney O. W. Kerns. This year the board of education of York township have refused to pay the tuition by reason of an opinion to that effect having been given them by me."

You further inquire as follows in reference thereto:

"Under the above statement of facts, is the board of education of York township liable for the pupil's tuition?"

In reply thereto section 7747 of the General Code provides as follows:

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

In an opinion which was rendered by this department to the Hon. D. W. Murphy, prosecuting attorney of Clermont county, under date of July 22, 1912, appears the following statement of facts:

"A Patterson graduate in Miami township, Clermont county, Ohio, attended the Milford, Ohio, school for three years as such graduate, gave due notice to the Miami township school board, and the Miami township school board paid her tuition for three years at the Milford high school.

"In March of her third year in the Milford school she moved from Miami township to Owensville special school district in Stone Lick township, Clermont county, Ohio. She continued from March to June to go to the Milford school which was her third year at that school, the Milford school maintaining a four years' course. In the following fall she again attended the Milford school for her fourth year, being then a resident of the Owensville school district in Stone Lick township, there being maintained by the Owensville school board a high school having three years' course. She did not notify the Owensville board of her attendance at the Milford high school for the fourth year. After she attended the Milford school and graduated therefrom the Owensville board of Stone Lick township refused to pay her tuition at the Milford school on the ground, first, that she had never gone to the Owensville school, second, that she was not a graduate of Stone Lick township, and, third, that she gave no notice of attending the Milford school during the fourth year.

"The board of education of both the Milford school in Miami township where she attended high school, and the board of education of the Owenville school where she resided, have requested an opinion from me as to who is liable for the payment of her tuition."

Said opinion in reference to the foregoing statement of facts, cites and comments upon section 7747 of the General Code, supra, as follows:

"After said graduate removed from Miami township where she received her diploma, to the Owensville school district, she lost her legal school residence in said township.

"It is to be noted that said section 7747 of the General Code specifically states that the board of education is only required to pay the tuition of pupils holding diplomas, and residing in township or special districts *in which no high school is maintained and in which such pupils have legal school residence.*"

The conclusion contained in said opinion is as follows:

"For the reason herein stated, I am of the opinion that the school board of Miami township is not liable the tuition of the said graduate for and during the time she attended the Milford high school after she removed from said township."

Furthemore, section 7681 of the General Code, as amended by the 80th general assembly, April 20, 1913, and approved May 9, 1913, and found at page 897 of the 103rd volume of Ohio Laws, provides as follows:

"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates

of a county or district children's home or orphans' asylum located in such a school district but the time in the school year at which beginners may enter upon the first year's work at the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

It is to be noted that said section contains the specific provision to the effect that the schools of each district shall be free to all youth between six and twenty-one years of age, *who are children, wards or apprentices of actual residents of the district.*

The provision so contained in this section seems to apply to the situation as set forth in the statement of facts contained in your inquiry for the reason that the particular people inquired about are actual residents in the Venedocia school district and the fact that the parents, or rather the father, owns a farm in York township and still votes in said township, does not in my judgment alter or change the said provision contained in said section 7681 of the General Code, supra. In other words, while the parent of the child in question still has a legal residence in York township for the purpose of voting, nevertheless, his actual residence under the facts stated in your inquiry, is within the Venedocia school district and this entitles his son to attend the Venedocia school free of charge, provided he is within the age of six and twenty-one years.

For the foregoing reasons, I am of the opinion that the board of education of York township is not liable for such pupil's tuition while so attending the schools of Venedocia school district.

This opinion is written in the assumption that the actual residence of the parents of the scholar has been established in the Venedocia district not for the mere purpose of permitting said children to attend in such school district without paying tuition, such residence only continuing during the school term or part thereof.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

963.

STATE PLUMBING CODE—PRIVATE DWELLING—PLUMBING RESOLUTIONS—MUNICIPAL BOARD OF HEALTH—PLUMBER'S LICENSE.

1. *The state building code does not cover private dwellings, therefore, there are no state plumbing resolutions in regard to private dwellings. To regulate plumbing in private dwellings in a city or in a village, not having a building department, it is necessary under section* 4420, *General Code, that the board of health pass resolutions governing the same.*

2. *Council of a municipality has a duty under section* 4457, *General Code, which may be compelled by mandamus to make appropriations for municipal board of health expenses which would include expenditures for publishing regulations and for the salary of plumbing inspector.*

3. *Under sample regulations submitted, a man could do plumbing in his own residence without a license, but would be required to secure a permit and be subject to further requirements with respect to inspection, etc.*

COLUMBUS, OHIO, May 28, 1914.

DEAR SIR:—Under date of April 29th, you submit the following communication:
HON. CHARLES W. CHEW, *City Solicitor, Mansfield, Ohio.*

"I am sending you a matter that was put up to me, as city solicitor, by the board of health of this city.

"The plumbers of this city are agitating the matter of the appointment of a plumbing inspector for the city.

"It is my opinion that the Code is not broad enough to cover the inspection of private residences and that it only applies to buildings that are mentioned, and that if a plumbing inspector was appointed he would be without authority to act in case of private residences. However, I would like to have your opinion on this matter before we act."

Enclosed therewith you sent a copy of a list of inquiries from the board of health with respect to their powers under a sample regulation furnished said board by the state board of health. A copy of this ordinance was enclosed with your letter.

Many of the inquiries submitted by the board of health overlap as regards the substance covered by them. It seems that primarily the board of health desires to know whether or not under the sample regulation the right and power is conferred to inspect and supervise plumbing in private residences. This inquiry is prompted in the main by section 7 of the sample regulation, which section is as follows:

"The inspector shall be notified by the person doing same, when any plumbing work is ready for inspection. All parts of every plumbing system shall be made perfectly gas tight. All soil, waste and vent pipes when placed in position shall be tested by the water test in the presence of the inspector *All plumbing systems when completed, and before being used, shall be tested by the water test* in the presence of the inspector, and if he is satisfied that the work is done *in accordance with the laws of the state* or *the rules and regulations of the board of health,* he shall issue a certificate of approval; but otherwise shall disapprove same, and said plumbing system shall not be put to any use until they have been altered as prescribed by him, and received his approval. All plumbing work shall be left uncovered and convenient for inspection, until examined and approved by the inspector."

Under section 3637 of the General Code municipalities are empowered to provide for the licensing of plumbers, and under section 3639 of the General Code they are authorized to regulate by ordinance the use, control, repair and maintenance of buildings used for human occupancy or habitation * * *, the mode and manner of occupancy, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof.

Under section 4420 of the General Code, it is provided that except in cities having a building department or otherwise exercising the power to regulate the erection of buildings, the board of health may regulate the location, construction and repair of water-closets, privies, cesspools, sinks, plumbing and the drains. In cities having such departments or exercising such power, the council by ordinance shall prescribe such rules and regulations as are approved by the board of health, and shall provide for their enforcement.

Under section 4421 the board of health is also given power to regulate plumbing, drains and other places where dangerous or offensive substances are or may accumulate; and under the same statute the board may prosecute for failure to have plumbing systems maintained in a sanitary and wholesome condition.

Under section 4413 of the General Code a municipal board of health is empowered to make such orders and regulations as it deems necessary for the public health, the prevention or restriction of disease and the prevention, abatement or suppression of nuisances; and under this statute orders and regulations intended

for the general public must be advertised, recorded and certified as are ordinances of municipalities, and the record of such are to be given the same effect in the courts as is given ordinances.

Under these provisions it is clear that the board of health of a municipality, where a building department is not maintained, or where the power to regulate the erection of buildings is not otherwise exercised, is empowered to enact rules and regulations regulating the licensing of plumbers, and providing for the inspection of plumbing systems with a view to compelling such systems to be installed in accordance with the rules laid down by the board or by the state laws. It is needless to say that where the state itself has prescribed a restriction or a requirement the law of the state takes precedence, and any order or regulation of a municipal corporation or board of health in conflict therewith would be to the extent, at least, of such conflict, invalid.

Coming then to the sample regulation submitted by the state board, under the provisions above referred to, it will not be disputed that if your city has no building department, and is not otherwise exercising the regulation of building construction, the board of health is empowered to pass the sample regulation submitted. It is manifest, however, that the regulation existing for and of itself alone, would be very incomplete in its terms. It is clear from the terms of this ordinance that all persons engaging in the business of plumbing in the city will be required to procure licenses (section 1), and that no plumbing work may be done in said city (with certain exceptions in the nature of repairs or leaks) without a permit being first issued therefor by the said board of health, (sections 3 and 8), and that such permit will not be issued until suitable plans and a description in duplicate of the work to be done has been submitted to the inspector in plumbing and approved by him.

It is clear that these provisions have a direct and undoubted application to all manner and forms of plumbing upon buildings of every class. A doubt arises, however, with respect to the construction of section 7 above quoted, pertaining to the certificate of approval of the plumbing inspector. Under this section it is clear that he may not approve until all parts of every plumbing system are made perfectly gas tight and have been subjected to the water test. The further prescription of this section, however, "that he shall be satisfied that the work is done in accordance with the laws of the state or the rules and regulations of the board of health," is under the present condition of affairs in the city very indefinite and unsatisfactory as regards private dwellings. It has always been regarded as settled by this department that the state building code has no application to private dwellings. The inspector, therefore, with reference to the inspection of such has no guidance whatever so far as state laws are concerned, and inasmuch as your board of health have as yet passed no regulations in this connection, it is clear that this part of section 7 is of absolutely no force and effect and can have no bearing whatever with reference to private dwellings. The answer is that it is necessary for the board of health to prescribe such rules and regulations as are thought desirable with respect to the installation of plumbing in private residences. Until this is done the board of health in this connection will have only such powers as are granted by sections 4420, et seq., of the General Code, when the plumbing in question amounts to a nuisance or may be regarded as dangerous to life or health.

It is further desired to know how the expense of paying for publication of regulations by the board of health is to be provided for and met. Section 4451 of the General Code provides as follows:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board,

the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

By this statute it is made the duty of the council to make the necessary appropriations to meet expenses lawfully incurred by the board of health, and council may be compelled to comply with this duty by means of mandamus if necessary, either by making an appropriation if the funds are available, and if not, by making a levy to provide the same. The same applies with reference to the provisions for the salary of the plumbing inspector.

Lastly you inquire whether under this sample regulation, the man may do his own plumbing in his private residence without having a plumbing license, or whether he must hire a licensed plumber. The sample regulation in question under section 1 requires only those persons, firms or corporations to obtain a license who engage "in the business of plumbing." A man installing plumbing in his own residence, and not doing such work for others for compensation, is not engaged in the business of plumbing. I must conclude, therefore, that under this regulation a man would not *ipso facto* be prevented from doing plumbing work in his own residence without a license. Such an individual, however, would not be exempted from the other requirements of this ordinance with respect to the obtaining of a permit, the necessity of approval by the plumbing inspector, and compliance with all rules and regulations of the board of health and the state law.

Whilst the questions submitted to you by the board of health are about sixteen in number, I have endeavored to reduce the same to the above answers. I trust that I have, in substance, covered the entire ground of the inquiries submitted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

964.

CIVIL SERVICE—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—CLASSIFIED SERVICE.

The state examiners appointed by the bureau of inspection and supervision of public offices are within the classified service and subject to examination, unless the civil service commission shall determine that as a matter of fact it is impracticable to determine the merit and fitness of state examiners by competitive examination.

COLUMBUS, OHIO, May 28, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of May 8, 1914, you inquire:

"The bureau of inspection and supervision of public offices has submitted to us the question as to whether or not the state examiners in that bureau are within the classified service, and whether or not they are subject to examination as provided by the state civil service act."

The bureau of inspection and supervision of public offices is governed by the provisions of sections 274 to 289, both inclusive of the General Code.

Section 274, General Code, provides:

"There shall be a bureau of inspection and supervision of public offices in the department of the auditor of state which shall have power as hereinafter provided in sections two hundred and seventy-five to two hundred and eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state officers including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district, or public institution in the state of Ohio. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding three deputy inspectors and supervisors, and a clerk. No more than two deputy inspectors and supervisors shall belong to the same political party."

Section 276, General Code, authorizes the appointment of assistants who shall be known as "state examiners." Said section reads:

"The chief inspector and supervisor shall appoint such assistants as he deems necessary, who shall be known as state examiners, and such other assistants as he deems necessary, who shall be known as assistant state examiners. State examiners and assistant state examiners shall receive the following compensation for each day necessarily employed by them in the discharge of such duties as may be assigned to them: (Here follows amount of compensation.)

Section 284, General Code, as amended in 103 Ohio Laws, 506, provides:

"The bureau of inspection and supervision of public offices, shall examine each public office. Such examination of township, village and school district offices shall be made at least once in every two years and all other examinations shall be made at least once a year, except that the offices of justices of the peace shall be examined at such times as the bureau shall determine. On examination, inquiry shall be made into the methods, accuracy and legality of the accounts, records, files and reports of the office, whether the laws, ordinances and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with."

By virtue of this section as amended the bureau is required to make the examination. Prior to this amendment this section provided in part:

"The chief inspector and supervisor, a deputy inspector and supervisor, or a state examiner, shall examine the condition of each public office, * * *"

By virtue of this section prior to its amendment, the state examiner was required by statute to make the examination, but by the amendatory act the bureau of inspecion and supervision of public offices is required to make the examination. The state examiner now makes his examination by virtue of the authority granted to the bureau, and not by authority granted directly to him.

The statute designates these state examiners as assistants of the chief inspector and supervisor of public offices. In making a report of their examination they in fact certify to it in their own names. They are assistants within the meaning of subdivision 7 (a) of section 8 of the civil service act, section 486-8, General Code, which reads:

"Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk."

They are not deputies within the meaning of subdivision 8 (a) of said section 8, which reads:

"The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

By virtue of section 274, General Code, supra, the chief inspector and supervisor of public offices is authorized to appoint a clerk, and section 275, General Code, fixes the salary of such clerk.

Section 2249, General Code, fixes a salary for the chief clerk of the auditor of state as follows:

"The annual salaries of the appointees herein enumerated of elective state officers shall be as follows:

"Deputy auditor of state, three thousand dollars; chief clerk to auditor of state, two thousand four hundred dollars; deputy inspectors and supervisors of public offices, each, two thousand five hundred dollars."

Section 271, General Code, provides:

"Not less than six times each year, the financial transactions of each public institution of the state, including the monthly financial statements required by law to be filed by the officers thereof with the auditor of state, shall be thoroughly and critically inspected and examined. Such further inspection and examination shall be made as is deemed necessary by the governor and auditor of state."

These duties are similar in character to those required of the chief inspector and supervisor of public offices.

The duties required by the auditor by section 274, General Code, wherein he is designated as the chief inspector and supervisor of public offices, do not give him an additional office, but this section adds new duties to the office of auditor of state.

The auditor of state as an elective and principal executive officer would be entitled under subdivision 7 (a) of section 8 of the civil service act, to two clerks or assistants in the unclassified service, and the auditor of state may designate such positions. He may select two state examiners, or two clerks, or one of each.

However, there are more than two state examiners, and these are not placed in the unclassified service by section 8 of the civil service act, but are in the classified service, unless taken out by the state civil service commission because it is impracticable to determine the merit and fitness of applicants by competitive examinations.

You call my attention to the provisions of section 285, General Code, as amended in 103 Ohio Laws, 506, which reads:

"The chief inspector and supervisor, each deputy inspector and each state examiner, shall have such authority to issue subpoena and compulsory process, to direct service thereof by a sheriff or constable, to compel the attendance of witnesses and the production of books and papers before him,

to administer oaths, and to punish for disobedience of subpoena, refusal to be sworn, or to answer as a witness, or to produce books and papers, as is conferred upon officers authorized to take depositions. Sheriffs and constables shall receive the same fees as for like services in similar cases, and witnesses shall receive the same fees as are allowed in the common pleas court. The chief inspector, and, subject to his approval, each deputy inspector and each state examiner, shall likewise have authority to employ such experts or other assistants as may be necessary to disclose the facts concerning any matter under investigation, and fix their compensation."

The employment of experts and assistants by the state examiner is subject to the approval of the chief inspector.

The state examiners are authorized to subpoena witnesses, compel their attendance and may punish for disobedience of subpoena, refusal to be sworn, or for refusal to answer questions or furnish books and papers. This power is granted to enable the state examiner to make a thorough examination of the public offices and is an incident to their power to make an investigation. Their main duties are to examine and investigate. The examination of witnesses is a part of that investigation.

The case of People vs. Kraft, 145 App. Div. (N. Y.), 662, which was affirmed without report in 204 N. Y., 626, concerned examiners of stock transfers. The civil service commission placed the positions in the classified service and it was sought to have the court place them in the unclassified service on the ground that as a matter of law it was impracticable to determine the merit and fitness of applicants by competitive examinations. The action of the civil service commission was sustained.

Smith, P., J., of the appellate division, defines their duties as follows:

"These examiners are in fact secret service men. Their sole duties are of a detective nature, involving not only thorough knowledge of bookkeeping, but a general commercial experience, which will enable them to detect the many devices by which this law may be sought to be evaded. Not only extensive business experience, but a keen acumen is a necessary qualification for the successful performance of duties which are unusually exacting."

The duties of these examiners are very much like the duties of the state examiners now under consideration.

Section 15 of the civil service act, section 486-15, General Code, as to promotions, must be considered. This section reads:

"Vacancies in positions in the competitive class shall be filled so far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the competitive classified service, and for making promotions in the competitive classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service; and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest of the service so to fill such vacancies. All examinations for promotion shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promo-

tion, the commission shall certify to the appointing power only the name of the person having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations."

It will be observed that efficiency and seniority of service is an important factor in examinations for promotions.

Section 276, General Code, authorizes the appointment of assistant state examiners, and who are in fact assistants to such state examiners. These assistants are in the field and are acquiring knowledge which should fit them for the positions of state examiners. One of the purposes of the civil service act is to secure and retain the benefit of the experience gained in office or in the employ of the state.

It is therefore my conclusion that it cannot be determined as a matter of law that it is impracticable to hold competitive examinations of applicants for the positions of state examiners in the bureau of inspection and supervision of public offices. The question of the practicability of examinations should be determined by the state civil service commission.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

965.

DEPUTY ASSESSOR—CLERK OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—TAX COMMISSION.

A deputy assessor cannot be appointed as clerk of the board of deputy state supervisors of elections, without first resigning as deputy assessor, for the reason that under a rule of the tax commission the term of office of deputy assessor has been prescribed as indefinite or indeterminate, and, consequently, such term of office is not over as soon as the time within which personal property is to be assessed and passed. The law prescribes that a deputy assessor shall not hold any office of profit, except office in the state militia, and office of notary public; the clerk of the board of elections is an office.

COLUMBUS, OHIO, May 28, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 29th, submitting for my opinion thereon the following question:

"A person holding the position of clerk of the board of deputy state supervisors of elections resigned said position to accept appointment as a deputy assessor. He has now completed the work of assessing the property for the year 1914.

"*Question.* May he be reappointed as clerk of the board of deputy state supervisors of elections without first resigning as deputy assessor?

"This commission calls your attention to the journal entry fixing the time of employment of deputy assessors, which was submitted to it by your department as follows:

"'For the purposes of sections 3 and 17 of the act of April 18, 1913, G. C., sections 5581 and 5595 and with a view to avoiding difficulties under the state civil service law, it is hereby ordered that all deputy assessors shall hold their respective offices for indefinite periods of time.

"'The commission determined and fixed the subassessment districts, the number of deputy assessors to be employed in each and the time within which the work of assessing property for the year 1914 shall be completed in each as follows, to wit:'"

Your question involves consideration of the following sections of the so-called Warnes Law, 103 O. L., 786:

"Section 3. Each district assessor shall appoint such number of deputy assessors, assistants, experts, clerks and employes as may, from time to time, be prescribed for his district by the tax commission of Ohio. Such deputy assessor, assistants, experts, clerks and employes shall hold their respective offices and employments for such times as may be prescribed by the tax commission.

"Section 38. A district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or other employe of a district assessor or district board of complaints shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public.

"Section 54. The tax commission of Ohio shall, from time to time, prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with any provision of law, as may be deemed necessary respecting the manner of the exercise of the powers and the discharge of the duties of any and all officers, relating to the assessment of real and personal property and the levy and collection of taxes.

"Section 4. * * * The deputy assessor shall have and perform, under the direction of the district assessor, and in such territory as may be assigned to him by the district assessor, all powers and duties of the district assessor, except those provided for by sections 7, 8, 12, 21, 22, 23, 28, 29, 31, 32, 47, 49, 53, 58, 63, 64 and 65 of this act.

"Section 46. In addition to the duties specifically imposed by law upon district assessors, deputy assessors and district boards of complaints, they and each of them shall perform such other duties as the tax commission of Ohio in the exercise of its powers may from time to time direct, and in the discharge of such duties they and each of them shall exercise all and singular the powers in them vested by this act."

Except in section 54, supra, I find no authority on the part of the tax commission to prescribe the time within which the work of assessing property shall be completed. I think the power clearly exists in the commission, and raise no question as to that; I mention the point because by its order fixing the time within which the personal property shall be assessed the commission has not fixed the "period of employment" of deputy assessors within the meaning of sections 3 and 38 of the act, but has merely by order prescribed the time within which such deputies shall perform certain functions. Their term of office having been prescribed as an indefinite one by other provisions of the same order, it is clear that the deputies so employed or appointed, may at any time be called upon to furnish services either by the adoption of a new rule by the tax commission, similar to the

one fixing the time within which the assessment of personal property shall be completed, extending that time; or otherwise in a number of ways which might be imagined but need not be mentioned.

I am of the opinion that the commission's order has the effect of fixing the term of office or period of employment of a deputy assessor as indefinite; and that such indefinite duration of service is the "term of office or period of employment" contemplated in sections 3 and 38 of the act. It follows, therefore, that the deputy assessor mentioned by you must resign his office in order to accept appointment as clerk of the board of deputy state supervisors of elections.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

966.

CERTIFICATE—APPROPRIATED FUNDS—COUNTY COMMISSIONERS —RAILROAD COMPANY—GRADE CROSSINGS.

It is not necessary that a certificate of an appropriated fund be furnished when the county commissioners enter into a contract with a railroad company to make a change in grade crossings.

COLUMBUS, OHIO, May 25, 1914.

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

GENTLEMEN:—Under favor of April 18th, you request my opinion as follows:

> "Is it necessary that a certificate of the appropriated funds be furnished where the county commissioners enter into contract with a railroad company to make a change in a grade crossing?"

The statutes providing for the procedure pertinent to the alteration of a grade crossing by agreement between the county and the railroad are sections 8863-8873 of the General Code. I quote the following sections as those having an immediate bearing on your inquiry:

> "Section 8864. When it is deemed necessary by a municipality or a county to join with any railroad company or companies in the alteration or abolition of a grade or other crossing, the council of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote, by resolution, shall declare such necessity and intent, and state therein the manner in which the alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other property it is necessary to appropriate, *and how their cost is to be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done and how its cost is to be apportioned between the municipality or county and the railroad company or companies.*
>
> "Section 8866. In not less than thirty nor more than ninety days after the passage of such resolution the council or commissioners shall determine

whether it or they will proceed with the proposed improvement or not. *If it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed,* which ordinance or resolution must contain, in addition to the terms and conditions stated in such resolution, the plans and specifications of the proposed alteration and improvement, a statement of the damages claimed or likely to accrue by reason thereof, *and how their payment is to be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies, through their directors, it shall constitute an agreement,* valid and binding on the municipality or county and the railroad company or companies respectively. Such agreement shall thereupon be filed in the common pleas court of the county in which the crossing is located, for entry upon its records, whereupon it shall have the same force and effect as a decree of the court.

"Section 8867. The land or property required to make the alteration in the street or highway necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or county in the manner provided by law for the appropriation of private property for public use, and the land or property required to make the alteration in the railroad or railroads necessitated by the proposed improvement, shall be purchased or appropriated by the railroad company or companies in the manner provided for the appropriation of private property by such corporation.

"Section 8868. The cost of the construction of the improvement in the crossing, including the cost of land or property purchased or appropriated, and the payment of damages to abutting property shall be apportioned as follows: The railroad company or companies, if several railroads cross a public way at or near the same point, shall pay not less than sixty-five per cent. and the municipality or county not more than thirty-five per cent. of such cost. Within these limits the apportionment may be fixed by the agreement hereinbefore provided for."

Section 5660 of the General Code is as follows:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Under the above statutes after council, under section 8866 of the General Code, passes its ordinance determining to proceed with the improvement, the question of the cost of the improvement, and the amount apportioned between the railroad and the county have all been determined and agreed upon, the acceptance of

the ordinance determining to proceed completes the contract between the railroad and the county.

The issuance of bonds for the purpose of raising money to pay the county's portion of the cost of such improvement under section 8870 of the General Code, is done subsequent to the completion of the agreement.

It is clear, therefore, that these statutes cannot contemplate that the money is in the treasury at the time the agreement is entered into. These provisions, therefore, must be construed as an exception to the general provisions of section 5660 above quoted, requiring a certificate of the clerk with respect to the moneys in the treasury, or placed on the duplicate or in process of collection.

In support of this construction the following language of Judge Minshall in the case of Cincinnati vs. Holmes, 56 O. S., 104, may be presented:

> "The plain purpose of the Burns law was to prevent the incurring of an indebtedness by a municipal corporation beyond the ordinary resources of its revenue and whereby an annual excess of indebtedness will be created over these revenues. But it has not the vigor of a constitutional provision, and cannot therefore apply to a statute that not only authorizes the making of a particular kind of improvement, but also provides the mode and manner in which the funds are to be raised to defray the costs and expense of it. Under this statute the burden of the taxpayer will neither be increased nor diminished by the time when the contract is let for the work of the improvement. The making of the contract has reference, for its performance on the part of the village, to a fund to be raised by taxation and assessment, authorized by the act for the particular purpose, and which can be applied to no other. These considerations show the inapplicability of the Burns law to improvements made under a statute like the one in question. Where a contract is made to be discharged from a general fund, that may be applied to a variety of purposes, more obligations may be incurred by way of anticipation than can be discharged from it, this causing an annual deficit, to meet which increased taxation must be resorted to. Hence the wisdom of the Burns law, which in such cases requires that the money must be in the treasury, applicable to the particular expenditure before it is made. Here, however, the fund to be raised is appropriated by the statute to a particular improvement; and all taxation and assessment authorized must be limited to the costs and expenses of the improvement. All the limitations in this regard are in the statute. The bonds to be issued shall not exceed twelve and a half per centum of the total tax valuation of the property of the village; shall be made payable in thirty years and bear interest at a rate not to exceed four per centum.
>
> "It is a rule observed constantly in the construction of statutes, that where the general provisions of a statute conflict with the more specific provisions of another, or are incompatible with its provisions, the latter is to be read as an exception to the former"

I am, therefore, of the opinion that the certificate of the clerk is not necessary for the proceedings under these statutes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

967.

AUDITOR OF STATE—BUDGET APPROPRIATION BILL—AUDITOR'S CERTIFICATE—ASSIGNMENT OF VOUCHER.

The auditor of state does not have general power under section 5 of the budget appropriation bill to require all departments to present their vouchers for the auditor's warrant before delivering them to parties in whose favor they are drawn. The auditor of state, has the right, and it is his duty to refuse to issue a warrant in any amount on a voucher or requisition which has not been properly assigned.

COLUMBUS, OHIO, May 23, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of February 26th, requests my opinion upon the following question arising under section 5 of the 1914 appropriation bill, 104 O. L., 73.

> "Under the following section of the 1914 appropriation bill, can the auditor of state require all departments of the state government to present their vouchers for the auditor's warrant, and would the same be lawful?
>
> "Would it, under this section, be lawful for the auditor of state to refuse payment on vouchers presented by banks, unless properly assigned?"

Said section 5 is in full as follows:

> "No money appropriated in section 1 of this act shall be drawn except in accordance with the detailed classification of the budget of authorized expenditures, and upon a requisition or voucher presented to the auditor, approved by the head of a department or by the trustees of an institution or by the members of a board or commission, or by an officer or employe of such department, institution, board or commission, specially designated by resolution or order to approve and present such requisition or voucher, a copy of which resolution or order shall be filed with the auditor of state. Such requisitions or vouchers shall set forth, in itemized form and specify the budgetary classification of, the service rendered, or material furnished, or expenses incurred, and the date of purchase, and time of service, and showing that competitive bids were secured, or that it was an emergency requiring purchase; and all institutions, boards, commissions and departments to which appropriations are herein made shall render to the auditor of state an itemized account of such receipts and expenditures, as may be required by the auditor of state; and such institutions, boards, commissions or departments shall be subject to inspection by the auditor of state; and it shall be the duty of the auditor of state to see that these provisions are complied with."

As throwing light upon the interpretation of this section for the purpose of this question I refer to section 21 of the General Code, which provides as follows:

> "On or before the sixth day of each month each officer or board of the state shall furnish the auditor of state, upon blanks prepared and furnished by him, a detailed and itemized statement with the certificate of such officer or board as to the truth thereof thereto attached, of all checks or requisitions issued on behalf of such department on the auditor of state

for warrants on the treasurer of state, during the preceding month. As soon as such statements have been received, the auditor of state shall compare them with the accounts in his office, and certify to each such officer or board a list of checks or requisitions which have been presented, and the warrants issued upon the treasury for the payment of requisitions presented during the preceding month, and which do not appear upon the certified list of such officer or board. The auditor of state shall file and carefully preserve the original statement in his office, and he shall not issue his warrant on the treasurer of state for the salary of any such officer or board until the provisions of this section have been complied with."

Of course this section of the General Code is of no higher dignity than section 5 of the appropriation bill and if there is any irreconcilable inconsistency between the two, the latter would control the expenditure of the moneys appropriated by other sections of the same act, and section 21 of the General Code and all inferences to be drawn therefrom would have to be held inapplicable to the case at hand. However, I am of the opinion that no such irreconcilable inconsistency exists and that the two sections can and must be harmonized.

The inference to be drawn from section 21, standing by itself, is to the effect that a department has the right to issue a voucher to one in whose favor the department may legally create an obligation against the state, without first presenting the claim to the auditor of state for his examination and approval.

Section 5 of the appropriation law is not inconsistent with this inference except in part. The first sentence thereof provides really for two kinds of vouchers, viz., those approved by the head of a department or by the trustees of an institution or by the members of a board or commission, and those approved by an officer and employe of such department, institution, board or commission specially designated by resolution or order to *approve and present* such requisition or voucher.

The requirement of the section as to the first class of requisitions or vouchers is merely that they be "presented to the auditor." The section does not require that the presentation be made by any representative of the department, board, institution or commission; therefore to this extent the section is harmonious with the inference to be drawn from section 21 of the General Code, and any holder of the requisition or voucher to whom it has been properly assigned may make presentation, subject, of course, to audit by the auditor of state.

This means, of course, that the assignee of such a voucher takes the same subject to correction in process of audit. The requisitions or vouchers are not negotiable and no one can acquire as to them the status of a bona fide holder, and therefore, the state could in no way be damaged by reason of the failure of the department, board, officer, institution or commission to present a voucher before delivering it to the party in whose name the claim exists.

With respect to the second class of vouchers and requisitions a distinction may exist. It appears from the language of the section that if the voucher is to be approved by a designated representative of the department, board, institution or commission, such representative is to have authority both to approve and present. I express no opinion as to the exact meaning of this language, particularly as to whether or not such vouchers, so approved by a representative rather than by the head of the department are required to be presented before being delivered. I content myself merely with the remark already made to the effect that there may be a distinction between the two classes of vouchers in this respect, because what I have stated relative to the first class of vouchers is sufficient, it seems to me, to show that your first question must be answered generally in the negative. That is to say, the auditor of state does not have general power under section 5 of the

appropriation bill to require all departments to present their vouchers for the auditor's warrant before delivering them to the parties in whose favor they are drawn.

Your second question must be answered in the affirmative. While the auditor of state has the right, and it is his duty to pay a claim against the state on account of which a voucher or requisition has been issued to any person to whom, or bank to which the same has been assigned, it is the right and duty to refuse to issue a warrant in any amount on a voucher or requisition which has not been properly assigned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

968.

INDETERMINATE SENTENCE LAW—EFFECT AS TO PRISONERS SENTENCED, AFTER ITS BECOMING EFFECTIVE, FOR CRIMES COMMITTED PRIOR TO THAT TIME—HABEAS CORPUS PROCEEDINGS—POWER OF COURTS TO IMPOSE INDETERMINATE SENTENCES.

The indeterminate sentence law passed February 13, 1913, *is ex post facto and void as to prisoners sentenced after it became effective, for crimes committed prior to that date. Where the courts impose definite sentences after that date upon such prisoners, such sentences should stand regardless of the indeterminate sentence law, and such prisoners should be released on the expiration of such definite term.*

The question of the legal effect of indeterminate sentences imposed upon prisoners after May 29, 1913, *for crimes committed prior to that date should be determined by habeas corpus proceedings in view of the question of the power of the court to impose indeterminate sentences under the law.*

COLUMBUS, OHIO, June 4, 1914.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of a request for an opinion from one Chas Murray, serial No. 42149, of your institution, asking whether he is legally detained in the Ohio penitentiary. His letter states that he was sentenced by the court of common pleas of Crawford county, Ohio, to a term of one year on the ------day of July, 1913, for grand larceny, and was received at the Ohio penitentiary on the 16th day of July, 1913; that the crime for which he was sentenced was committed in August, 1912, and that after he was received at the penitentiary he was entered on the records as serving an indeterminate sentence of from one to seven years for grand larceny instead of one year as fixed by the court, and that he is still confined by the penitentiary, although the "short time" on a one year's sentence (10 months) under section 2163 of the General Code, expired May 15, 1914.

This department would ordinarily decline to pass upon any such question until it has been submitted by yourself or the Ohio board of administration, but because of the opinion rendered by this department on September 26, 1913, to you, I feel it necessary to advise you in this case without waiting for a request to be submitted in the regular manner.

The opinion referred to was written in reply to your inquiry of August 28, 1913, part of which was as follows:

> "Am I right in my understanding that where a sentence is passed subsequent to the effective date of the new indeterminate sentence law, 103 O. L., p. 29, and the commitment papers provide for a definite term of years, that the parties so sentenced are to be entered on our records as indeterminates and subject to the provisions of this law, regardless of the date of conviction?"

The opinion written in response to this inquiry held that:

> "In view of the fact that this statute (indeterminate sentence law, 103 O. L., p. 29) relates only to the sentence, the court should impose an indeterminate one, and you should enter such persons on your records as indeterminates if sentenced after the above section was in force."

While the holding of the opinion is correct when standing alone, it is incorrect when read as an answer to the question submitted by you in your letter of August 28, 1913, and I wish to substitute the following opinion for the one given under date of September 26, 1913, to which reference has just been made.

The indeterminate sentence law, passed February 13, 1913 (103 O. L., p. 29), reads:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chapter, he shall be held to the serving one continuous term of imprisonment. If through oversight, or otherwise, a sentence to the Ohio penitentiary, should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

Before the passage of this act, the courts of this state were empowered by section 7388-6 Revised Statutes, to impose general sentences to the penitentiary. In adopting the General Code, a part of these statutes was omitted and a question was raised later as to whether the change was sufficient to divest the courts of this power. In an opinion under date of March 31, 1913, this department held that such power was still in the courts. However, the courts in this state seldom imposed indeterminate sentences to the penitentiary under the old statute and I am informed that but few prisoners were received in your institution to serve indeterminate sentences until after the new indeterminate sentence law became effective, which made it compulsory on the courts to impose such general sentences. The indeterminate sentence law above quoted, besides amending section 2166 of the General Code, repealed by implication section 12374 of the General Code, which read:

"When sentencing a person to imprisonment in the penitentiary, the court shall declare for what period he shall be kept at hard labor, and for what period, if any, he shall be kept in solitary confinement without labor."

since it is clear that the court cannot make the sentence "general and not fixed or limited in duration" and at the same time comply with section 12374, supra. This section was in full force and effect on August 29, 1912, the day upon which Chas. Murray committed the crime of grand larceny for which he was sentenced to serve his prison term in the Ohio penitentiary, and the question is, should Chas. Murray, who was sentenced on the ____day of July, 1913, have been sentenced under the indeterminate sentence law passed Feb. 13, 1913, and which became effective on the 29th day of May, 1913?

Section 26, General Code, reads:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

It has been held that the commission of a crime is a cause of prosecution within the meaning of this section and that the subsequent amendment or repeal of such criminal statute does not affect the prosecution of such prior offenses.

Bergin vs. State, 31 O. S., 111.
Chinn vs. State, 47 O. S., 575.
State vs. Lawrence, 74 O. S., p. 25.

In the case of Bergin vs. State, supra, the court said at page 113:

"The phrase 'causes of prosecution' is somewhat vague, and if standing alone, its meaning might not be easily ascertainable; but when applied to criminal prosecutions, standing as it does in connection with 'causes of action in civil actions' there can be no doubt as to the sense in which it is used in this act. A statutory cause of action in a civil case, is that given by the statute and upon which the action is based. So in this statute the phrase 'causes of prosecution' must be held to mean the offense or crime defined in the statutes, and which gives rise to the prosecution."

The cause of prosecution in the case submitted by Murray was the statute defining the crime of larceny and the indeterminate sentence act in no way affected that statute. Therefore, unless arrest was made and the prosecution commenced at the time of the passage of this act, section 26 would not apply nor have any bearing on the case. However, if the arrest was made before the act began to operate, the prosecution was pending when the act became a law.

Section 12374 above quoted provides that:

"When sentencing a person to imprisonment in the penitentiary, the courts shall declare for what period he shall be kept at hard labor and for what period, if any, he shall be kept in solitary confinement without labor."

Now it has been shown that the indeterminate sentence act, passed February 13, 1913, repeals this section by implication, but inasmuch as this section relates to the remedy, its repeal cannot affect prosecutions pending before the indeterminate sentence act of February 13, 1913, became effective or operate upon prisoners arrested prior to that date for the crime for which they are now serving.

Palmer vs. State, 42 O. S., 595.

In other words, my interpretation of section 26, General Code, with respect to the indeterminate sentence law passed on February 13, 1913, leads me to this conclusion: that where prisoners in the Ohio penitentiary were arrested and charged with the crime for which they are now serving, prior to the date upon which the indeterminate sentence law became effective, viz., May 29, 1913, that law does not apply and such prisoners should have been sentenced as if such law did not exist. Other than this, section 26 has no bearing on the situation.

But aside from section 26, General Code, we must view the passage of the new indeterminate sentence law from a constitutional standpoint and determine whether or not it can operate upon all prisoners sentenced after the date it became effective, viz., May 29, 1913, or only upon those who have committed crimes since the date on which it became a law.

Article 1, section 10 of the constitution of the United States, reads:

> "No state shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver, coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

In the case of Kring vs. Missouri, 107 U. S., 221, 27 Lawyer's Edition, 505, it was held:

> "Any law is an ex post facto law, within the meaning of the constitution, passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, *alters the situation of the party to his disadvantage* and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

Section 2163 of the General Code, reads:

> "A person confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence:
>
> "(a) A prisoner sentenced for a term of one year shall be allowed a deduction of five days from each of the twelve months of his sentence.
>
> "(b) A prisoner sentenced for a term of two years shall be allowed a deduction of six days from each of the twenty-four months of his sentence.
>
> "(c) A prisoner sentenced for a term of three years shall be allowed a deduction of eight days from each of the thirty-six months of his sentence.

"(d) A prisoner sentenced for a term of four years shall be allowed a deduction of nine days from each of the forty-eight months of his sentence.

"(e) A prisoner sentenced for a term of six or more years shall be allowed a deduction of eleven days from each of the months of his full sentence.

"(g) A prisoner sentenced for a number of months or fraction of years shall be allowed the same time per month as is provided for the year next higher than maximum sentence."

This statute was rendered nugatory by the indeterminate sentence law of February 13, 1913, since definite terms in the penitentiary were dispensed with by that act and the prisoners sentenced to the penitentiary under the new indeterminate sentence law receive no deduction of time for good behavior by force of the provisions of any statute such as section 2163 above quoted. For example, a prisoner committed the crime of burglary before the passage of the indeterminate sentence law and was sentenced under it after its passage, to a term of from one to fifteen years, as provided by section 12438. Under this sentence the Ohio board of administration may keep the prisoner imprisoned 15 full years if they see fit. If he had been given a definite sentence, as was the almost universal custom prior to the enactment of the new indeterminate sentence law, under the law in force at the time the crime was committed, and the judge had given him a maximum sentence of fifteen years, he would, if his behavior in the penitentiary was good, have been entitled *as a matter of law*, to his release in nine years and six months. The new indeterminate law compels the court to impose upon the prisoner an indeterminate sentence instead of a definite one and thereby grants to the Ohio board of administration the power to compel the prisoner to serve five years and six months more than they could have compelled him to serve had he been convicted and sentenced under the definite sentence law in force at the time he committed the crime.

It seems clear to me, therefore, that the indeterminate sentence law passed February 13, 1913, "alters the situation of a party to his disadvantage" when it is made to operate upon prisoners who committed crime before it became effective; that as to these prisoners it is ex post facto and void and cannot be made to operate upon any prisoners save those who are sentenced for crimes committed on or after the 29th day of May, 1913, upon which date the indeterminate sentence law became effective.

This conclusion is supported by the case of Murphy vs. Commonwealth, 172 Mass., 264. In that case on a petition for a writ of error to reverse a sentence of the superior court by which the petitioner was confined in the state prison, it appears that the offenses of which he was convicted, were committed between July 19, 1892, and November 17, 1893, but that he was sentenced on May 28, 1896, under Statute 1895c, 504, entitled "An act relative to sentences to the state prison," which took effect on January 1, 1896. As the law stood when the offense was committed, the petitioner was entitled to a deduction for good behavior and to a permit to be at liberty for the time thus deducted on such terms as the prison commissioners should fix and subject to revocation by them. Held, that, as to the petitioner, the statute of 1895 was void as an ex post facto law, and that the case must be remanded to the superior court for sentence, according to the law as it was before the passage of the statute. The court in that case said on page 270:

"As the law formerly stood in this state, the effect of good conduct on the part of the prisoner was to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened

term * * * It would seem plain, therefore, that a subsequent statute which interfered to his disadvantage with the right of deduction for good behavior to which a convict was entitled at the time of the commission of the offense under the acts of 1857, 1858 and 1859, would have been unconstitutional and void, notwithstanding the fact that those acts related, according to their titles, to the discipline of the state prison, and to that of jails and houses of correction, and therefore appeared to pertain to prison regulation. To have taken away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been in effect to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been ex post facto. See opinion of the Justices, 13 Gray, 618; Kring vs. Missouri, 107 U. S., 221; Medley, petitioner, 134 U. S., 160; Thompson vs. Utah, 170 U. S., 343; Commonwealth vs. McDonough, 13 Allen, 581; In re Cenfield, 98 Mich., 644; Ex parte Hunt, 28 Tex. App. 361."

After a consideration, therefore, of section 26, of the General Code, and section 10 of article I of the constitution of the United States, it is my opinion that the indeterminate sentence law (103 O. L., page 29) passed February 13, 1913, and effective May 29, 1913, is to operate only upon prisoners who have committed crimes on or after May 29, 1913, the day upon which that law became effective. I would therefore advise you as follows: with respect to the sentences of prisoners received at your institution since May 29, 1913.

First. Where the court has imposed a definite sentence:

If the prisoner was sentenced on or after May 29, 1913, and the crime was committed before that date, the definite sentence imposed by the court should stand and the prisoner should be released at the expiration of his "short term" in accordance with section 2163. If a person was sentenced on or after May 29, 1913, and the crime was committed on or after that date, the definite sentence imposes by the court should be made to read upon your records as an indeterminate sentence, in accordance with the provisions of the new indeterminate sentence act, to the effect that:

"If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

Second. Where the court has imposed an indeterminate sentence:

If the prisoner was sentenced for a crime committed before May 29, 1913, he should not have been sentenced under the indeterminate sentence law (103 O. L., p. 29). But whether such sentence would be legal in view of the power of the court under the old section of the Revised Statues to impose an indeterminate sentence, is another question, and one which I think could better be settled by habeas corpus than by an opinion from this department and I would therefore suggest this as the proper proceeding to determine this question.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

969.

CHILDREN'S HOME—MAY NOT REFUSE TO RECEIVE A CHILD COMMITTED BY JUVENILE COURT, EXCEPT IN CERTAIN CASES—JUVENILE COURT—GUARDIANSHIP OF CHILDREN—DEPENDENT CHILDREN—RIGHT OF BOARD OF TRUSTEES TO CONTRACT WITH FAMILIES FOR THE CARE OF CHILDREN.

1. *The trustees of the county children's home cannot refuse to receive a child committed by the juvenile court to such home, unless such child so presented for admission is afflicted with an infectious or contagious disease.*

2. *The trustees of a children's home have the right to accept through arrangement with parents children for temporary care and custody.*

3. *In the commitment of a child to the children's home by the juvenile court, the trustees of the institution are immediately vested with the guardianship and control of the child, subject to the continuing jurisdiction of the juvenile court for the purpose of discipline and protection.*

4. *A dependent child of parents resident of the county, both of which parents have died, is eligible for admission to the county children's home, although such child is not yet one year of age. Section* 3089, *General Code, providing that a child should have resided in the county not less than one year not being one made for the purpose of placing a limitation upon the age of the child, but for the purpose of establishing residence.*

5. *The board of trustees have the legal right to enter into a contract with proper families to board and care for a child of tender years, when such children's home is not properly equipped to care for such children.*

COLUMBUS, OHIO, June 6, 1914.

HON. H. H. SHIRER, *Secretary, Board of State Charities,* 1010 *Hartman Bldg., Columbus, Ohio.*

DEAR SIR:—I have your letter of April 3, 1914, as follows:

"1. May the trustees of a county children's home refuse to accept dependent or neglected children committed by the juvenile court?

"2. Have trustees of a children's home the right to accept through arrangement with parents children for temporary care and custody, such as may be incidental to sickness or other physical handicaps of a nature that a mother's pension law will not cover? For example: father is dead, mother in a hospital for several months' treatment, two children are without proper care. May such children be received at the home until this temporary disability is removed?

"3. In case of commitment of a child to the institution by the juvenile court, when nothing is said in the commitment relative to guardianship, do the trustees of the institution automatically become the guardian of the child with full power to place such child in foster home with or without adoption? (See sections 1653, 1672 and 3089 of the General Code.)

"4. In section 3089 there is a provision that a dependent child shall have resided in the county not less than one year before it is eligible for admission to a county children's home. John Doe and wife have resided in a county for one year. Shortly before the birth of their child he dies. The mother dies within a week after the child is born. Is not the child through the prior residence of its parents, if without other means of care, entitled to admission to a county children's home?

"5. In case a children's home is not properly equipped to care for babies, have the board of trustees the legal right to enter into contract with proper families or persons to board such young children until they arrive at an age suitable for care at the institution? Some county homes refuse to care for children until three years of age on the ground that they have not the equipment to care for such children satisfactorily and without risk of heavy mortality."

Answering your first question, I beg to call your attention to sections 3089 and 3090 of the General Code, as amended in 103 O. L., page 890, which read:

"Section 3089. The home shall be an asylum for children under the age of sixteen years, of sound mind and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them.

"Section 3090. They shall be admitted by the superintendent on the order of a majority of such trustees, accompanied by a statement of facts, signed by them, setting forth the name, age, birthplace, and present condition of the child named in such order, which statement of facts contained in the order, together with any additional facts connected with the history and condition of such children shall be, by the superintendent, recorded in a record provided for that purpose, which shall be confidential and only open for inspection at the discretion of the trustees."

Section 1645, General Code, relating to the juvenile court, defines the term "dependent child" and section 1653 of the General Code, as amended in 103 O. L., p. 872, reads in part:

"When a minor, under the age of 18 years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home, if there be one in the county where such court is held."

While it is true that section 3089 allows the trustees of the children's home to determine who are "suitable children for admission," yet section 1653 confers the same authority on the juvenile judge, and when such judge orders a dependent or neglected child committed to the children's home, it is made the duty of the superintendent of such home to receive the child under section 3090. Section 3090 in providing that the children "shall be admitted by the superintendent on the order of the juvenile court or of a majority of such trustees," makes it clear that the juvenile judge, in cases that come within his jurisdiction, has the same authority as the trustees of the children's home have in other cases, in determining what children shall be admitted to such home. Of course, he is bound by the provisions of the law concerning the age, mental and moral qualifications of the child, when committing it to the children's home, but when he has passed upon these questions, his judgment is final and not subject to review by the board of trustees, and they may not, therefore, refuse to receive a child so committed to the home. The only ground I can see, upon which they might make such refusal, is this; that the child presented for admission is afflicted with an infectious or contagious disease. Such

disease might, of course, appear after the order of the juvenile court had been made, and would justify the superintendent in refusing to accept the child. Other than this, I can see no legitimate reason for such refusal.

In reply to your second inquiry, I desire to call your attention to section 3089, which provides in part:

> "The home shall be an asylum for children under the age of 18 years * * * who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them."

Nothing is said in this section as to how long the inability of the parents to provide for the children must continue. It is my opinion that in the case you submit, where the father of the children is dead and the mother is in the hospital for several months' treatment, the children may be admitted to the children's home by the trustees thereof.

Your third question compels a consideration of sections 1643 and 3093, General Code, as amended (103 O. L., pages 869 and 891 respectively). These sections read:

> "Section 1643. When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age.
>
> "Section 3093. All inmates of such 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 such home, until they are eighteen years of age, and if such child is placed out or adopted such control shall continue until such child becomes of lawful age. A child shall be deemed abandoned, if at any time the parents or persons having control thereof are in arrears for his or her board for a period of one year or more. Payment of such board thereafter shall not reinstate such parents or persons in the control or guardianship of such child, unless such board shall deem it wise."

Section 1352-3 as amended, 103 O. L., p. 866, reads in part:

> "The board of state charities shall when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court that court must first consent to such transfer."

Section 3089 as amended (103 O. L., p. 890) reads in part:

> "If an inmate of such home (county children's home) is found to be incorrigible, he or she shall be brought before a juvenile court for further disposition."

From a reading of these sections, it is apparent that although under section 3093, the trustees of the children's home are given "sole and exclusive guardianship" of children admitted to the home by reason of neglect or dependence, there is a continuing jurisdiction vested in the juvenile court, which such court retains "for all necessary purposes of discipline and protection" until the child attains the age of twenty-one years. The words "sole and exclusive guardianship" in section 3093 are limited in their meaning by these other sections of the Code, which plainly indicate that the protecting arm of the juvenile court remains about the child until it has attained the age of twenty years.

Answering your third question then, it is my opinion that when a dependent or neglected child is committed by the juvenile court to the county children's home, the trustees of such home are immediately vested with the guardianship and control of the child, subject to the continuing jurisdiction of the juvenile court for the purpose of discipline and protection.

Whether the juvenile court in its commitment makes the trustees of the home the guardian of the child, is of no consequence. The statute (section 3093) does this to the extent above mentioned.

Replying to your fourth inquiry, I beg to again call your attention to that part of section 3089, which reads:

> "The home shall be an asylum for children under the age of 18 years * * * who have resided in the county not less than one year."

While it is true that the child in question has not resided in the county for one year, yet I do not think this fact would make it ineligible for admission to the county children's home. The provision that the child should have "resided in the county not less than one year" is not one made for the purpose of placing a limitation upon the ages of children to be admitted to the home, but to my mind was made for the sole purpose of establishing a residence in the county. In the case referred to, this is not necessary since the child was born of parents who were residents of the county and had been for more than one year. In volume 14 of cyc., page 843, the following doctrine is stated:

> "An infant being *non sui juris* is incapable of fixing his domicile, which therefore during his minority follows that of the father."

At page 845 it is stated:

> "The domicile of an infant, after the death of both parents, will be that of the parent who died last."

The provision, therefore, that a child should have "resided in the county not less than one year," is not applicable to the case mentioned and the child may be admitted to the home.

Attention is called, however, to that part of section 3089, which reads:

> "The house shall be an asylum for children under the age of 18 years * * * who are in the opinion of the trustees suitable children for admission * * *."

By virtue of this provision, if the trustees are of the opinion that there are not proper facilities in the home to care for a child of such tender age, and for that reason deem it a child not "suitable for admission," they may refuse to accept it.

In answering your fourth question I have stated that the infant, whose parents are residents of the county, may be admitted by the trustees to the children's home. I have also stated that if the trustees deem the child, by reason of its tender age, not suitable for admission, they may refuse to accept it. However, inasmuch as they may accept it, it follows that if they desire to do so, and yet deem it unwise to keep the child in the home, they may contract with proper families to board and care for it, regardless of whether it is below or above the age of three years. This answers the fifth and last question submitted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

970.

HITCHING POST—RIGHT OF MUNICIPALITY TO COMPEL REPLACING A HITCHING POST ORIGINALLY PLACED BY PROPERTY OWNER.

A municipality has no authority to compel a property owner to replace a hitching post in front of his property, which had originally been placed there by a property owner.

COLUMBUS, OHIO, June 6, 1914.

HON. GEO. C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—I have your letter of February 17th, which is in part as follows:

> "'A' is the owner of a business block in the city of Painesville which abuts upon a public street in the closely built up business section of the city.
>
> "'A' has erected at the edge of the sidewalk hitching posts (so called) which consist of upright iron pipe embedded in concrete.
>
> "'A' sells to 'B' said property.
>
> "'B' not desiring the public to hitch in front of his property removes all said hitching posts.
>
> "Query. Has the city of Painesville the authority to compel the replacing of such hitching posts, they not having been maintained there continuously during a period of twenty-one years (if such condition, did it exist, affects the question)."

It appears from your statement of facts that the hitching posts were originally erected in front of this property by the person who then owned the same, presumably for some benefit which he believed would accrue to him in a business way from permitting the hitching of horses in front of his place of business. The erection of such posts was wholly voluntary on the part of such owner and the municipality was without power or authority to compel him to erect them. The present owner of this property has the right to say whether he will maintain hitching posts for the benefit of the public and if he does not desire to do this, the municipality cannot compel him to do it.

I am of the opinion that the city of Painesville cannot compel "B" to replace such hitching posts in front of his property.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

971.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—RIGHT TO CHARGE FOR WATER USED IN WATERING TROUGH OR PUBLIC DRINKING FOUNTAIN IN VILLAGE STREET—CITY HALL.

The board of trustees of public affairs cannot require the village council to pay for water furnished for watering troughs or public drinking fountains installed on a village street, said water being furnished from a municipally owned plant. Such board of public affairs cannot charge for water furnished and used in village city hall, even though part of such hall is rented as a lodge room.

COLUMBUS, OHIO, June 6, 1914.

HON. W. B. MOORE, *Legal Counsel, Village of Lisbon, Ohio.*

DEAR SIR:—Under date of May 8, 1914, you wrote asking my opinion on certain questions stated by you, as follows:

> "(a) Can the board of trustees of public affairs conducting a municipal waterworks require the village council to pay for water furnished for a watering trough installed on a village street jointly by the council and the board of trustees of public affairs for public use, and generally so used?
>
> "(b) Can such charge be so made for water supplied to a public drinking fountain installed by the village council upon a public square?
>
> "(c) Can such charge be made for water furnished and used at the village city hall, which is owned by the village and used for village purposes, but part of which is rented as a lodge room?"

Among the enumerated powers of municipal corporations, section 3619, General Code, provides as follows:

> "To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs and waterworks, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor."

By section 3648 of the General Code, among other things, municipalities are given power to establish, maintain and regulate drinking fountains and water troughs. By section 4357, General Code, it is provided among other things, that in each village in which a waterworks is situated, or when council orders waterworks to be constructed, or to be leased or purchased from any individual company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years.

Section 4361 of the General Code, as amended 103 O. L., p. 561, provides that the board of trustees of public affairs shall manage, conduct and control the waterworks, furnish supplies of water, and appoint necessary officers, employes and agents. It is further provided that such board may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, and that such by-laws and regulations, when not repugnant to the ordinances of the village or to the constitution or laws of the state, shall have the same validity as ordinances. The section further provides

that for the purpose of paying the expenses of conducting and managing such waterworks, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water rent of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, and that when such rents are not paid, the trustees may certify the same over to the auditor of the county in which such plant is located, to be placed on the duplicate and collected as other village taxes. Or, they may collect the same by action at law in the name of the village.

By section 4362, General Code, it is provided that when waterworks are owned and operated by a village which receives its fire protection therefrom, and the proceeds from the operation of such plant is insufficient to pay the expenses of operating the same, the council of the village may levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village, real and personal, to pay the running expenses and extensions made thereto, after applying the proceeds therefrom, which tax shall be in addition to all other taxes authorized by law.

The council of municipalities is given certain supervision over the management of waterworks therein situated. Touching this point, section 3962, General Code, provides as follows:

> "The council of a municipality in which waterworks are situated or in progress of construction may appoint a committee for the investigation of all books and papers, and all matters pertaining to the management of the waterworks, at least once a year, and oftener, if necessary, by reason of neglect of duty or malfeasance on the part of any officer of the works. Any such officer found by such committee so offending shall be liable to removal from office by the council."

Section 3963 of the General Code, provides that no charge shall be made by the board for supplying water for certain purposes, among which are "the use of any public building belonging to the corporation." I note that no mention is made in this section of water troughs and drinking fountains.

It is evident from the foregoing that the primary control and management of a waterworks in villages are vested in the board of trustees of public affairs and that for most purposes such board in its management of the waterworks is not subject to the control of council. Nevertheless, as a matter of course, the village in its corporate capacity is the sole owner of the waterworks and all its accessories of pipes, plugs, hydrants, buildings, machinery and all fixtures and appurtenances belonging thereto, and the board of trustees has no interest or ownership in any of these. The board as such, is a mere agency of the village for maintaining and operating the waterworks, with full power for effectuating those purposes.

Waterworks Commissioners vs. Sewickley, 159 Pa. State, 194, 198.

With respect to the particular questions presented, it may be noted that with respect to third persons at least, exemption from payment for water supplied is never inferred and where a charter or statute requires water to be furnished free of charge to certain institutions, this duty will be confined to the uses substantially provided for in the statute and to no other.

People vs. Willis, 23 Misc. N. Y., 545.

It has been held that where a municipality operates waterworks through its agents, it may be supplied with water for certain municipal purposes free of charge.

Thus in the case of Waterworks Commissioners vs. Sewickley, supra, it was held that where a municipality erects and maintains waterworks and the board of water commissioners act as its agent, in so doing the municipality may, without the consent of the commissioners, use the water from the waterworks to sprinkle the streets, and lay sewers.

With respect to the question at issue, in the case just noted the court in its opinion says:

> "It is apparent that the sole and exclusive right and power to determine when water is required for cleaning streets and constructing and using sewers, is vested in the borough. But if the borough possesses this right and power, it cannot be trammeled or controlled by any other authority in the full performance of its functions in these regards. It must have the water, and it has the sole power to determine when and to what extent the water must be used. It is the exclusive owner of the entire water supply and works of the municipality; the purposes for which it needs the water are of an entirely public character and to deny the borough the right to use the water for those purposes is to simply prevent it from performing its plain legal duties. We are very clear that this power is possessed by the borough exclusively, and that the water commissioners have no right or power to interfere with the borough in the exercise of this class of its functions."

In the case of Water Commissioners vs. Detroit Citizen's Street Railway, 131 Mich., page 1, it was held that where a city water board is authorized to fix and collect rates for furnishing water to private consumers, this gives no implied authority to levy rates on the city for water used by it for hydrant and drinking purposes. The purposes to be subserved in the establishment and maintenance of waterworks in a municipality is to furnish water for the public and private uses of the inhabitants of the city, and there is no express provision for payments for water used for general and ordinary public purposes, nor is any pertinent or effective provision made for the collection by the board of trustees for water used by the village for public purposes. As has been suggested, it would seem that it would be taking an anomalous position to hold that the board of trustees, which is but the authorized agency of a village in operating waterworks therein, may charge the village itself for water used for authorized public purposes, and on these considerations I am constrained to the position that the questions submitted by you should be answered in the negative.

With respect to your third question, I note that it is specifically provided in section 3963, that no charge shall be made for water supplied for the use of any public building belonging to the corporation. The "city hall" of a village is undoubtedly in every sense a public building and the fact that a part of it may be rented by the village for private use occasionally, does not make such building any the less a public building.

Bates vs. Bassett, 60 Vt., 535.
Greenbanks vs. Boutwell, 43 Vt., 207.
Camden vs. Camden, 77 Me., 530.
Wheelock vs. Lowell, 196 Mass., 220.

I am of the opinion, therefore, that the board of trustees cannot require the village to pay for water furnished for the purposes indicated by the questions presented by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

972.

DISPOSING OF STOCK AND BONDS RECEIVED PRIOR TO THE ENACTMENT OF THE "BLUE SKY LAW" AND PRIOR TO THE LAW CREATING THE PUBLIC UTILITIES COMMISSION—"BLUE SKY LAW"—PUBLIC UTILITIES COMMISSION.

Where a railroad entered into a contract with A for building a part of a road, and assigned in payment thereof certain bonds and stock of the corporation; A failed to turn back such stock and bonds, and the railroad company then entered into a contract with B in the same manner. B subsequently assigned the contract to C, together with stock and bonds. B received the stock and bonds prior to the "blue sky" law, and prior to the law creating the public utilities commission, consequently the securities were not authorized by the public utilities commission. B assigned to C subsequent to the "blue sky law" and subsequent to the enactment of the public utilities act; C now desires to dispose of such stock and bonds to raise money to carry out the contract.

In such case, B and his assignee C are bona fide owners of such stock; B was not a dealer under the "blue sky law" in his assigning the stock to C. C can dispose of such stock and bonds in his hands for the purpose of raising money to carry out his contract with the railroad company without securing a license as provided in the "blue sky law" by reason of the exception (a) stated in section 6373-2, General Code, not being a dealer, but a bona fide owner of such stock and bonds, and disposing of the same for his own account; further, the proposed disposal of the stock and bonds in the hands of C is not required to be certified, since C would be acting solely in his own right in the disposal thereof.

The disposal of stock and bonds received prior to the enactment of the "blue sky law" and prior to the law creating the public utilities commission does not come within the provisions of the statute with respect to either the license or certification therein provided for, and they may be disposed of without either such license or certificate.

COLUMBUS, OHIO, June 6, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 21, 1914, you wrote asking my opinion on facts stated by you, as follows:

> "The Cleveland, Barberton, Coshocton and Zanesville Railway Company was incorporated in April, 1909, under the laws of the state of Ohio with a capital stock of $1,000,000.00 for the purpose of constructing, equipping and operating a line of electric railway between Cleveland, Zanesville and other points in the state of Ohio, and on the 22nd day of October, 1910, for the purpose of constructing and equipping a line of its road between Cleveland and Orrville, the railway company increased its capital stock to $2,000,000.00 and authorized and executed the issue of first mortgage coupon bonds to the amount of $2,000,000.00 in the amount of $1,000.00 each, and to secure payment of said bonds, executed and delivered to the Guardian Savings & Trust Company of Cleveland, as trustee, a mortgage on this property, and on the 3rd day of November, 1910, the railway company caused said bonds to be placed in the hands of said trust company as trustee, and in *September,* 1910, the company sold and assigned to A. D. Mayo & Company, $1,750,000.00 of its bonds and $1,050,000.00 of its capital stock, and in consideration therefor Mayo & Company agreed to construct and equip said line of railway.

"Later, on the 9th day of February, 1911, the railway company entered into an agreement with one William Knox, whereby the said company sold, assigned and transferred to said Knox $2,000,000.00 face value of its bonds and $1,400,000.00 par value of its stock, the portion of its bonds and stock theretofore assigned to Mayo having been reassigned to said company, on failure of said Mayo to complete the contract, and said Knox agreeing to construct and equip said line between Cleveland and Orrville.

"Later, in December, 1913, the said Knox sold and assigned to one O. F. Clifford, of Clarence Hobson & Company, of Newark, N. J., all his right, title and interest in and to said construction contract and the bonds and stock heretofore mentioned. These securities were issued by the company prior to the enactment of the law creating the public utilities commission of Ohio, and consequently the issuance of said securities was not authorized by the public utilities commission of Ohio.

"Are the securities, being those of a character which would properly come within the jurisdiction of the public utilities commission had that commission been in existence at the time of their issuance, subject to exemption, and do they require certification at the hands of the banking department under the act of April 28, 1913, entitled, 'An act to regulate the sale of bonds, stocks, etc?' Second. Is Mr. Clifford's right to such securities such as would constitute him a bona fide holder for value prior to the enactment of the said act of April 28, 1913, and is his holding one which would authorize him to dispose of the securities in Ohio without the necessity of obtaining a license so to do?

"Mr. Clifford and his associates are now actively engaged in the work of organizing for a disposal of the securities and realizing funds to push the construction and equipment of the road, and an early reply to this request will be appreciated both by the department and Mr. Clifford and his associates."

Section 6373-1, General Code, provides as follows:

"Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

Section 6373-2 excepts from the meaning of the term "securities," certain instruments therein designated, and among them the following:

(1) "Mortgage bonds and notes (other than corporate bonds where more than fifty per cent. of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate."

(2) "Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state."

This section, further excepting conditionally certain persons both natural and artificial from the meaning of the term "dealer," defines that term as follows:

"The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any such security,

through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either indirectly or through agents or underwriters or any stock promotion scheme whatsoever."

Among those so excepted from the meaning of the term "dealer" are the following:

"(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is the bona fide owner of the security and disposes of his own property for his own account."

The sections of the General Code, above noted, are part of an act passed originally April 28, 1913, entitled "An act to regulate the sale of bonds, stocks and other securities * * * and to prevent fraud in such sales;" and of course the transactions mentioned in your communication as occurring prior to this date, are in nowise affected by said provision. It is likewise apparent that the transaction in December, 1913, whereby said William Knox sold and assigned to O. F. Clifford, all his right, title and interest in the construction contract and to the stock and bonds mentioned in your communication, was not as to such stock and bonds an act requiring a license from your department, for the reason that with respect to said transaction, Knox was not a dealer "but came within the exception (a) of section 6373-2, General Code, before noted, as a bona fide owner of stock and bonds, who disposes of the same for his own account and not in the course of repeated and successive transactions of a similar character."

The only questions presented are those affecting O. F. Clifford and concerning his right to dispose of the stock and bonds in his hands without securing the license provided for in the act, and without having his disposals of said stock and bonds certificated as in said act provided.

In the first place, I am inclined to the view that the fact that this stock and these bonds were of such a character as would, if issued now, require the authorization of the public utility commission, is wholly immaterial. All securities which otherwise come within the provisions of the act in question are subject to its provisions except insofar as excepted by the provisions of the act itself. It suffices to say that although the securities of a quasi-public corporation, the issuance of which has been authorized by the public service commission, are excepted from the provisions of the act requiring that their sale or disposal be by a licensed person, the fact remains that the issue of the securities here in question has not been authorized by any such commission.

However, it appears from the facts stated, that the contract for the construction of the railway line of the company issuing these securities, being held by said Knox, was assigned and transferred by him to said Clifford, and that as a consideration for the contract of said Clifford to construct said line, the stock and bonds received by Knox from the company were assigned and transferred to Clifford. It further also fairly appears that the only purpose of Clifford in effecting the proposed disposal of such stock and bonds is to secure money with which to carry out his contract for the construction of said line. Under these facts, I am of the opinion that the proposed disposal of this stock and these bonds by Clifford likewise comes within exception (a) of section 6373-3, above noted.

A further question presented is whether the proposed disposal of the stock and bonds in his hands is required to be certificated under the provisions of the act, above noted.

Section 6373-14, General Code, provides:

> "For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code, which shall not be done until; together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in section 6373-16, General Code."

Section 6373-16, above referred to, provides that the superintendent of banks as "commissioner" shall have power to make such examination of the securities mentioned in section 6373-14 as he may deem advisable; and if it shall appear that the law has been complied with and the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities is not on grossly unfair terms, and that the issuer of the same is solvent, then upon the payment of a fee of $10.00, the commissioner shall issue his certificate to that effect, authorizing such disposal; but that if it shall not affirmatively so appear, he shall notify the applicant in writing, of his refusal to issue such certificate authorizing the disposal of the securities.

It is manifest that the only regulation provided for with respect to the sale of securities is that affecting an issuer or underwriter of such securities, and any person or company acting for or on behalf of such issuer or underwriter in organizing or promoting a corporation or assisting in the flotation of its securities.

The issuer of the securities in question, to wit, The Cleveland, Barberton, Coshocton & Zanesville Railway Company is not affected by the provisions of the sections above noted, providing for certification, for the reason that the securities in question were issued before this act was passed. As before noted, it appears that said O. F. Clifford is now the bona fide holder of said bonds of the company, and of its stock to the amount of $1,400,000.00, and that the same was transferred to him in consideration of his contractual obligations to construct the line of said railway company.

On the foregoing facts I am of the opinion that Mr. Clifford is not an underwriter of the securities in question, nor is he a person acting on behalf of the issuer or any underwriter in his proposed disposal of the same for the purposes of raising money to enable him to carry out his contract.

The terms "underwriting" and "underwriter" have a well defined meaning in the affairs of corporate organization and promotion, and it is quite clear that word "underwriter," as used in section 6373-14, was used in such defined and understood sense.

> "Underwriting means an agreement made before the shares are brought before the public, that in the event of the public taking all the shares or the number mentioned in the agreement, the underwriter will take the shares which the public do not take. (Cook on Corporations, section 14.)
>
> "Underwriting is a guarantee of the sale of the underwritten securities at a specified minimum price. It is, in fact, a conditional subscription for such securities, the underwriters obligating themselves to purchase at a specified price all of the underwritten securities not sold at an advanced price at public offering or otherwise, on or before a fixed date, or within a certain time of the underwriting. (Conyngton on Corporate Organization, section 218.)"

That the term "underwriter" is used in this sense in the provisions of section 6373-14 above noted is apparent from other provisions of this section providing, among other things, that the section shall not apply where the issuance of the securities has been approved by the public service commission or like body, or where the sale is made by or on behalf of an underwriter who, in good faith and not for the purposes of avoiding the provisions of the act, purchases the securities so afterwards sold by him, and pays therefor in cash or its equivalent, before attempting to sell the same, not less than ninety per centum of the price at which such securities are thereafter sold by him.

On the considerations above noted, I am of the opinion that Mr. Clifford does not come within the provisions of section 6373-14, making provision with reference to certification, at all. I further note that this section provides that it shall not apply to the securities of a common carrier. There are not enough facts stated in your communication to advise me whether the company issuing these securities comes within the designation of a common carrier, as the terms are here used. On the whole, however, I am of the opinion that the proposed disposal of the securities of this railway company, now in the hands of Mr. Clifford, does not come within the provisions of the statutes with respect to either the license or certification therein provided for, and that he may dispose of the same without either such license or certificate.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

973.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—DIRECTING COMMISSIONER—COMPENSATION—VOUCHER—REIMBURSEMENT.

Under the provisions of house bill No. 8, 104 *O. L., the directing commissioner of the Panama-Pacific International Exposition has the right to draw a voucher on the auditor of state without the concurrence of the governor and the other deputy commissioners.*

This commission also has the right to draw from the state reimbursement for his expenses incurred since his original appointment as deputy commissioner in November, 1913, *to date and for compensation from January* 1, 1914, *to date.*

COLUMBUS, OHIO, March 2, 1914.

HON. D. B. TORPY, *Directing Commissioner for Ohio, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of even date herewith, requesting my opinion as to your authority, as deputy and directing commissioner for Ohio at the Panama-Pacific International Exposition, to draw a voucher on the auditor of state without the concurrence of the governor and the other deputy commissioners.

You also request my opinion as to your authority to draw from the state reimbursement for your expenses incurred since your original appointment as deputy commissioner, in November, 1913, to date; and for compensation from January 1, 1914, to date.

With respect to your second question you state the fact that in January, 1914, the governor fixed your compensation and directed that it begin on January 1, 1914.

Your questions invite consideration of several related acts of the general as-

sembly. However, it will be sufficient for my purpose to consider house bill No. 8, passed by the late extraordinary session. This act, in a somewhat lengthy preamble, refers to previous legislation authorizing the governor to act as commissioner for the state of Ohio at the Panama-Pacific Exposition, with power to appoint and employ deputy commissioners. It then enacts that,

> "the governor is * * * authorized and empowered to appoint a special commissioner as directing commissioner * * * which directing commissioner shall have such *exclusive* powers and duties with regard to such exposition as the governor may confer upon him and shall receive such compensation for his services as the governor may prescribe. (Section 1.)"

Section 2, in full, is as follows:

> "That to further carry out the provisions of the act heretofore mentioned, passed May 31, 1911, there is hereby appropriated from any moneys in the state treasury to the credit of the general revenue fund, and not otherwise appropriated, the sum of one hundred thousand dollars, for the purpose of erecting a state building in which to house and exhibit the state products, of securing complete and creditable display of the interests of the state at such international exposition and of paying the expenses and compensation, *including such as have already been incurred and remain unpaid,* of said board of deputy commissioners and such directing commissioner and the state auditor is hereby directed to draw his warrant from time to time for such portions of said sum so hereby appropriated and in favor of such persons as said board of deputy commissioners or *directing commissioner* shall designate and the state treasurer is hereby directed and empowered to pay the same."

This act, I am informed, received an affirmative vote of more than two-thirds of the members of each house of the general assembly.

I am clearly of the opinion that, by reason of the disjunctive phraseology of section 2, when it provides who may designate the person in whose favor warrants on the appropriation may be drawn, the directing commissioner, without the concurrence of the other deputy commissioners or of the governor, is authorized to make the necessary designation; which, I take it, amounts to the presentation of a voucher to the auditor of state.

In acting under this authority, of course, the directing commissioner should present with his designation or voucher such evidence of the nature of the claim upon which it is founded, and the items thereof, as will enable the auditor of state to discharge the duties imposed upon him by the general statutes of the state.

Accordingly, my answer to your first question is in the affirmative.

The answer to your second question is likewise in the affirmative. It is true that, at the time your expenses as directing commissioner were incurred, and prior to the passage of the act above referred to, there was no express authority of law for your reimbursement from the state treasury; nor was there any authority of law for the governor to act as he did in January, 1914, and to fix a salary payable from the present appropriation, which was subsequently passed. But the general assembly of the state, however, has special authority, under article II, section 29, of the constitution, to pay extra compensation for services already rendered, and to allow claims the subject-matter of which has not been provided for by pre-existing law, upon the single condition that such legislation shall receive the affirmative vote of two-thirds of the members elected to both houses thereof. This being the fact, in the present case, I am of the opinion that you are authorized to

draw upon the present appropriation, which by express terms recognizes the expenses and compensation already incurred, for the payments referred to in your second question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

974.

CIVIL SERVICE—LIQUOR LICENSING BOARD—ENTITLED TO TWO SECRETARIES OR CLERKS IN THE UNCLASSIFIED SERVICE.

The county liquor licensing board is entitled to two secretaries or clerks in the unclassified service, under the civil service, since the county liquor licensing board is by law authorized to appoint a secretary upon authorization of the state board, and to appoint clerks, said boards being such a board as would come under subdivision 7a, section 8 of the civil service act.

COLUMBUS, OHIO, June 12, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Inquiry has been made of this department as to whether the county liquor licensing board is entitled to two secretaries or clerks in the unclassified service under the civil service act.

Subdivision 7 (a) of section 8 of the civil service act, section 486-8, General Code, places the following positions in the unclassified service:

> "Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk."

The act providing for the appointment of liquor license commissioners and prescribing their duties is found in 103 Ohio Laws, 216, et seq.

Section 7 of said act, section 1261-22, General Code, provides for the appointment of county liquor licensing boards.

Section 12 of the act, section 1261-27, General Code, authorizes such a board to appoint a secretary when approved by the state liquor licensing board. Said section provides in part:

> "* * * Should the duties of the county board demand, and upon authorization first had from the state board, the county board may appoint a secretary and fix his compensation. Such appointment and compensation shall be first approved by the state board. * * *"

Section 13 of the act, section 1261-28, General Code, provides in part:

> " * * * Each board may employ such clerks and employes as it deems necessary for the transaction of business and fix their compensation. * * *"

It appears, therefore, that the county liquor licensing board is authorized "by law" to appoint clerks, and a secretary upon authorization of the state board.

In answering the question in hand it is not necessary to determine whether the word "principal" as used in subdivision 7 (a) of section 8 of the civil service act, qualifies the words "boards or commissions."

Section 9 of article XV of the constitution of Ohio as amended, provides in part:

> "* * * License to traffic in intoxicating liquors shall not be granted unless the place of traffic under such license shall be located in the county in which the person or persons reside whose duty it is to grant such license, or in a county adjoining thereto. * * *"

The legislature has carried out this provision of the constitution when it enacted section 16 of the liquor license act, section 1261-31, General Code. This section reads in part:

> "It shall be the duty of the county liquor licensing boards of the respective counties of the state, and they are hereby authorized to grant, issue, renew and transfer, as provided by law, all licenses to traffic in intoxicating liquors in the county wherein the board is situated; also to suspend or revoke, subject to the conditions and in the manner provided by law, all licenses granted or renewed in said county; and to perform such other duties as may be required by law."

By virtue of the provisions of this section licenses are granted, renewed or revoked by the county liquor licensing board and not by or through the state board.

It is my opinion that if the word "principal" as used in subdivision 7 (a), supra, of the civil service act, qualifies the word "boards," the county liquor licensing board is such a board. This conclusion is reached on consideration of the constitutional provision, as well as of the statutory provisions.

It is my conclusion, therefore, that the county liquor licensing board is entitled to one secretary and one clerk, or to two clerks in the unclassified service. Section 12 of the liquor licensing act authorizes the appointment of but one secretary, and section 13 authorizes the appointment of more than one clerk if such are deemed necessary for the transaction of business.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

975.

ORDINANCE DEFINING A MISDEMEANOR AND IMPOSING A PENALTY—CONSTITUTIONALITY OF SUCH AN ORDINANCE.

An ordinance defining a misdemeanor and imposing a penalty of $500.00 *only, without a further alternative of imposing a sentence of imprisonment, is not unconstitutional as depriving a man of his liberty without trial by jury, even though a person convicted thereunder on failure to pay such fine could be imprisoned until the fine and costs are paid.*

COLUMBUS, OHIO, June 13, 1914.

HON. WM. F. POTTING, *Member of Ohio Senate, Akron, Ohio.*

DEAR SIR:—As previously acknowledged, I have your communication of May 3, 1914, asking opinion of me with respect to the validity of a certain ordinance passed by the council of the city of Akron, April 28, 1913. I have deferred more

immediate reply to your communication for the reason that on account of the importance of the question presented, I desired to give this matter my most considerate attention.

The ordinance in question provides as follows:

> "Whoever shall engage in or promote any riot, disturbance or disorderly assemblage, or shall organize, promote or be engaged in any party, dance or carousal for dissolute persons, or persons of bad repute, shall be fined not more than five hundred dollars ($500.00)."

Among the enumerated powers of municipal corporations in this state, section 3628, General Code, provides that they shall have power

> "To make the violation of ordinances a misdemeanor and provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars, and such imprisonment shall not exceed six months."

Pertinent to the power of the city to enact the ordinance in question, section 3658, General Code, provides that municipal corporations shall have power

> "To prevent riot, gambling, noise and disturbance, indecent conduct or assemblage and to preserve peace and good order and to protect the property of the corporation and its inhabitants."

With respect to the power of the court to enforce the payment of the fines inflicted as punishment for a misdemeanor committed in violation of a statute or ordinance, sections 4559 and 4563, General Code, provides as follows:

> "Section 4559. When a fine is the whole or part of a sentence, the court or mayor may order that the person sentenced shall remain confined in the county jail, workhouse or prison, until the fine and costs be paid, or secured to be paid, or the offender be otherwise legally discharged.
>
> "Section 4563. When a fine, imposed for the violation of an ordinance of the corporation, is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued for the purposes, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law."

The ordinance in question makes no provision for imprisonment as a penalty for the commission of any of the offenses defined by its terms and this being true, it follows that the person charged with the commission of any such offense defined by this ordinance, is not on a prosecution of any such offense under this ordinance, entitled to a jury trial, notwithstanding that, upon such conviction such person may be imprisoned for the purpose of enforcing the payment of the fine imposed by the court under the provisions of the ordinance.

Inwood vs. State, 42 O. S., 186.
State vs. Smith, 69 O. S., 200.
State vs. Borham, 72 O. S., 363.
Fletcher vs. State, 18 C. C., 674.
Markle vs. Akron, 14 Ohio, 587.
Kuback vs. State, 1 N. P. (n. s.), 405.

These cases for the most part consider the constitutional provisions of this state, preserving the right of trial by jury to persons accused of crime, and arrive at the conclusion that the constitutional guarantee does not cover the case of prosecutions for offenses defined by statutes or ordinances, where imprisonment is not provided as a penalty for the violation of the offense. You inquire particularly, however, with respect to the validity of this ordinance in view of article VI of the amendments to the constitution of the United States, which provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It may well be doubted whether the provisions of this article of the United States constitution is any more inclusive in its language than the constitutional provisions of our own state; but however that may be, it has been established by the decisions of the federal courts, that the provisions of article VI, as well as of all other articles of the first ten amendments to the United States constitution, prescribe limitations on the federal government only and have no relation to the governmental regulations of the several states or of their political subdivisions.

In the case of ex parte Spies, 123 U. S., 166, the court held:

> "The first ten articles of the amendment of the constitution of the United States, were not intended to limit the powers of the state government in respect to their own people, but to operate on the national government alone."

In its opinion in this case, the court says:

> "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone, was decided more than a half century ago and that decision has been steadily adhered to since."

In support of its conclusion, the court in the above case cited the following cases:

Barrow vs. Baltimore, 32 U. S., 243, 247.
Livingston vs. Moore, 32 U. S., 469, 552.
Fox vs. Ohio, 46 U. S., 410, 434.
Smith vs. Maryland, 59 U. S., 71, 76.
Withers vs. Buckley, 61 U. S., 84, 91.
Walker vs. Sauvinet, 92 U. S., 90.
Pearson vs. Yewdall, 95 U. S., 294, 296.

The foregoing decisions, above state and federal, being of course binding on me in the consideration of the question presented by you, I am compelled to the conclusion that the ordinance in question is not violative of the constitutional provisions.

With respect to some of the offenses at least, defined by the provisions of this ordinance, the maximum fine prescribed seems unreasonably high. It is to be

presumed, however, that the court in imposing sentence for the violation of any of the offenses thus defined in the ordinance, will fix the fine at an amount commensurate with the nature of the offense. However, in the consideration of the question presented by you, I have addressed myself only to the constitutional fees presented by the enactment of this ordinance and on the considerations above noted. I am compelled to the conclusion that there is no constitutional infirmities in the ordinance in question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

976.

THE RIGHT OF A CITY OR VILLAGE TO ENTER INTO A CONTRACT WHEREBY THE CITY FURNISHES ELECTRIC CURRENT TO THE VILLAGE—SUCH CONTRACT SHOULD CONFORM TO THE PROVISIONS OF SECTION 6, ARTICLE XVIII OF THE CONSTITUTION.

The amendatory provisions of section 3809, *General Code,* 103 *O. L.,* 526, *granting to a city or village the power to purchase electric current, are to be considered in connection with the other provisions of said section, as amended, and so considered the legislative intent appears to grant to a city or village authority to purchase such electric current from another municipal corporation, as well as from persons, firms, corporations, etc. The authority of a city or village to purchase electric current from another municipality clearly appears from the consideration of the provisions of section* 3809, *General Code, authorizing a city or village to purchase electric current, when considered in connection with the provisions of section* 6, *article XVIII of the constitution of the state, which provides that any municipality holding and operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants may sell and deliver to others the surplus product of such public utility in an amount not exceeding fifty per centum of the service or product supplied by such utility within the municipality. The opinion holds that such contract between a city or village for the purchase of electric current from another municipality, should be governed by the limitations of said section of the state constitution as to the amount of the current to be taken, and by the provisions of section* 3809 *as to the term or duration of the contract.*

COLUMBUS, OHIO, June 13, 1914.

HON. C. C. MCCORMICK, *City Solicitor, Wellston, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of April 3, 1914, in which you advise that the city of Wellston has its own electric light plant and that there is a proposition pending between that city and the village of Hamden, whereby the city is to furnish electric current for lighting to the village. Your inquiry is with respect to the validity of the proposed and contemplated contract.

As I view this question, authority for the proposed agreement between the municipalities named is to be found, if at all, in the provisions of section 3809, General Code, as amended in 103 O. L., 526. This section as so amended, reads as follows:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the

streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or to the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated."

Independent of the amendatory provisions of this section, municipal corporations have power to establish, maintain and operate municipal lighting, power and heating plants and to furnish the municipality and the inhabitants thereof with light, power and heat (section 3618). By section 3990, General Code, a municipality may not only erect electric works but may purchase or, if necessary, appropriate existing plants within the municipality belonging to any person or company.

By sections 3809 and 3994, municipalities may contract with any person, firm or corporation for lighting the streets, alleys, lands, lanes, squares and public places therein. Furthermore, independent of the amendatory provisions in section 3809, as amended in 103 O. L., 526, a municipal corporation might make a contract for the leasing of the electric light plant of any person, firm or company therein (section 3809, General Code).

From the foregoing statutory provisions, defining the powers of municipal corporations, it is clear that independent of the amendatory provisions of section 3809, such municipalities do not have power to lease an electric light plant and equipment of another municipality, neither do the powers so granted authorize a municipality to purchase electric current for its own use or for supplying the same to its inhabitants.

Ottawa Electric Light Company vs. Ottawa, 12 Ont., Law Rep., 290.

Conversely, the power given to a municipality to establish, maintain and operate an electric light plant and to furnish the municipality and its inhabitants light, heat and power, does not authorize such municipality to furnish electricity as a commodity to other municipalities.

Farwell vs. Seattle, 43 Wash., 141.
Reahill vs. East Newark, 73 N. J. Law, 220.

However, in this connection I note a decision by the Kentucky court of appeals, 119 Ky., 224, holding that under a statute authorizing certain cities to provide "the city and the inhabitants thereof" with light, a city was not prohibited from extending its electric light service to points without the city limits, when it can do so with very little additional expense and in such a way as to result in advantage to the city and its inhabitants. The case just cited is not one where current was sold or service was rendered to another municipality, but is one where service was rendered to inhabitants outside of the city. The conclusions of the court were predicated upon the proposition that in the management and operation of an electric

light plant, a city does not exercise governmental or legislative powers, but mere business powers, and it may conduct such plant in a manner which in the judgment of the city council promises the greatest benefit to the city and its inhabitants, and that courts will not interfere with the reasonable discretion of council in such matters. A like decision was made by the same court in the case of Rogers vs. City of Wickliffe, 94 S. W., Rep., 94, with reference to city waterworks, the court holding that a city owning and operating a waterworks system may contract to supply water for use outside of the city, where there will be sufficient water remaining to supply the residents of the city.

On the authority of the above cited cases the same court in the case of Dyer vs. City of Newport, 123 Ky., 203, held, if a municipality desiring to be supplied with water from the city of Newport had constructed a plant of mains, pipes, etc., to supply its citizens with water, that Newport might lawfully sell it water from its plant, but that Newport could not extend its main into another municipality for the purpose of supplying such municipality with water.

Under the strict rule as to municipalities obtaining in this state, I am not persuaded that the above noted decisions are sufficient authority for holding that a municipality in this state may sell either water or electric current to another municipality without express legislative authority to do so.

Wright vs. Village of Kennedy Heights, 25 C. C. 409; 1 C. C. (n.s.) 195.

As to water, I note that express authority is given to a municipality having waterworks to supply another municipality therewith, or to extend its service to persons living outside the corporate limits (sections 3973, 3967, G. C.).

Looking to the amendatory provisions of section 3809, it will be noted that thereby a "municipality" is added to the list of persons, natural and artificial, of whom a city or village may lease an electric light plant and equipment and such city or village is given power to contract for the purchase of electric current for furnishing light, heat and power to such municipality or the inhabitants thereof. So that, with respect to the question at hand, said section 3809, G. C., now provides:

> "The council of a city may authorize, and the council of a village may make a contract * * * for the leasing of an electric light plant and equipment * * * of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof, for a period of not exceeding ten years."

The authority of the municipalities named in your inquiry to enter into the contract contemplated, if it exists at all, must rest upon the power granted cities and villages to contract for the purchase of electric current, found in this section. A valid contract contemplates that both parties are competent to do the things required by the contract by them respectively to be done, and if the provisions of this section, authorizing cities and villages to contract for the purchase of electric current, stood alone and unaided, there would be no hesitation in holding that the power of purchasing current was limited to a purchase from some person, firm or company having a right to sell such commodity; and that a general power in a municipality to purchase confers no right in another municipality to sell the current desired. I apprehend, however, that if it should fairly appear that a city or village is given power to purchase electric current from another municipality, power in such other municipality to sell may be inferred.

Conformable to accepted rules of construction, however, whether a city or village is authorized by this section to purchase current from another municipality, must be determined upon a consideration of all its provisions and particularly upon

a consideration of the provisions of the section with which the power granted to purchase current stands in association. Looking to the provisions of section 3809 as it stands amended, I am inclined to the view that it was the legislative intention to grant to cities and villages authority to purchase electric current for the purposes named in the statute, from another municipality; as much so as it was the legislative intention to authorize a city or village to lease the electric light plant and equipment of another municipality. However this may be, I note that section 6 of article XVIII of the constitution of the state, as adopted September 3, 1912, provides as follows:

> "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility, and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

The provisions of this section of the constitution indicate that it was intended as a present enactment, complete in itself as definitive legislation and that it does not contemplate subsequent legislation to carry it into effect. Construed in the light of these considerations, this section of the constitution is self-executing.

Willis vs. Mabon, 48 Minn., 140, 150.

By force of its provisions, municipalities owning and operating a public utility such as an electric light plant, may within the limitations of the section, sell and deliver their product to others and as has been before noted, a city or village by the provisions of section 3809, is authorized to purchase current for the purposes therein designated. It follows on a consideration of the provisions of this section, together with those of the constitutional amendment above noted, that within the limitations of such constitutional provisions, a city or village may purchase such current from another municipality.

The purchase of electric current by one municipality from another may result in the necessity of carrying such current for some considerable distance over wires on poles or through conduits. In this connection I note that by the provisions of section 3995, General Code, a municipal corporation is authorized to enter upon private lands and appropriate so much thereof as is necessary for applying or laying down poles, wires and conduits for the purpose of carrying and transmitting electricity, while by the provisions of section 3996, General Code, it is provided that as far as the rights of the public therein are concerned, the county commissioners as to county and state roads, township trustees as to township roads and the council of municipal corporations as to streets and alleys, in their respective jurisdictions, may grant to such municipal corporation the right to construct and lay poles and wires, and conduits therein, subject to such regulations and restrictions as may be prescribed.

On considerations before noted, I am of the opinion that the city of Wellston and the village of Hamden have power to enter into the proposed contract, whereby the city is to furnish electric current for lighting, to the village. Such contract if made, should of course conform to the limitations of the constitutional provision above noted, with respect to the amount of current to be sold, and also with the provisions of section 3809, General Code, with respect to the duration of the contract.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

977.

BOARD OF PARK COMMISSIONERS—LICENSE FOR AUTOMOBILES AND MOTORCYCLES USED BY THIS DEPARTMENT.

It is necessary for the board of park commissioners to take out a license for automobiles and motorcycles used in such department, since the same is not excepted in section 6290, 103 O. L., 763.

COLUMBUS, OHIO, June 13, 1914.

HON. WALTER M. SCHOENLE, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—Under date of March 12, 1914, you submitted for my opinion the following:

> "Recently the board of park commissioners wanted to know whether it is necessary for it to take out licenses for its automobiles and motorcycles. The automobiles have large numbers printed on them and also the seal of the city of Cincinnati. The motorcycles are used by the police of the park department in patroling their beats. I wrote to the secretary of state regarding this, and he was of the opinion that it would be necessary for the board to take out licenses. He based this upon the opinion rendered by former Attorney General U. G. Denman, dated February 11, 1910. However, I wish to call your attention to a letter sent our department on May 22, 1909, wherein the secretary of state held that it would not be necessary for us to take out licenses for the automobile used by the chief of fire department, providing that it was used solely for municipal purposes. Therefore, I would be glad if you would be kind enough to send me an opinion under the present and existing law."

The opinion to which you refer is found on page 231 of the annual report of the attorney general for the year 1910.

My predecessor took the position that only those motor vehicles were exempt from the provisions of the registration act as were expressly exempted by section 6290; that is to say, the provisions of that section should be strictly construed and the language should not be extended beyond its plain and ordinary signification. I agree with the conclusion reached by my predecessor as well as the reasoning upon which it was based.

Section 6290 was amended in 1913 (103 O. L., page 763) so as to provide:

> "The term 'motor vehicle' as used in this chapter and in the penal laws, except where otherwise provided, includes all vehicles propelled by power other than muscular power, except road rollers, traction engines, fire engines, fire trucks, police patrol wagons, public ambulances and vehicles run upon rails or tracks."

It will be noted that while the amended statute made some changes in the classes of vehicles to be exempt from registration, it did not include automobiles and motorcycles owned and used by a municipal board of park commissioners in the exempted class, and I am of the opinion that such vehicles must be registered.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

978.

DEPUTY SHERIFF MAY NOT RECEIVE COMPENSATION FOR USE OF AUTOMOBILE BY HIMSELF OR SHERIFF—PUBLIC POLICY

A deputy sheriff owning an automobile cannot receive pay from the county for trips driven by himself and sheriff, on the ground that it is against public policy to permit such practice.

COLUMBUS, OHIO, June 13, 1914.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I have your letter of April 15th, wherein you inquire:

> "Can the deputy sheriff own an automobile and receive pay from the county for trips driven by himself and the sheriff, just the same as an outsider or one not connected with the affairs of the county can? That is to say, when a drive is necessary to be made for the service of a summons or the capture of an indicted party, can such deputy sheriff receive from the county pay for the same by order of the sheriff."

Section 2997 of the General Code, provides in part:

> "* * * the county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

The question of whether the words "livery hire" as used in this statute would include the hire of automobiles, was decided in the affirmative in the case of State of Ohio ex rel. Sartin, vs. Sayre, Franklin County Common Pleas Court.

This department has followed that decision and has advised county officials to do likewise. The official relationship between a sheriff and his deputy is so close that I deem it contrary to public policy for a sheriff to deal with his deputy in matters of this kind. I am of the opinion, therefore, that a deputy sheriff may not receive pay from the county for the use of his automobile in the transaction of business pertaining to the office of sheriff.

On April 11, 1913, in an opinion addressed to Hon. Wm. C. Hudson, prosecuting attorney of Vinton county, I held that a sheriff under the power given to him under section 2997, would have the right to employ members of his own family to take care of his horses and vehicles used by him in the discharge of his official duties, and if he did employ them, the commissioners should allow for their services, providing the charges were just and reasonable. That opinion, however, was based solely upon statutory provisions and did not go into the question of public policy.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

979.

VILLAGE—TELEPHONE COMPANY FRANCHISE—TELEPHONE COMPANY CANNOT BE COMPELLED TO MAINTAIN THE RATE AGREED TO IN THE ORDINANCE GRANTING THE FRANCHISE —RIGHT TO USE VILLAGE STREETS—PUBLIC UTILITIES COMMISSION MAY FIX REASONABLE RATE.

1. *Where a village by ordinance grants a franchise to a telephone company for the use of the village streets for the company's poles, wires, etc., and where, as one of the conditions of said grant, the telephone company by said ordinance and its acceptance thereof agrees to charge only certain designated rates for telephone service to its patrons within the municipality, the village cannot compel the telephone company to maintain the agreed rates for the reason that the telephone company takes its right to use the village streets for its poles and wires from the state rather than the municipality, and there is no consideration supporting the agreement of the company to maintain the designated rates.*

2. *If the present rates of the telephone company for service within the village are unreasonable, the public utilities commission may on proper written complaint, and after a hearing of such complaint fix such rates for telephone service by the company as are reasonable.*

COLUMBUS, OHIO, June 13, 1914.

HON. F. H. PELTON, *Village Solicitor of Willoughby, Society for Savings Bldg., Cleveland, Ohio.*

DEAR SIR:—Under date of April 14, 1914, you wrote asking an opinion of me as follows:

> "In 1896, an ordinance granting a twenty-five year franchise to the Willoughby Telephone Company was passed by the council of the village of Willoughby, and among other provisions section 4 reads as follows:
>
> "'It is further understood and agreed as one of the conditions of this grant, that the price of rental charged by the said Willoughby Telephone Company, its successors or assigns to any individual company or corporation subscribers for the use of each telephone instrument shall not exceed for residences the sum of eighteen dollars per year and for places of business shall not exceed the sum of twenty-four dollars per year.'
>
> "Since the passage of this ordinance this company has without consulting the council or anyone else on two occasions raised these rates. Is it possible for the village to hold the company to the rates as agreed upon in the franchise, and if not what powers have the council in this regard? Also if the council does not have this power, what procedure must be followed to determine whether the rates now charged are reasonable or not?"

At the time this contract between the village and the telephone company, fixing the rates for telephone service, was entered into, the statutory provisions pertinent to the right of such companies to enter municipalities were sections 3454, 3461 and 3471, Revised Statutes, since carried into the General Code as sections 9170, 9178 and 9191. These sections are as follows:

"Section 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines from point to point along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public use of such road.

"Section 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.

"Section 3471. The provisions of this chapter (chapter 4) shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Construing these sections, the court in the case of State vs. Telephone Company, 72 O. S., 60, 70, says:

"Taking these sections with others in the same chapter, it seems clear that telephones have their grant directly from the state through its general assembly, to occupy the roads, streets and highways with their lines and fixtures and that a grant for that purpose from the municipality is not necessary. These statutes were so construed in Zanesville vs. Telegraph & Telephone Co., 64 O. S., 67."

In the case of Farmer vs. Telephone Company, 72 O. S., 526, it was held that a stipulation fixing rates of telephone service in an ordinance, permitting a telephone company to use the city streets for its poles and wires, was not a valid and enforceable contract, though the ordinance together with the rates so fixed had been accepted by the telephone company. In this case the court followed the case of Macklin vs. Home Telephone Company, I. C. C. (n. s.) 373, 70 O. S., 507, where the same question was involved. In both cases the decision as to the invalidity of the contract as to rates, was placed on the ground that the telephone company took its right to use the streets and public ways of a municipality by legislative grant from the state, and that the municipality possessed nothing in the way of a valuable right to bestow upon the telephone company, as a consideration for its agreement to maintain the rates fixed by the ordinance.

It follows from these decisions that the village of Willoughby is without power to compel the telephone company to observe the rates fixed in the ordinance or to maintain the same.

Sections 614-2 and 614-2a, General Code, the same being a part of the public utilities act, define and classify a telephone company as a public utility; and as such it is made subject to the provisions of that act. Section 614-16 of the General Code, provides in part as follows.

"Every public utility shall print and file with the commission, within 90 days after this act takes effect, schedules showing all the rates, joint rates, rentals, tolls, classifications and charges for service of each and every kind by it rendered or furnished, which were in effect at the time this act takes effect and the length of time the same has been in force, and all rules and regulations in any manner affecting the same."

Section 614-18 provides:

"No public utility shall charge, demand, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered than that applicable to such service as specified in its schedule filed with the commission and in effect at the time. * * *"

Section 614-21, General Code, provides:

"Upon complaint in writing, against any public utility, by any person, firm or corporation, or upon the initiative or complaint of the commission that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law * * * the commission shall notify the public utility complained of that complaint has been made and of the time and place when the same will be considered and determined which notice shall be served upon the public utility not less than 15 days before such hearing and shall plainly state the matters or things complained of. The commission shall, if it appears that there are reasonable grounds for the complaint, at such time and place proceed to consider such complaint and may adjourn the hearing thereof from time to time. The parties thereto shall be entitled to be heard, represented by counsel and to have process to enforce the attendance of witnesses."

Section 614-23, provides:

"Whenever the commission shall be of the opinion, after hearing, that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded or exacted, is, or will be unjust, unreasonable, unjustly discriminatory or unjustly preferential or in violation of law * * * the commission shall, with due regard among other things, to the value of all the property of the public utility actually used and useful for the convenience of the public, * * * and all such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be thereafter rendered, charged, demanded, exacted, or collected for the performance or rendition of the service, and order the same substituted therefor; and thereafter, no change in the rate, fare, toll, charge, rental, schedule, classification or service, shall be made, rendered, charged, demanded, exacted or charged by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification or service shall be deemed and held to be unjust and unreasonable, prohibited and unlawful."

It thus appears that though the village is without power to compel the telephone company to maintain the rates fixed in its contract, yet that it may be compelled on proper complaint to the public utilities commission to maintain such rates as are reasonable. On the hearing of such complaint, though the contract as to rates is not binding or enforceable against the company, it would be of evidential value as indicating that the rates fixed in such contract were at the time reasonable.

In reaching the conclusion that the village cannot compel the telephone company to observe its contract rates as to service, I assume that in pursuance of the contract, the company entered the streets of the village in the usual way, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires and that the matter of underground conduits for such wires did not enter into the contract between the village and the company. The point to the suggestion just noted is, that though a telephone company may under statutory provision, enter the streets of a municipal corporation with its usual overhead fixtures, without the consent of the municipality, yet it does not have the right to enter upon such streets for the purpose of digging them up and laying conduits for its wires without municipal consent, (73 O. S.,64), and an agreement by the municipality, granting such consent would, I believe, be a sufficient consideration to support any agreement by the company having proper relation to the franchise granted, whether such agreement be one as to rates or otherwise.

Rochester Telephone Company vs. Ross, 125 App. Div., 76; 195 N. Y., 429.
Peoples vs. Telephone Company, 192 Ill., 307.
Beerth vs. Detroit City Gas Co., 152 Mich., 654.
Columbus Citz. Telephone Co. vs. Columbus, 88 O. S., 466.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

980.

WORKMEN'S COMPENSATION ACT—THE RIGHT OF ADMINISTRATOR OR PERSONAL REPRESENTATIVE TO RECEIVE A BALANCE WHERE THE AWARD HAS NOT BEEN FULLY PAID TO THE INJURED EMPLOYE.

The payment of compensation under the compensation act does not cease upon the death of the injured employe to whom an award has been made under section 33 of said act and to whom the whole amount of the award has not been paid prior to his death, for the reason that as soon as an award is made, the full amount immediately becomes vested, though paid in installments, and the unpaid balance becomes part of the employe's estate; said balance should be paid to the administrator or to those entitled thereto, and if the estate is settled without an administrator, those receiving such unpaid balance should be required to give bond.

COLUMBUS, OHIO, June 13, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of October 23, 1913, you write as follows:

"We desire your opinion as to whether payments of compensation should cease upon the death of an injured employe to whom an award has

been made under section 33 of the compensation act of 1913, and to whom the whole amount of the award had not been paid prior to his death.

"To give you a concrete example: On May 29, 1913, an award for the sum of $536.23 was made to an applicant to cover a permanent partial disability. Under the rules of this department compensation is not paid in a lump sum but is paid in installments every two weeks. In this instance the claimant was paid $16.50 every two weeks from the date of the award until the date of his decease, a total of $172.05, having thus been paid, leaving an unpaid balance of $364.18.

"If your answer be that payment of this balance should be made from the state insurance fund, will you kindly advise us whether we can lawfully pay it to any other than the personal representative of the deceased."

Section 21 of the workmen's compensation act provides for the payment to injured employes such compensation on account of injuries received in the course of employment, and such medical, nurse, hospital services and medicine as is provided in sections 32-40 of the act.

Section 32 provides for compensation for temporary disability, but I note in your communication that the award was based on a permanent, partial disability. This, as you suggest, is governed by section 33, which provides:

"In case of injury resulting in partial disability, the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of $12.00 per week, or a greater sum in the aggregate than $3,750.00. *In cases included in the following schedule the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified, to wit.:* (Here follows a schedule prescribing a definite time during which payments shall be made in case specified injuries are received).

As illustrative I shall merely call attention to the first item specified which is as follows:

"For the loss of a thumb sixty-six and two-thirds per cent. of the average weekly wages."

In view of the fact that the award made by you is for a specified amount, I assume that the injury must have been comprehended within one of the items of the schedule to which I have just referred, as otherwise it would be impossible for you to arrive at a specified amount, for the reason that in other cases of parital disability the employe is to receive sixty-six and two-thirds per cent. of the impairment of his earning capacity *"during the continuance thereof,"* such continuance being indefinite it would be impossible to determine the lump sum to be paid prior to the recovery of the injured employe. It is with reference to this class of cases wherein no definite sum has been prescribed that Mr. Ruegg on page 404 of his work on "employers' liability and workmen's compensation," says:

"It is thought that the right to compensation given by the act vests in the workman as soon as each weekly payment becomes due. If the workman dies leaving arrears of compensation, they could, therefore, be recovered by his legal representative."

The provision of the English act upon which the foregoing statement is based authorizes a weekly payment during the incapacity in cases of partial disability. After such payments have been continued for six months the employer may pay a lump sum, which, if the incapacity is permanent, shall be sufficient to purchase an annuity equal to seventy-five per cent. of the annual value of the weekly payments. It will be noted that in the Ohio schedule the injury is presumed to continue for a definite length of time, and consequently in order to arrive at a proper sum to be paid, it is only necessary to multiply the number of weeks of the conclusively presumed continuance by two-thirds of the average weekly wage. This is in practical effect a fixing of the sum to be paid, and the full amount of compensation becomes vested immediately upon the happening of the injury.

This is in harmony with the decision of the House of Lords in United Collieries vs. Simpson, 78 L. J. P. C., 129, wherein it was held that the personal representative of the mother of an employe killed in the course of his employment, was entitled to the compensation provided by the English law, even though the mother had died prior to making application for such compensation, she being the sole dependent of the killed workman. In other words, the court held that the right became vested in the dependent even though she died before she had an opportunity of presenting her claim in the manner prescribed by law, and even though, as a result of her death, the money paid would not be for the benefit of any dependent of the decedent.

This emphasizes the theory that the right of him who is entitled to compensation vests immediately upon the happening of such injury. When this right is to a definite amount, the whole of such amount immediately becomes vested even though it is to be paid in weekly installments, and if the beneficiary should die before all of the sum has been paid, the unpaid balance becomes part of his estate. As the statute makes no provision for the payment of such balance to any designated heirs at law, dependents, or next of kin, it must follow that it should be dealt with as other personal property of an intestate, and therefore should pass to the personal representative.

I think it would be legal for your board to pay money, however, to those persons who would be entitled to take under the laws of distribution, provided such persons were of full age, without the intervention of an administrator, if those interested in the estate desired to dispense with such appointment, and there was no question or doubt as to there being no unpaid claims against the estate, and all those entitled to distribution received the same from your commission.

Should the estate be settled in the way last suggested, it would be advisable to take a bond from those receiving the money to save your commission and the state insurance fund harmless from any and all claims that might arise against such said fund from any person or persons other than those receiving the unpaid compensation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

892.

ROADS—BOND ISSUE—SMITH LAW—TEN-MILL LIMITATION—LONGWORTH ACT—MAIN MARKET ROAD—HITE ROAD LAW.

1. *Bonds issued now or hereafter without a vote of the people must be provided for by levies within the* 10-*mill limitation of the Smith law.*

2. *The county commissioners may levy for the state highway improvement fund from year to year; the authority to make a levy for a given road is not exhausted when a single levy has been made.*

3. *The phrase "subject, however, to the maximum limitation upon the total aggregate amount of all levies now in force" found in the new state highway law denotes the* 10-*mill limitation of the Smith law, and not the* 15-*mill limitation.*

4. *The debt limit of the state highway improvement law is exclusive and the Longworth act does not apply to the township's portion.*

5. *Bonds issued under the new highway law are county bonds upon which judgment could be obtained against the county, but the satisfaction of such judgment would have to be by levying or assessing against the township, or specially benefited property, and not by levying against the whole county, unless the deficiency is in the county's portion.*

6. *Levies upon the property of the township and assessments upon specially benefited property as contemplated by the state highway improvement law constitute taxation within the meaning of article XII, section* 11 *of the constitution.*

7. *A main market road designated as such by the state highway commissioner is but another name for an intercounty highway, so that such a road may be improved in the manner provided for the improvement of such highways, and main market roads designated as such by the legislature in the Hite law are routes of travel upon which an intercounty highway improvement may be made, as well as the kind of an improvement provided for in the Hite law itself.*

8. *"The total amount of such bonds issued shall not be in excess of* 1 *per cent. of the tax duplicate" means that the amount of outstanding bonds of this kind shall not be in excess of* 1 *per cent. and not that a single issue of this kind of bonds is limited to* 1 *per cent., subject to repetition indefinitely, nor that when* 1 *per cent. has been issued regardless of the retirement of those first issued, the limit is reached.*

9. *There is no authority of law for the submission to the electors of the county of a proposition to issue bonds for the purpose of general road improvements, the object being to escape the* 10-*mill limitation of the Smith law. An election upon the question of levying taxes for the state highway fund outside of this limitation may be held under section* 5649-5 *of the Smith law.*

10. *Under sections* 7181 *to* 7231, *General Code, the whole county is to be taxed for the improvement of the specific roads, except insofar as a portion of the cost of the improvement is assumed by the taxpayers.*

11. *Sections* 7219 *to* 7231, *General Code, though in the same chapter are parts of different acts, and for that reason do not conflict one with the other.*

12. *Section* 7217 *as amended has the effect of taking the levy to which it relates outside of the* 10-*mill limit.*

13. *The levy authorized by section* 7217, *General Code, may not be made without a vote of the people, under section* 7203.

COLUMBUS, OHIO, April 27, 1914.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, East Liverpool, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 19th, supplementary to that of February 26th, already acknowledged. In these two letters you submit some

fourteen questions arising under the state highway laws, stated with particular reference to the matter of taxation and the issuance of bonds.

The first of your questions differs from the others in certain respects and has no peculiar relation to the subject-matter of highways. I have made my answer to it the subject of a separate opinion which you either will have received by the time this opinion reaches you, or will receive soon thereafter. Your other questions are as follows:

"2. If bonds are either now or hereafter issued without a vote of the people, must the levy providing for interest and sinking fund be included within the ten-mill limitation of the Smith one per cent. law, as amended 103 O. L., 552?

"3. May the county commissioners levy the tax provided for in section 1222-1, General Code, annually, or is the authority to levy therein provided for, limited to one year?

"4. What is meant by the phrase, 'subject however to the maximum limitation upon the total aggregate amount of all levies now in force,' as found in section 1222-1, General Code? Does the phrase denote the ten-mill limitation or the fifteen-mill limitation of the Smith law?

"5. Is the power of the county commissioners to issue bonds to pay the share of the township in a road improvement under the state highway department law, as provided for particularly by section 1223, General Code, limited by the provisions of the Longworth act and particularly section 3940, General Code, referred to and adopted in section 3295, General Code?

"6. (a) Are bonds issued under section 1223, General Code for the purpose of paying the respective shares of the township and the lands assessed only general obligations of the county, or is the county's liability representative only the ultimate security for the payment of the bonds, being the assessments and taxes to be levied upon the property of the township only?

"(b) The requirement of article XII, section 11 of the constitution being that no bonded indebtedness shall be incurred unless provision is made for levying and collecting annually *by taxation* an amount sufficient to pay the interest on the bonds and to create a sinking fund for their ultimate retirement, what provision of this character must be made by the county commissioners when issuing bonds to pay the respective shares of the townships and the assessed lands only? That is, would the commissioners be required to provide for the levying and collecting of an annual *county* tax sufficient to create a sinking fund to pay the interest on the bonds, the county to recoup itself out of the proceeds of the taxes collected from the abutting property? Or would the taxes levied against the township's property and the assessments levied against the abutting property be considered an adequate provision under the constitution?

"7. Does section 1222-1, General Code, provide for levying taxes for both intercounty highways and main market roads?

"8. Does section 1223, General Code, authorize the county commissioners to issue bonds for both intercounty highways and main market roads?

"9. Does the one per cent. limitation of section 1223, General Code, refer to the total amount of bonds issued in a county, the total amount of bonds issued in any one year, or the total amount of outstanding bonded indebtedness existing at any one time?

"10. Is there any authority whatever for the submission to the electors of a county, of a proposition to issue bonds for the purpose of general

road improvements; the object being to avoid the ten-mill limitation of the Smith law, assuming this limitation to apply to the levies made under section 1222-1, General Code?

"11. Under sections 7181 to 7231, General Code, both inclusive, may the entire county be taxed for the payment of the interest and redemption of the bonds issued for the building of the road or must this tax be limited to a special district situated within two miles of the road to be improved?

"12. Is there a conflict between section 7219 and section 7231, General Code, particularly with respect to the time within which the bonds to which both refer shall be payable? If there is such a conflict, which section controls?

"13. Section 7217, General Code, as amended, requires the tax authorized thereunder to 'conform to the restrictive limitation of the maximum 15-mill limit,' does this language by inference exclude the tax provided for in the section from the operation of the other limitations of the Smith one per cent. law?

"14. Does section 7217, General Code, authorize the levy of a tax without a vote of the people?"

For convenience I shall repeat the statement of your separate questions in connection with my discussion of each one of them.

Your second question, which I need not fully repeat, inquires whether interest and sinking fund levies, for the purposes of providing for the retirement of bonds issued now or hereafter without a vote of the people are to be included within the 10-mill limitation of the Smith law?

I may answer this question in the affirmative without quoting the statute, which is section 5649-2, General Code, as amended 103 O. L., 552. This section provides for a limitation of ten mills on the aggregate levies of a taxing district and excludes certain levies from the operation thereof. The excluded levies are those for interest and sinking fund purposes to provide for the payment of indebtedness, "heretofore incurred or any indebtedness that hereafter be incurred by a vote of the people."

The indebtedness which you describe would not fall within either of the classes referred to in the statute, and levies for the purpose of providing for it would, therefore, come within the 10-mill limit.

You refer in your question to the amendment of section 5649-5b, 103 O. L., 57. This section, as amended, relates solely to the 15-mill limit of the Smith law, and the mere fact that it provides that levies under section 5649-1 (which provides for the making of sinking fund levies) shall be subject to the 15-mill limitation, in no way militates against the conclusion above expressed with respect to the operation of the 10-mill limit. The two limitations are cumulative, and each is operative within its proper sphere.

Your third question is as follows:

"3. May the county commissioners levy the tax provided for in section 1222-1, General Code, annually, or is the authority to levy therein provided for, limited to one year?"

This question requires a consideration of section 1222-1, General Code, as found in 103 O. L., 458. I quote the entire section as therein found, together with section 1223, General Code, as amended in the same act, which has some bearing upon this interpretation:

"Section 1222-1. For the purpose of providing a fund for the payment

of the proportion of the cost and expense to be paid by the county for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax not exceeding one mill upon all taxable property of the county. Said levy shall be in addition to all other levies authorized by law, for county purposes, subject however to the maximum limitation upon the total aggregate amount of all levies now in force.

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the county commissioners or township trustees are hereby authorized to levy a tax not exceeding three mills upon all taxable property of the township or townships in which such road improvement is situated, in whole or in part. Such levies shall be made in addition to all other levies authorized by law for township purposes, subject, however to the maximum limitation upon the total aggregate amount of all levies now in force. A county may use moneys lawfully transferred from any fund in place of the taxes required under the provisions of this chapter.

"Section 1223. The county commissioners, in anticipation of the collection of such taxes and assessments, and whenever in their judgment it is necessary, are hereby authorized to sell the bonds of any such county in which such construction, improvement, maintenance or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement, but the aggregate amount of such bonds issued shall not be in excess of one per cent. of the tax duplicate of such county. Such bonds shall state for what purposes issued, and bear interest at a rate not in excess of five per cent. per annum, payable semi-annually, and in such amounts to mature in not more than ten years after they are issued, as the county commissioners shall determine. Such bonds shall be advertised once each week for four consecutive weeks in two newspapers published and having a general circulation within the county. Such bonds shall be sold to the highest responsible bidder for not less than par and accrued interest. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement, maintenance or repair of the highway for which the bonds were issued."

Your question relates primarily to the interpretation of the first paragraph of section 1222-1. It is true that in order perfectly to express an intention to authorize the county commissioners to levy an annual tax the general assembly should have used the word "annually" in this context. However, the true intention of the legislature may be gathered from all the related provisions.

Section 1223, General Code, which I have quoted, authorizes the anticipation of the collection of the tax provided for in section 1222-1 by the issuance of bonds. These bonds may run for a period of ten years. It seems to me from a fair reading of the related provisions, that the intention of the legislature was to authorize the annual levy of the tax provided for in section 1222-1; so that the power therein conferred is not exhausted when it is once exercised; and so also that the power to issue bonds under section 1223 is not limited to the anticipation of the collection of a single levy.

There may be a distinction between the first and second paragraphs of section 1222-1 in this particular: The first paragraph authorizes a levy "for the purpose of providing a fund for the payment of the proportion * * * to be paid by the county

for the construction, improvement, maintenance or repair of highways under the provisions of this chapter." That is to say, the purpose is to provide for and to keep up a county highway improvement fund, not with reference to a particular road improvement or a particular enterprise of maintenance or repair but for the purpose generally of paying such charges under the state highway improvement law as may lawfully be made from time to time against the county. Strictly speaking, of course, this levy is actually for the purpose of providing for the payment of bonds to be issued under section 1223, General Code; or at least becomes so whenever the bonds are issued, for in that event the proceeds of the tax are applied to the payment of the bonds and may not be directly expended for the purpose mentioned in section 1222-1.

On the other hand, the second paragraph of section 1222-1 authorizes a levy "for the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for construction, improvement, maintenance or repair of highways * * * in which such road improvement is situated in whole or in part." The power to make this levy depends upon the actual location of a contemplated road improvement in a given township or townships. The commissioners or trustees may not simply levy this tax for the mere purpose of providing a continuing fund, but the tax must be related to a particular road improvement. Of course, if there is such a road improvement, then for the purpose of maintenance or repair a continuing fund may be created. But I do not find it necessary to go further into the interpretation of paragraph two of section 1222-1 as your question does not directly relate to it. However, the distinction made between the language respecting the levying power created by the second paragraph of section 1222-1 and that created by the first paragraph of the same section is such as to shed some light at least upon the interpretation of the latter.

For all the foregoing reasons, then, I repeat my conclusion upon your third question, which is that the county commissioners may make an annual levy of taxes under the authority of the first paragraph of section 1222-1, General Code.

Your fourth question is as follows:

> "4. What is meant by the phrase 'subject, however to the maximum limitation upon the total aggregate amount of all levies now in force,' as found in section 1222-1, General Code? Does the phrase denote the ten-mill limitation or the fifteen-mill limitation of the Smith law?"

Your question here arises out of the failure of the general assembly to be specific in its description of the limitation which it had in mind in using this language. As you point out it could have obviated all doubt by referring directly to "the restrictive limitations of the maximum 15-mill limit" as was done in section 7217, General Code, 103 O. L., 515. Doubtless, however, this course was not followed because it may have been feared that the exact number of mills constituting a given limitation might be changed by subsequent amendment of the Smith one per cent. law.

I enclose herewith copy of an opinion addressed to Hon. Charles M. Milroy, prosecuting attorney of Lucas county, with reference to the interpretation of similar language in section 6945, General Code, as re-enacted in 103 O. L., 198-202. By comparing the language of the last clause of that section with that of the last sentence of the first paragraph of section 1222-1 as above quoted, it will appear that the two phrases are in identically the same words with the exception of the word "total" which is found in section 1222-1 and is not found in section 6945. In my opinion this difference in phraseology is immaterial for reasons pointed out in the enclosed opinion. These reasons find expression in the statement that in order to denote the 15-mill limitation otherwise than has been done in the amendment to

section 7217 above quoted it is necessary to use the phraseology "the combined maximum rate for all taxes" as found in section 5649-5b, as amended 103 O. L., 57. The 10-mill limitation as I have interpreted it in the opinion upon your first question, sent, or to be sent under separate cover, is accurately described by the phraseology used in section 1222-1, it being a "maximum limitation upon the total aggregate amount of all levies," just as is the 15-mill limitation. In other words, the phraseology of section 1222-1 described both the 15 and the 10-mill limitation; whereas the only appropriate language which could be used to describe the 15-mill limitation *only* would be that found in section 5649-5b.

Your fifth question is as follows:

> "5. Is the power of the county commissioners to issue bonds to pay the share of the township in a road improvement under the state highway department law, as provided for particularly by section 1223, General Code, limited by the provisions of the Longworth act and particularly section 3940, General Code, referred to and adopted in section 3295, General Code?"

In my opinion the limitations of the Longworth act, so-called, do not apply to bonds issued under section 1223, General Code, which has already been quoted. There are several reasons for this conclusion. In the first place section 1223, General Code, provides a limitation of its own. There is, therefore, presented a case of two statutes, one of them general and one of them particular. The familiar rule of construction is that the particular statute is to be interpreted where it conflicts with the general statute as an exception to the former. It seems to me that there is a conflict here, so that it will be impossible to superimpose one of these statutes upon the other and to regard them as merely cumulative. However, I concede that there may be some doubt about this.

In the second place, the limitations of section 3939 and succeeding sections, as adopted by reference in section 3295, General Code, apply to bonds issued by the township trustees. The sections themselves insofar as their quotation is necessary here, are as follows:

> "Section 3295. *The trustees of any township* may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., in such manner as provided by law for the sale of bonds by such township, for any of the purposes authorized by law for the sale of bonds by a municipal corporation for specific purposes, when not less than two of such trustees, by an affirmative vote, by resolution deem it necessary and the provisions of law applicable to municipal corporations in the issue and sale of bonds for specific purposes, the limitations thereon, and for the submission thereof to the voters, shall extend and apply to the *trustees of townships.*
>
> "Section 3939. When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent., and in the manner as provided by law, for any of the following specific purposes:
>
> * * * * * * * * * * * * *
>
> "4. For improving highways leading into the corporation, or for building or improving a turnpike, or for purchasing one or more turnpike roads and making them free.
>
> * * * * * * * * * * * * *

"22. For resurfacing, repairing or improving any existing street or streets as well as other public highways. * * *."

"Section 3940. Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation.

"Section 3941. The net indebtedness created or incurred by the council under the authority granted it in section one of this act, and in an act passed April 29, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes (O. L. v. p. 318) together with its subsequent amendments, shall never exceed four (4) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

"Section 2942. In addition to the authority granted in section one (1) (G. C. 3939) of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. per annum, as it may determine upon for any of the purposes set forth in said section one (G. C., 3939) upon obtaining the approval of the electors of the corporation at a general or special election in the following manner."

It will be observed that the limitations of the above sections are applicable only to the issue of bonds by the township trustees. Bonds to be issued under section 1223, however, are to be issued by the county commissioners.

In the third place I do not believe that the township trustees could issue bonds under section 3939, as adopted by reference to section 3295, for the purpose of paying a *township's proportion* of a state highway improvement. This is quite a different thing from "building or improving turnpikes," or "resurfacing, repairing or improving * * * public highways." The obvious reference in section 3939 is to improvements to be carried on by the township itself. The section does not refer to the issuance of bonds for a purpose like that contemplated in section 1223, General Code, nor in my opinion could it be properly interpreted so as to refer thereto.

In an opinion to your predecessor, Hon. Lewis P. Metzger, rendered some time ago, I held that a joint reading of sections 3295 and 3939, General Code, is not of itself sufficient to authorize township trustees to borrow money for any one of the purposes enumerated in section 3939. In addition to these two sections there must also exist independent power on the part of the township trustees to do the thing for which, under section 3939, money may be borrowed. In the case at hand, the township trustees do not have the independent power to improve public roads under the highway commission act.

The scheme of the law contemplates the contribution by the township of a part of the cost and expense of making the improvement; but this is quite a different thing from making the improvement as a township enterprise.

Again, it seems to me that if the Longworth act is to apply at all then the township trustees or the county commissioners would have the authority to exceed the limit by proceeding under section 3942, General Code, above quoted. I think it must be conceded, however, upon a fair reading of the highway law that this authority does not exist, and that the latter law does not contemplate the submission of any question relative to exceeding the debt limit to a vote of the people. Finally, the bonds to be issued under sections 3939, et seq., are, generally speaking, such bonds as are to be provided for by subsequent tax levies. This is perhaps not universally true as evidenced by section 3952, General Code, which I need not quote. However, it is true that section 1223, General Code, contemplates the issue of bonds

in anticipation of taxes. The taxes themselves being levied under prescribed limitations as provided in section 1222-1, General Code, this, of itself, constitutes a limitation upon the power to create indebtedness. Furthermore, the thing to be anticipated is not only the taxes to be collected from the township, but also the other revenues which are to be available to pay any part of the cost of a given improvement. Again, the limitation is applicable not only to a single improvement but to all improvements for which bonds are to be issued in any one year. Hence, it seems to me that the whole scheme of the state highway improvement law, and of section 1223 in particular, is incompatible with the idea of the Longworth act.

For all the foregoing reasons I am of the opinion, in answer to your fifth question, that county commissioners, in issuing bonds under section 1223, General Code, are not controlled by the limitations of sections 3940, et seq., General Code, when the taxes to be anticipated are those levied against the township or townships in which one or more road improvements are situated.

The first part of your sixth question is as follows:

> "6. (a) Are bonds issued under section 1223, General Code, for the purpose of paying the respective shares of the township and lands assessed only, general obligations of the county, or is the county's liability representative only of the ultimate security for the payment of the bonds, being the assessments and taxes to be levied upon the property of the township only?"

In answer to this question, I would say that in my opinion the bonds are county bonds to the extent that if default were made in their payment a suit would lie against the county or against the county commissioners as such, and judgment would be rendered against the defendant therein. But the only way in which such a judgment could be enforced would be by a writ of mandamus to compel the levy of a tax within the prescribed limitations of section 1222-1, General Code, sufficient to pay the respective proportions; that is to say, should the default arise through a shrinkage in the assessment against abutting property owners the proportions of the state, county and township respectively having been fully paid into the fund by appropriate tax levies, etc., the specially benefited property, and that only, would be liable for the satisfaction of the judgment through proceedings in mandamus. So also, if the deficiency should arise from the failure of the township tax to meet the township's proportion, the remedy of the judgment creditor would be limited to a securing of a writ of mandamus compelling the levy of additional township taxes within the limitations of section 1222-1 until the township's proportion has been provided for and the deficiency made up.

The leading case on this point is Davenport vs. County of Dodge, 105 U. S., 237, to which I refer you generally.

In this connection I beg leave to point out that the respective proportions chargeable against the county, township or townships and the specially benefited property are prescribed by section 1208 as amended 103 O. L., 456, subject to certain waivers and other arrangements which may be entered into by and among the different authorities. I do not think mandamus would lie to compel taxes to be levied, for example, against a township in an amount which would charge against the township ultimately a greater proportion of the expense of a given improvement than that prescribed by this section, or agreed upon otherwise under authority of the law.

In a word, then, after the holder of a bond issued, under section 1223, General Code, had secured judgment against the county he could enforce his judgment only by compelling the necessary taxes and assessments to be levied so as to charge against each contributor to the fund, in anticipation of which the bonds are issued,

the amount for which it, or they, are liable under the provisions of the state highway department law; and I may add, that this is especially true in that the bonds are issued in anticipation of the taxes and assessments, and with particular reference to the "respective shares of the county, township or townships and the lands assessed," so that a buyer of such bonds is put upon this notice as to what these shares are, and as to how they are to be provided for.

The second part of your sixth question is as follows:

> "(b) The requirement of article XII, section 11 of the constitution being that no bonded indebtedness shall be incurred unless provision is made for levying and collecting annually *by taxation* an amount sufficient to pay the interest on the bonds and to create a sinking fund for their ultimate retirement, what provision of this character must be made by the county commissioners when issuing bonds to pay the respective shares of the townships and the assessed lands only? That is, would the commissioners be required to provide for the levying and collecting of an annual *county* tax sufficient to create a sinking fund to pay the interest on the bonds, the county to recoup itself out of the proceeds of the taxes collected from the abutting property? Or would the taxes levied against the township's property and the assessment levied against the abutting property be considered an adequate provision under the constitution?"

This second part of your sixth question requires consideration of article XII, section 11 of the constitution which is as follows:

> "Section 11. No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The supreme court of this state in the recently decided case of Linke vs. Karb, has expressed the opinion that this provision requires a resolution or other similar measure to be passed or incorporated in the proceedings to issue the bonds, to the effect that taxes shall be annually levied and collected, sufficient in amount, to provide for the sinking fund and interest charges on account of a bond issue. The court did not have the constitutional amendment squarely before it in this case; much less did it have the case of bonds to be provided for in part by special assessments.

I confess that the question which you submit is involved in considerable doubt, as article XII, section 11 embodies a distinct departure from the former policy of this state, and we are without precedents as to its interpretation. However, I am of the opinion, generally speaking, that where bonds are issued in anticipation of taxes levied, or to be levied, and of special assessments, the contemporaneous or subsequent levying of sufficient taxes and assessments to provide for the sinking fund and interest charges on account of the bond issue, is a substantial compliance with the constitution. In other words, "by taxation" as found in the constitution, is not to be so interpreted as to require the bonds to be provided for by tax levies, and to preclude the issuance of special assessment bonds, or bonds to be paid partially in this way. Indeed, there is some question in my mind whether article XII, section 11 applies *at all* when the bonds are issued *in anticipation* of all taxes and assessments levied or to be levied, especially when the amount of the taxes and assessments which can be levied is definitely ascertainable in advance. As I have

already pointed out, the buyer of bonds issued under section 1223, General Code, as amended, is charged with knowledge of the amounts which will be contributed to the cost of a given improvement by the various taxing districts, etc., contributing thereto. Furthermore, he is charged with knowledge of the tax limitation applicable to the levying of the tax in question. The case is quite different from those instances in which bonds are issued to provide for the cost of an improvement, which bonds are to be paid for by general sinking fund levies made without reference to any particular apportionment of cost, and under rate limitations not especially applicable to the particular levy in a given district. With a very great show of reason it could be urged that in the case of anticipation of such levies and assessments the constitutional provision does not apply at all. Whatever may be the ultimate decision of the courts as to the scope of section 11 of article XII of the constitution, I feel justified in hazarding the opinion that it would not be necessary for the county commissioners to provide at the time of issuing bonds under section 1223, General Code, for an annual tax levy against all the property in the county, making this tax levy the primary source of revenue for the payment of the sinking fund and interest charges on account of the bond issue, and relying, on behalf of the county, upon the reimbursement which should be afforded to the county by the contemporaneous collection of the township taxes and assessments upon special benefited property. In other words, I think that the taxes for the township's portion and the special assessments for the proportion chargeable to the abutting property, constitute the "taxation" required by article XII, section 11 of the constitution; if that section applies at all and that the provisions of the state highway department law prescribing what proportion of the total cost of an improvement shall be paid by the county, township and abutting property owners, respectively, together with the fact that the bonds are issued in *anticipation* of the collection of the taxes and assessments for these respective shares constitute "provision for" the annual levy and collection of such taxes with a view to meeting interests and sinking fund requirements on account of the bond issue within the intendment of that section, if a formal resolution to the effect of the constitutional language be passed at the time.

Your seventh and eighth questions, which may be considered together, are as follows:

> "7. Does section 1222-1, General Code, provide for levying taxes for both intercounty highways and main market roads?
>
> "8. Does section 1223, General Code, authorize the county commissioners to issue bonds for both intercounty highways and main market roads?"

I am at a loss as to just how to interpret these two questions. I shall assume, however, that both of them relate to the *construction* of a state highway improvement along a "main market road." That is to say, I shall eliminate the question of repair and maintenance, and shall consider only as to whether or not bonds may be issued under section 1223, and taxes levied under section 1222-1 of the General Code, as amended, for the purpose of providing for the cost and expense, or part thereof, of constructing an improvement upon and over a part of the route designated as a "main market road."

Of course it is perfectly clear that all the provisions of the state highway commission law apply to the improvement of roads lying along the routes designated as "intercounty highways."

The question respecting "main market roads" is somewhat more difficult. It involves an interpretation of the following sections:

"Section 1227. The word 'highway' as used in this chapter, includes an existing causeway or bridge, or a new causeway or bridge, or a drain or watercourse which forms a part of a road authorized by law. The term 'state highway' as used in this chapter shall be held to mean such part or parts of the intercounty highways and main market roads which have been constructed by the state, by the aid of state money or have been taken over by the state."

The term "state highway" however, is not used in any of the sections of the highway commission act relating to the *original improvement* of highways. The term is used in section 1222 as follows:

"Moneys appropriated by the state for the purpose of carrying out the provisions of this chapter, shall not be used in any manner or for any purpose, except as provided herein. Moneys so appropriated shall be equally divided among the counties of the state, except such moneys as are appropriated for the use of the department and for surveys, plans and estimates, and the maintenance and repair of state highways."

The term is also used in section 1225 as follows:

"The state highway commissioner shall maintain and repair all intercounty highways, main market roads, bridges and culverts, constructed by the state by the aid of state money, or taken over by the state, the state may pay the entire cost and expense thereof. Nothing in this chapter shall be construed as to prohibit any county, township, municipality or the federal government or any individual, firm or corporation from contributing any portion of the cost of the maintenance and repair of state highways.

"When any bridge or culvert on a state highway, shall require renewing, it shall be constructed and the cost apportioned as herein provided for the construction and improvement of bridges and culverts on intercounty highways."

Wherever in the chapter a descriptive term is used to refer to a road, the improvement of which is contemplated or in process of construction, the language is "public road," "highways constructed under the provisions of this act," "intercounty highway" or some other term. In fact it is clear from the language of section 1227 itself that the technical phrase "state highway" applies only to a road which has actually been constructed or taken over by the state. Therefore, in the very nature of the case it could have no necessary reference, so far as section 1227 is concerned to a highway, the improvement of which is contemplated or in course of construction. Hence, it follows that section 1227 does not itself authorize anything with respect to the construction of main market road improvements.

Main market roads are referred to by name in several sections of the act, among them, sections 1183 and 1183-4 for example, which authorize the state highway commissioner to make surveys, plans, specifications, etc., for the improvement of main market roads and to designate routes of travel which shall be called main market roads. Again, the term is used in section 1197 in the following negative manner:

"Nothing in this chapter shall be construed as preventing or forbidding the local authorities from constructing, maintaining or repairing any part

> of the intercounty highways or main market roads, provided, however that the plans and specifications shall first have been submitted to the highway commissioner and shall have received his approval."

Of course this section cannot be pointed to as giving authority to improve a main market road under the state highway department law, i. e., under the apportionment plan and upon contracts to be let by the state highway commissioner. It does negatively authorize the local authorities to make an improvement over the route of a main market road under plans submitted to and approved by the state highway commissioner, but in my opinion levies for this purpose cannot be made under section 1222-1, General Code, nor could bonds be issued under section 1223, General Code, therefor.

In section 1225, already quoted, is found reference to the maintenance and repair of main market roads, but as my interpretation of your question limits it to the original construction of the improvement, this section is obviously not pertinent to the inquiry.

It is not clear to me whether there are any main market roads in the state, designated as such by the state highway commissioner, other than those designated by the general assembly itself in the act found in 103 O. L., 155. This act provides for a half-mill levy on all the taxable property in the state, 25 per cent. of the proceeds of which, under section 3 thereof, is to be "used for the construction, improvement, maintenance and repair of certain main market roads in said state, and the same shall be located upon the route or portions of said intercounty highways designated as follows." Here follows the description of twelve routes, none of which appear to pass through Columbiana county.

As to the improvement of these roads the following provision of section 4 of the act just cited governs, viz.,

> "and as to such main market roads * * * no procedure for construction, improvement, maintenance and repair of roads as is provided for in any other act or acts of the general assembly shall apply to such main market roads."

But I am led to believe that there is in your county some route of travel designated as a main market road by the state highway commissioner, possibly under authority of section 1184-4, General Code, but not so designated by the general assembly. The statutes are practically silent as to the status of such a main market road. Inasmuch as the phrase is also used in connection with intercounty highways as "intercounty highway or main market road," I am of the opinion that the two terms are used practically interchangeably and that a main market road," *designated as such by the state highway commissioner,* is for the proper purpose of the act, merely an "intercounty highway." That being the case, your seventh and eight questions are answered by saying that there is no difference at all between the procedure in the construction of an intercounty highway and a main market road, designated as such by the state highway commissioner, so that sections 1222-1 and 1223 are equally applicable to both kinds of improvement if they may be so characterized.

If the main market road be one of those designated by the general assembly, sections 1222-1 and 1223, General Code, do not apply to or authorize the raising of money for the purpose of making an improvement by the use of the 25 per cent. of the proceeds of the tax levied and apportioned for this purpose under section 3 of the act in 103 O. L., 155, nor do any of the other sections of the state highway department law apply thereto.

Upon the assumption that you may have in mind a road designated as a main market road and changed from one of the routes named by the legislature under the supposed authority of section 1184-4, General Code, I feel that I should elaborate

a little further upon my view as to the meaning of section 4 of the act found in 103 O. L., 155. As already pointed out, one clause of this section provides that in the construction of main market roads none of the procedure provided for by any of the other laws of the state shall apply. Two meanings are possible, first, that along the entire route of a main market road no improvement shall be made except by the sole and exclusive use of the 25 per cent. of the proceeds of the special levy set apart for this purpose under section 3 of the act, and second, by the sole and exclusive efforts of the local authorities under section 1227, General Code, as amended.

The other possible interpretation is that the money set aside under section 3 of the act providing for the tax levy, when used shall be the only money used on a particular job or improvement.

This interpretation fits in perhaps more satisfactorily with the language of section 3, which is to the effect that the main market roads to be constructed under the act shall "be located *along and upon* the routes or portions of state intercounty highways, designated as follows." In other words, the *routes* referred to in section 3 of the act, and similarly referred to in section 1184-4, General Code, as amended, are not the "main market roads" nor are they, strictly speaking, the "intercounty highways." They are merely the routes along which main market roads or intercounty highways may be constructed. This distinction would lead to the following definition of a main market road for the purpose of section 4 of the act found in 103 O. L., 155, viz., a main market road improvement is the improvement of any part of one of the routes of travel, designated by the general assembly, or (possibly) as altered by the state highway commissioner under section 1184-4, General Code, made by the use of the fund consisting of 25 per cent. of the proceeds of the hilf-mill levy.

From this it would follow that the making of a main market road improvement over a part of the main market road route would not prevent the improvement of another part of the same route under the state highway department law by the use of the 75 per cent. of the proceeds of the half-mill levy and the other revenues of the state highway department as an "intercounty highway." In other words, when the state highway commissioner applies the 25 per cent. set aside for main market roads he must make the improvement himself without any aid or assistance from the county, but he may entertain application for state aid for the improvement of any part of a main market road *route* as an intercounty highway. That being the case, the answer to your seventh and eighth questions becomes quite simplified, and it appears that in any event a levy to pay the county's and township's portion of an improvement along a main market road *route* may be made under section 1222-4, General Code, and bonds may be issued in anticipation thereof under section 1223, General Code, as amended, unless the proposed improvement is to be made by the use of moneys in the fund created by setting aside 25 per cent. of the proceeds of the half-mill levy.

Your ninth question is as follows:

> "9. Does the one per cent. limitation of section 1223, General Code, refer to the total amount of bonds issued in a county, the total amount of bonds issued in any one year, or the total amount of outstanding bonded indebtedness existing at any one time?"

Section 1223, General Code, as amended 103 O. L., 459, provides in part that, "the aggregate amount of such bonds issued shall not be in excess of the one per cent. of the tax duplicate of such county."

The question turns on the meaning of the word "issued." Shall it be interpreted by reading in the qualifying clause "in any one year;" shall it be interpreted as

equivalent to the word "outstanding;" shall it and the clauses in which it is found be interpreted so as to put a stop to the power of the county commissioners when they have once issued up to one per cent. of the tax duplicate of the county; or shall it be interpreted so as to put a temporary stop to the exercise of such power until such time as the duplicate may be increased?

Stated in another way, what bonds are to be counted in ascertaining whether the limitation has been or is to be exceeded; those which have been issued in a given year, those which are outstanding or those which have been issued in the past, whether they have been redeemed or not?

This question is not free from doubt. Prima facie, it seems to me the last of the meanings above suggested must be chosen, that being the primary and natural meaning of the word and the clause. Bonds which have been redeemed are nevertheless bonds which have been issued. If the word "issued" was not in the clause at all, and if the clause read "the aggregate amount of such bonds shall not be in excess of one per cent. of the tax duplicate of such county," then the second meaning above suggested would be the natural one, as the obvious import of such a clause would be to refer to the amount of bonds outstanding at a given time. At all events, I think the first meaning above suggested must be rejected as it would do too much violence to the plain language of the section to interpolate the phrase "in any one year" therein. Nor would it do, in my opinion, to interpret the whole clause merely as a limitation upon the amount of bonds that could be issued at one time, i. e., in one exercise of the borrowing power. The evident intention of the statute is to impose a real debt limit upon the county with reference to this particular class of obligations. To interpret the section as just suggested would destroy the effectiveness of the limitation in any real sense. The choice is, therefore, narrowed to that interpretation which counts as "issued" bonds which have been retired and that which regards as " issued" only those bonds which happen to be outstanding at a given time. Although as I have stated, the first of these two interpretations is perhaps more strictly in accord with the primary meaning of the word "issued," yet there is some evidence of the use of the term in the other sense to which I think it is susceptible. The exact phraseology is "the aggregate amount of such bonds issued shall not be in excess of one per cent. of the tax duplicate." This peculiar use of the word "be" indicates continuity. It denotes a continuation. Therefore, it relates to a thing which may be changed from time to time. Evidently the legislature had in mind an amount which might fluctuate when it provided that such amount should not be in excess of a certain per cent. of the duplicate. It seems to me that the reasonable intendment of the legislature is suggested by this language, together with the whole context, and that in spite of the technical and exact meaning of the word "issued" it may very well be read as if equivalent to "issued and outstanding." Indeed, in one sense there is a distinction between a provision to the effect that the county commissioners "shall not issue bonds in excess of one per cent. of the tax duplicate" and a further provision to the effect that the "total amount of such bonds issued shall not be in excess of one per cent. of the tax duplicate." The one would seem to forbid the act of issuing bonds after a certain amount had been issued. The other would seem to make the right to issue bonds dependent upon the "bonds issued." There is some indication here then that the legislature conceived of the phrase "bonds issued" as applicable to bonds actually in existence. In this case when a bond is paid and retired it has ceased to be a "bond issued." Looking at it in still another light it must not be forgotten that the word "bonds" is used in connection with the word "issued" as already pointed out, so that it is the amount of the *bonds* (issued) that is to be looked to for the purpose of ascertaining whether the limitation has been or is likely to be exhausted. The shade of meaning here can perhaps be suggested by transposing the noun and the adjective so as to make the phrase read "total amount of issued *bonds*

shall not be in excess of one per cent., etc." In the sense suggested by this transposition, an issued bond would cease to be such when it had been paid and retired. It would then become a cancelled or retired bond.

I am convinced then that when regard is had to the peculiar context in which the word "issued" is found it must be held that the phrase as a whole means that the bonds outstanding and not paid at any one time may not exceed one per cent. of the tax duplicate of the county.

Your tenth question is as follows:

> "10. Is there any authority whatever for the submission to the electors of a county, of a proposition to issue bonds for the purpose of general road improvements; the object being to avoid the ten-mill limitation of the Smith law, assuming this limitation to apply to the levies made under section 1222-1, General Code?"

You refer to section 7181 to section 7231, inclusive, of the General Code. I need not quote these sections in full but the following provisions will suffice to show their nature:

> "Section 7181. The county commissioners, when satisfied that the public interests of the county demand and justify special action for the improvement of the roads therein, may appoint three disinterested freeholders thereof as road commissioners to *view, survey and locate* one or more roads, beginning at and leading from the county seat of the county, or such other eligible points as are deemed proper, running by such direct and eligible route as they find best for the public convenience, and terminating at a point within or at the county line.
>
> "Section 7184. The roads so established and constructed under this chapter shall be opened not more than sixty nor less than forty feet wide. At least twenty feet in width shall be turnpiked with earth so as to drain freely to the sides, and be raised with stone, brick, gravel or other material equally as good not less than eight nor more than sixteen feet in width, nor less than twelve inches thick at the outer edges of such bed or stone, brick or gravel, compact together in such manner as to secure a firm, even and substantial road. The road commissioners may cause the road to be constructed wholly of earth, when stone, brick or gravel or other material equally as good is not accessible to the line of the road.
>
> "Section 7203. The county commissioners shall not levy a general tax, nor appropriate money, except so far as is necessary to pay the expense of preliminary surveys already commenced, or other liabilities already incurred, to be expended in the construction of such turnpikes, without first submitting to the qualified voters of the county the question of constructing such roads by general tax, which submission shall be at a general election."

It is evident from these and related sections that the procedure of the chapter in which they are found is not appropriate for the general improvement of roads. It is a method of laying out, establishing and constructing particular roads. This, of itself, answers so much of your question as relates to this chapter. You inquire, however, whether there is any way in which the voters of the county may authorize an improvement of the roads and thus place the tax levy outside of the ten-mill limit.

Generally speaking, I may say that I know of no such authority of law, although I may have overlooked some statutory provision. I refer you, however, to sections 5649-5, et seq., being parts of the Smith one per cent. law. These sections

authorize the levy of taxes outside of the ten-mill limit and within the fifteen-mill limit for any purpose upon a vote of the electors. In my opinion any county levy for the construction of road improvements such as, for example, the levy for the county's portion of the cost of the state highway improvement under section 1222-1, General Code, may be taken out of the ten-mill limitation by an election under the provisions last above cited—not an election upon the question of issuing bonds, but an election upon the question of an increased tax levy. Of course, the authority to have an increased tax levy would last for five years; on the other hand, however, under section 1223, General Code, the bonds may be made to mature in ten years. Some question might arise under section 11 of article XII of the constitution as to whether or not provision could be made for the retirement of the bonds when the authority to levy the tax necessary for that purpose would expire in five years, and the bonds themselves would run for ten years. For that reason I would advise that if the procedure which I have suggested is followed the life of the bonds be limited to five years or their retirement be provided for by levies to be made within the five-year period provided for by section 5649-5a, General Code.

Your eleventh question is as follows:

> "11. Under sections 7181 to 7231, General Code, both inclusive, may the entire county be taxed for the payment of the interest and redemption of the bonds issued for the building of the road or must this tax be limited to a special district situated within two miles of the road to be improved?"

I assume that you desire an aswer to this question notwithstanding my answer to your tenth question. The statutes involved are as follows:

> "Section 7212. When the county commissioners receive or require donations of money, or written agreements on the part of taxpayers subjecting their taxable property to taxation annually, to aid in the location and construction of such roads, and a majority of the taxpayers within the boundaries of the road sign such subscription or agreement, the county commissioners thereupon may levy the amount thereof upon all the taxable property within the boundaries of the road, according to the benefits of the property, taking into consideration assessments that have been heretofore made."

It will not be necessary to quote the other sections to which you refer. I am of the opinion that the effect of this section is to provide a special method of taxation upon the subscription or written agreement of the taxpayers within the boundaries of the road. In the absence of any special written agreement, sections 7217 to 7219, inclusive, control. They are as follows:

> "Section 7217. Upon the location and establishment of such turnpike road by the county commissioners, and after an affirmative vote by the electors, for the purpose of aiding in the construction and to provide a permanent fund for the maintenance and expense thereof, they may levy annually, in addition to other road taxes authorized by law, a tax for turnpike road purposes of not more than six mills on the dollar of valuation on the grand duplicate of taxable property in the county, and continue such levy from year to year, until the road or roads which have been commenced are completed.
>
> "Section 7218. Such taxes shall not be levied on lands which have heretofore been assessed for the construction of free turnpikes, or improved roads, already constructed, or in the course of construction at the time

of the levy of the tax, unless the amount that would be ratably levied upon such lands exceeds the amount of such assessment. In such cases, the excess only shall be levied and collected.

"Section 7219. For the purpose of raising the money necessary to meet the expenses of such improvements, the county commissioners, if in their opinion advisable, may issue the bonds of the county, payable at such times as they deem advisable, with interest not exceeding the legal rate per annum, payable semi-annually. Such bonds shall not be sold for less than their par value."

The special assessment or subscription provided for in section 7212 is, as that section provides, "to aid in the location and construction" of the road. The remainder of the cost, or all of it, in the absence of any special agreement, is to be provided for under other sections cited.

Your twelfth question is as follows:

"12. Is there a conflict between section 7219 and section 7231, General Code, particularly with respect to the time within which the bonds to which both refer shall be payable? If there is such a conflict, which section controls?"

There is no conflict between sections 7219 and 7231, General Code. The provisions beginning with section 7223, General Code, constitute an act quite separate and apart from that portion of the chapter which precedes them. (See 93 O. L., 234.) I need not go into detail as to the nature of the procedure under the two parts of the chapter respectively.

Your thirteenth question is as follows:

"13. Section 7217, General Code, as amended, requires the tax authorized thereunder to 'conform to the restrictive limitation of the maximum 15-mill limit.' Does this language by inference exclude the tax provided for in the section from the operation of the other limitations of the Smith one per cent. law?"

Section 7217, as amended, 103 O. L., 515, provides as follows:

"Upon the location and establishment of any such turnpike road by the county commissioners and for the purpose in aiding in the construction and to provide a permanent fund for the maintenance and expense thereof, they may levy annually, in addition to other road taxes authorized by law, a tax for turnpike road purposes of not more than two mills on the dollar of valuation on the grand duplicate of taxable property in the county, and continue such levy from year to year, provided, however, that the levying of such tax shall conform to the restrictive limits of the maximum fifteen-mill limit."

In my opinion the general assembly has clearly expressed in this section the intention of excluding the levy provided for therein from the ten-mill limitation of the Smith law. As already stated in this opinion, the ten-mill and fifteen-mill limitations are cumulative and co-ordinate provisions. While it is possible for the general assembly to have appropriately described both of them, as in the case of section 1222-1, yet where one is so explicitly referred to as to leave no doubt as to the intention of the legislature, as in the case of section 7217, as amended, it seems

clear to me that by this expression, the general assembly has excluded all possibility of reference to the other. Therefore, in my opinion, the levy provided for under section 7217, General Code, as amended is subject to the fifteen-mill limitation of the Smith law but not to the ten-mill limitation thereof.

Your fourteenth question is as follows:

"14. Does section 7217, General Code, authorize the levy of a tax without a vote of the people?"

Section 7217, General Code, has already been quoted.

In the law amending section 7217 (103 O. L., 515), section 7203, and that group of statutes providing for the submission to the electors the proposition to improve designated roads, were repealed. (Section 2 of the act).

I am of the opinion, in the light of the statutes as they are, that all the powers of the county commissioners under sections 7181 to 7224, inclusive, General Code, may be exercised without a vote of the people. Indeed, I am of the opinion that there is no present authority to submit any question pertaining to the exercise of such powers to a vote of the people.

With respect to the last group of questions stated by you, however, I feel impelled to repeat that the chapter of the General Code beginning with section 7181 thereof has no reference to the improvement of existing roads generally, but only to the construction of particular turnpikes.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

981.

CITY MANAGER OF CHARTERED CITY—NOT REQUIRED TO REGARD SENIORITY OF SERVICE IN REDUCING THE NUMBER OF POSITIONS IN A DEPARTMENT.

The city manager of a chartered city subject to the state laws pertaining to civil service, acting on behalf of the department of public safety in discharging a sufficient number of patrolmen and foremen to meet a reduction in the number of positions in said department is not required to consider solely the number or seniority in service by discharging the appointees last appointed in said department. He has the right to consider the relative merit, record and efficiency together with seniority in service in retaining those showing the highest general average.

COLUMBUS, OHIO, June 13, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 22, 1914, you submit an agreed statement of facts in the matter of the complaint of several former employes in the police and fire departments of the city of Springfield.

The agreed statement of facts is somewhat lengthy and I shall not copy it in full, but will refer to the material facts.

The civil service commission of Springfield has submitted the question as to the legality of the discharge of the complainants, and ask an opinion upon the following question:

"Whether upon the facts as above stated, the city manager as acting head of the department of public safety, in discharging a sufficient number of patrolmen and firemen to meet the situation occasioned by the reduction in the number of positions in said departments, was under a legal duty to consider solely the question of seniority in service, and to discharge the appointees last appointed in said departments, or had he the right to consider the relative merit, records and efficiency together with the seniority in service of each of the men in the department and retain those showing the highest general average of efficiency based upon such considerations."

I assume that the city of Springfield is subject to the state law pertaining to civil service.

It appears that the city of Springfield has a home rule charter, establishing a "city commission," which has the power to appoint a "city manager."

The city commission on January 19, 1914, duly passed an ordinance reducing the number of positions in the fire and police departments. Said ordinance did not designate the employes to be retained. The city manager as acting head of the department of public safety reorganized these departments and reduced the number of employes by discharging the complainants. A copy of such discharge and the reasons therefor was given to each discharged employe, and also filed with the civil service commission. It is uncertain whether said departments can be restored at any time in the future to their former number.

The city manager made an impartial investigation into the relative merits of each member of the departments and discharged the complainants "as the best solution in his opinion, for the city's interests under the above circumstances." The city manager acted in good faith and wherever possible discharged those who would be eligible to receive pensions as upon honorable discharge. That no charges were preferred, and no formal notice of the proposed action was given. Said discharges were termed to be "honorable discharges from the city's service," and each person so discharged was placed at the head of the proper eligible lists by the civil service commission.

It is further agreed :

"That none of said discharges, however, were controlled solely by the length of time for which the discharged officer had been in service of said city and such position. That there are now in the regular service of the city of Springfield nine firemen who were appointed to their respective positions of firemen subsequent to the original appointment of the nine complainant firemen in this cause, and who were retained in the city's service in preference to the said complainant firemen.

"That there are now in the service of said city seven patrolmen, duly appointed to and serving in said positions, who were appointed thereto at a date subsequent to the original appointment of the seven patrolmen, complainants herein; and that said patrolmen, were retained in the city's service in preference to the eight patrolmen, complainants herein."

It is admitted that the proceedings in the adoption of the ordinance were regular and that the city manager had the power to reorganize the departments by reducing the number of officers and employes.

The gravamen of the complaint is that the city manager retained in the service men who were appointed after those who were discharged. In other words, he did not recognize, solely, seniority of service, by discharging those who had been last appointed.

Cities are sometimes compelled to reduce the number of positions and this makes it necessary to discharge employes who were efficient. It is an unfortunate situation for those who are discharged, but someone must be discharged.

The courts have met a similar situation under the old municipal civil service law, and there is nothing in the new act to change the principles applicable to such cases.

In State ex rel., vs. Searcy, Mayor, 21 Cir. Dec. 83, it is held:

> "Seniority of employment in the classified service of municipalities entitles incumbents in office thereunder to no preference over others subsequently acquiring positions in such service by virtue of examinations under the merit system, except as provided by section 165 of the Municipal Code of 1902 in cases of promotion from one rank to another. Hence, in reducing the number of patrolmen of a city, pursuant to ordinance of its council, the board of public safety may reclassify its police force regardless of length of service of its members.
>
> "Section 227 of the Municipal Code of 1902, authorizing municipal councils to fix the number of employes in the department of public safety, gives councils authority to reduce the number of its patrolmen.
>
> "Sections 167 and 213, providing that no removals in the civil service list shall be made except for cause, and continuing in office certain municipal employes, are provisional in their scope and were intended to give incumbents their status under the new code, but they give no higher status or greater right to position than those subsequently placed in employment by examination under the merit system."

This case was affirmed by the supreme court without report in 80 Ohio State 740.

In the case cited the number of positions was reduced by ordinance and the appointing authority did not retain the employes according to seniority of service. The situation in the case at bar is identical.

Section 2 of the new civil service act, section 486-2, General Code, provides in part:

> "* * * and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Section 16 of said act, section 486-16, General Code, provides in part:

> "Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, he reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; and whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments."

In accordance with the provisions of this section the discharged employes have been placed at the head of the eligible lists.

Section 17 of the act, section 486-17, General Code, provides in part:

> "* * * In all cases of discharge, lay off, reduction for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended with a copy of the order of discharge, lay off, reduction or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission."

These provisions do not prevent a reduction in the number of employes, but recognize the right to do so.

The civil service act makes no other provision for reducing the number of positions in a department. It does not provide that in making reductions the oldest in time of service or appointment shall be retained. In the absence of such provision in the act, no one in the classified service would have any preference over any other. All stand upon an equal footing.

Therefore, in making reductions, the appointing authority may choose whom he shall retain, regardless of the time of service, or time of appointment. He may take into consideration other things in addition to seniority of service. He is not required to consider solely the seniority of service.

It is my opinion, therefore, that the discharges in question were made according to law.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

982.

ORGANIZING TOWNSHIP INTO A ROAD DISTRICT—TOWNSHIP TRUSTEES ARE NOT ENTITLED TO COMPENSATION FOR SUCH SERVICE—TOWNSHIP TREASURER—TOWNSHIP ROAD DISTRICT FUNDS—INTERCOUNTY HIGHWAY—STATE AID HIGHWAY LAW.

Township treasurers are entitled to no compensation for services rendered in the organizing of a township into a road district, etc., and supervision of the working sections in the construction of roads under section 7052, since the statutes are silent with reference to any payment therein, nor are they entitled to any reimbursement for actual expenses incurred.

A township treasurer is not entitled to any compensation for the handling of township road district funds. The township trustees cannot expend money derived from the sale of bonds of a township road district for the purpose of paying the township's proportion of the cost and expense of improvement of an intercounty highway, under the provisions of the state aid highway law, since such law provides the method for raising money to pay the township's portion for the cost of such improvement.

COLUMBUS, OHIO, June 17, 1914.

HON. ARCHER L. PHELPS *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your letter of April 4th, wherein you submit for opinion the four questions following:

"First. What compensation, if any, are township trustees entitled to for their services rendered in the organization of the township into a road district, the issuing of bonds, the letting of contracts and the supervision of working sections, in the construction of roads under section 7082?

"Second. Are township trustees entitled to receive their actual expenses incurred in the organization of the township into a road district, and the issuing of bonds, the letting of contracts and the supervision of the work of construction?

"Third. To what compensation, if any, is the township treasurer entitled for the handling of township road district funds?

"Fourth. Can the township trustees expend money derived from the sale of bonds of a township road district, for the purpose of paying the township's proportion of the cost and expense of the improvement of an intercounty highway, under the provisions of the state aid highway law?"

Section 7052, General Code, provides:

"The trustees shall designate one of their number to supervise the improvement of each working section of the public ways. They shall provide such blanks, books and records, as are necessary, and allow to the township clerk for the services to be rendered by him, reasonable compensation; all of which shall be paid out of the funds provided for such improvement on the order and allowance of the township trustees."

The foregoing is the last section of the subdivision of the statutes providing for the improvement of public roads, when the trustees of a township have erected the township or part thereof into a road district. Township trustees are not entitled to compensation for services rendered by them under this subdivision, by virtue of any provision in the subdivision itself, because section 7052 which is the only place where the subject of compensation of officers is at all mentioned, makes no provision for the payment of anything to the trustees. If the trustees are entitled to any compensation for such services, it is only by virtue of section 3294, which provides that there may be paid to the township trustees a compensation of "one dollar and fifty cents for each day of service in the *business of the township,* to be paid from the township treasury," but no trustee may receive more than $150.00 in any year. The answer to your first question depends upon whether the services required by sections 7033 -7052 to be performed by township trustees, are services in the business of the township for which trustees would be entitled to the per diem mentioned in section 3294. In the consideration of this question, it should be noted that township trustees under section 7033, may erect the whole township, an election precinct, or part thereof in the township, or the township not including municipal corporations therein, into a road district.

The next section provides that a district so erected shall have an appropriate name by which it shall be known and designated. The trustees are authorized by other sections to borrow money and issue bonds of the district to obtain funds for the improvement of the roads therein, and to levy a tax upon the taxable property of the district to pay the cost of such improvements, and to pay the principal and interest on the bonds. All through the act the district, rather than the township, is spoken of, so that it is evident that the district was intended to be a separate entity from the township, and it is clear to me that when the trustees are performing services under these sections, they are doing so for the district and not for the township. I am therefore of the opinion that the trustees are not entitled to the per diem mentioned in section 3294, for services performed by them under sections 7033-7052; payment under the latter sections not having been specifically provided

for, such services under a well known rule of law, must be regarded either as gratuitous or as compensated by the other fees and emoluments pertaining to the office. No provision is made, either in the general statutes or in sections 7033, et seq., for payment out of the township treasury or from funds of the road district, of the personal expenses of the trustees.

I am of the opinion, therefore, that the trustees are not entitled to have such expenses paid from either of the sources above indicated.

The statutes we are considering are likewise silent with reference to the payment of any compensation to a township treasurer for his services in handling the funds of a road district. The compensation of the township treasurer is provided for by section 3318, General Code, which read:

> "The treasurer shall be allowed and may receive as his fees for receiving, safekeeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

The compensation of the township treasurer is computed upon the moneys belonging to the township treasury, paid out by the treasurer upon the order of the township trustees.

The money raised under section 7033, et seq., belongs to the road district and not to the township treasury, hence it is my opinion that the township treasurer is not entitled to any compensation for handling the same.

The answer to your fourth question must be in the negative. Money raised by virtue of these statutes should be expended only as the statutes direct, that is by the township trustees. They cannot use any of the money so raised to pay the township's portion of the cost of the improvement of the intercounty highway under the state highway law. That law provides a method for raising money to pay the township's portion of the cost of an improvement and should be followed when roads are being improved under its provisions.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

983.

INCORPORATION OF A TOWNSHIP SCHOOL DISTRICT INTO A SPECIAL DISTRICT—DUTY OF BOARD OF EDUCATION TO TRANSPORT PUPILS UNPROVIDED FOR TO A SCHOOL.

Where part of a subdistrict of a township school district has been incorporated into a special school district leaving the balance of said township school district unprovided for as to a schoolhouse, the board of education of the township school district must either provide a schoolhouse in the remaining part of said subdistrict, or transport the pupils to a school.

COLUMBUS, OHIO, June 17, 1914.

HON. THOS. H. MOORE, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Under date of January 5, 1914, you submitted to this department for an official opinion thereon, the following request:

"A special school district was formed in Lakeville, Holmes county, Ohio, taking in part of subdistrict No. 6, Lake township, Ashland county, Ohio, and the school in the said No. 6 subdistrict, Lake township, Ashland county, was abolished by the order and decree of the probate court of Holmes county.

"There were several families that were part of the No. 6 subdistrict in Lake township, Ashland county, that were not included in the new Lakeville special school district, and the nearest school which they can now attend in Lake township is over two miles distance and there is no school nearer in any other district.

"Now the question I raised is in the interpretation of section 7730—must the board of education of Lake township, Ashland county, convey the children of the above mentioned families to the nearest school?"

In reply thereto section 7730 of the General Code (section 3922, Bates Revised Statutes), provides in part as follows:

"The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board *must* provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, *the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district.*"

Said section was considered and construed by the court in the case of Board of Education vs. Shaul et al., 17 C. D., N. P., p. 269, wherein the second syllabus holds as follows:

"A township board of education having exercised its judicial discretion in suspending school in certain subdistricts and changing the district boundaries and having provided transportation for the pupils of such schools to other schools, the court will not interfere with such discretion on the ground of expediency or because of popular disapproval of such action."

In further construing said section, together with other sections, the court at page 275 of the opinion, says:

"These several sections of the statute clearly authorize the board of education to suspend the schools in its discretion in any and all of the subdistricts in the *township district,* and to provide for conveyance of the pupils in such district or subdistricts to other public schools; or to abolish all the subdistricts and provide conveyance to one or more central schools."

And again at page 278 of the opinion, appears the following:

"It is clear from these acts that the board of education of Wayne township had the right to suspend these schools and provide for transportation of the pupils to another public school in the township, and the evidence before the commissioners shows that this is what the board of education of Wayne township had done."

Section 7730 above quoted applies to *township school districts.*

If the said subdistrict referred to in your inquiry had been abolished by the board of education of Lake township, Ashland county, by reason of the centralization of the schools of said township or by reason of suspending the operation of the school subdistrict by the board of education of said township school district, then section 7730 of the General Code would clearly apply, and the board of education of said township school district would be legally required to furnish conveyance to all the pupils in said township school district including those in said subdistrict No. 6.

But as stated in your inquiry, the situation in your case is different in that the said subdistrict No. 6 was abolished by reason of the fact that a special school district was formed which takes in part of subdistrict No. 6, Lake township, Ashland county, Ohio, in Lakeville, Holmes county, Ohio, by the order and decree of the probate court of Holmes county. The statutory provisions providing for the formation of special school districts are contained in chapter 5 of title 13 of the General Code. Section 4728 defines a special school district; section 4729 provides the procedure for the establishment of a special school district as follows:

> "To establish a special school district, a petition, signed by not less than ten male citizens who are electors of the proposed special district, shall be filed in the office of the probate judge of the county in which such special district is situated, or, if such district is situated in two or more counties, then with the probate judge of the county having the greatest total tax valuation of such proposed district. Such petition shall set forth the desires of the petitioners, shall contain a description of the territory to be included in the proposed special district and be accompanied by a statement giving the total tax valuation of such territory certified to by the county auditor or auditors, and an accurate map of the territory, to be included in such district, which map shall be prepared to the satisfaction of the probate judge."

Section 4731 specified the duty of the probate court upon the filing of such petition as follows:

> "Upon the filing of a petition for the establishment of a special school district, the probate judge shall fix the time for the hearing of the petition, which shall be within sixty days of the filing thereof. Thereupon he shall cause to be published for four consecutive weeks in two newspapers of opposite politics, printed and of general circulation in the county where the petition is filed, notice of the filing of the petition and the time of the hearing thereon. Such notices shall be mailed to the clerk or clerks of the boards of education having territory in the proposed special school district."

Section 4732 of the General Code provides that the probate judge may hear and determine the question of establishment of such special school district and that he may change the boundaries of the proposed districts as follows:

> "The probate judge may hear and determine the question of the establishment of such special school district and may subpoena and examine witnesses under oath. He may change the boundaries of the proposed special school district, and shall fix and determine the amount of money due and payable to the special district from the surplus money in the treasury or in process of collection in the district or districts from which it was formed, or, in case of indebtedness of such district or districts, he shall determine the amount of money due and payable by the special school district to the district or districts from which it was formed. In either case the amount so

found due shall be a valid and binding obligation upon the board of education of such district or districts."

The special school district of Lakeville, Holmes county, Ohio, as you state in your inquiry, was formed in accordance with the statutes providing for the formation of special school districts, (a portion of which are above quoted), the result being that said subdistrict No. 6 was thereby deprived of school facilities by reason of the fact that a considerable portion of subdistrict No. 6 of Lake township, Ashland county, was included within the boundaries of such special district so formed. This was done under section 4729, General Code, whereby a special school district may be formed in two or more counties but in such case the procedure so provided must be brought in the county which has the greatest tax valuation of such proposed district. This procedure is entirely separate and distinct from that provided by section 7730, supra. The provisions of said section 7730 apply only when the abolishment or suspension is made by the board of education of township school districts.

Section 7646 of the General Code provides as follows:

"Each township board of education shall establish and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

Said section was amended at the recent special session of the legislature February 16, 1914, and was filed in the office of the secretary of state, March 9, 1914. The recent amendment appears at page 228 of the 104th volume of Ohio Laws, and reads as follows:

"The board of education of each rural school district shall establish and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

As amended, its provisions are practically identical to those contained in said section (7646) prior to such recent amendment, and while as amended this section is not in effect for the reason that the same will not become effective until after 90 days after it is filed in the office of the secretary of state, nevertheless, because its provisions as before stated are practically the same, the fact that the amended section is not yet in effect does not make any material difference in this instance. Said section 7646 is specific in its provision that each township board of education shall at least establish and maintain one elementary school in each subdistrict, under its control, unless transportation is furnished to the pupils thereof as provided by law. Subdistrict No. 6 in Lake township, Ashland county, Ohio, still exists even though a part of it has been added to the special district which was formed in Lakeville, Holmes county, Ohio. Said subdistrict still being in existence, then it would seem to follow, under the provision contained in section 7646, that the board of education of such township district must either establish and maintain an elementary school in such subdistrict, or provide transportation as provided by law, such as the provisions therefor as contained in section 7730, General Code, supra.

Therefore, in direct answer to your inquiry, it is my opinion that the board of education of Lake township must provide an elementary school in said subdistrict No. 6 thereof, unless transportation is furnished to the pupils thereof as provided by law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

984.

BOILER INSPECTOR'S CERTIFICATE—FEE TO BE PAID BEFORE CERTIFICATE IS ISSUED.

It is not proper to issue a boiler inspector's certificate and forward the same before the certificate has been paid for, there being no authority in law for such a practice, and therefore, before the certificate is issued, the fee therefore should be paid.

COLUMBUS, OHIO, June 17, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 2nd, wherein you state:,

"Please advise this department if the boiler inspection certificate mentioned in section 1058-20 and section 1058-21 of the Ohio boiler inspection law may be issued and forwarded with a bill covering the same, before the certificate has been paid for.

"It has been the practice of this department not to forward the certificate until the fee has been received.

"In order that certificates may be issued promptly upon receipt of inspection reports, all owners are billed for their certificate fees in advance. A number of concerns pay a lump sum, which is placed to their credit and charged off as inspection reports are received and certificates issued.

"The above arrangement necessitates our department carrying a trust fund in the bank, which makes a complicated accounting system.

"In event the certificates were sent out with a bill for the amount of the fee, upon receipt of the fee, the department could make a record of the same and deposit the amount in the state treasury."

Sections 1058-20 and 1058-21, General Code, insofar as they have any bearing on your inquiry, provide:

Section 1058-20:

"If, upon making the internal and external inspection, the inspector finds the boiler to be in safe working order, with the fittings necessary to safety, and properly set up, upon his report to the chief inspector of steam boilers, the chief inspector shall issue to the owner or user thereof, a certificate of inspection stating the maximum pressure at which the boiler may be operated, as ascertained by the rules established by the board of boiler rules, and thereupon such owner or user may operate the boiler mentioned in the certificate for one year from the date of inspection, unless such certificate shall be sooner withdrawn. * * *"

Section 1058-21:

* * * * * * * * * * * *

"The owner or user of a steam boiler herein required to be inspected shall pay to the chief inspector of steam boilers the sum of one dollar for each certificate issued."

It will be observed that section 1058-20 required the chief inspector of steam boilers, upon the report to him of a deputy inspector that a boiler is in safe working order, etc., to issue to the owner or user thereof, a certificate; and section 1058-21 fixes the fee for such certificate at one dollar.

These statutes contemplate that in the issuance of certificates, your department should do a cash business, that is to say, the fee of $1.00 prescribed by section 1058-21 should be in your possession before the certificate is issued and forwarded to the person entitled thereto, otherwise your department would be put to the trouble and expense of collecting these fees after the certificates were issued, and this would place upon your department a burden not intended by the statutes.

I am of the opinion that the practice of collecting fees in advance of the issuance of certificates is legal.

The acceptance by you of a lump sum of money to cover the costs of certificates to be issued in the future is a matter that concerns you and the parties paying the money under such arrangement. You receive the money as the agent of the payer and not as the agent of the state of Ohio, and no claim attached to the money in favor of the state until an inspection is made and a certificate issued. I am of the opinion that this practice is not contrary to law, but it should be made clear to the persons contributing to this fund that you accept the same in your private or individual capacity and not as a representative of the state.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

985.

PLATS FOR QUADRENNIAL APPRAISEMENT—CONTRACT FOR THE MAKING OF SUCH PLATS MUST BE ENTERED INTO ACCORDING TO LAW—MORAL OBLIGATION TO PAY FOR SUCH MAPS AND PLATS WHERE THE SAME ARE FURNISHED ON AN ILLEGAL CONTRACT.

There is no legal liability on the part of the county to pay a printing company a claim for making plats for quadrennial appraisement and district board of assessors by the county auditor, when the only contract was a telephone conversation, for the reason that the expenditure involved more than $1,000.00 *and the provisions of sections* 2414, 2445 *and* 5660, *General Code, were not complied with. Since the county has gotten the benefit of the maps and retained the same, there is a moral obligation that such bill be paid, and the county commissioners may in their discretion pay such sum for the maps furnished as they deem reasonable and proper.*

COLUMBUS, OHIO, June 17, 1914.

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

GENTLEMEN:—Under date of April 17th, you presented for my opinion the following question:

> "Should a bill for making plats for quadrennial appraisement and district board of assessors and county auditor against the county commissioners, the only authorization for which was a telephone conversation, be allowed?"

From the communications it appears that the total amount of the bill for maps amounted to $6,616.05. These maps were provided from time to time as they were desired; there was no special contract for the furnishing of these maps other than a telephone conversation between the company furnishing the maps and a Mr. Edmondson, in which conversation the price for medium prints, measuring 24x30 was agreed upon at $1.25. With respect to the smaller prints (18x24), no price was agreed upon, but it was arranged that the amount charged would be proportional.

Section 41 of the act appearing on page 786 of 103 O. L., providing for the appointment of district tax authorities and prescribing their powers and duties, is as follows:

> "The county commissioners shall furnish for the district assessor and the district board of complaints for their county, and their deputies, assistants, experts, clerks, and employes suitable office rooms at the county seat and the district assessors shall furnish for his own office for the district board of complaints all maps, plats, stationery, blank forms, books, supplies, furniture and other equipment necessary for the proper discharge of their duties and for the preservation and safe keeping of their books, records and files. Provided, however, that the maps, plats, stationery, blank forms, and other supplies and equipment used by the district assessor, shall so far is practicable, be used also by the district board of complaints. In case any board of county commissioners fails or refuses to furnish such rooms, maps, plats, stationery, blank forms, books, supplies, furniture and other equipment, the tax commission of Ohio, upon complaint of the district assessor or district board of complaints, may authorize the district assessor or the district board of complaints, as the case may be, to procure such rooms, furniture, maps, plats, stationery, blank forms, books, supplies and other equipment, as may be deemed necessary by the commission, and the amount so authorized to be expended for such purpose shall constitute a charge against the county, regardless of the money in the county treasury appropriated for such purposes and notwithstanding any failure of the county commissioners to levy or appropriate funds therefor."

Under this enactment it is clear that the duty of providing the necessary maps rests upon the county commissioners when application is made therefor by the district assessor, but that in the refusal or failure of the county commissioners to so provide, the district assessors may be authorized themselves to procure the maps, upon the authorization of the tax commission. There is nothing whatever in this statute upon which to base the presumption that contracts made by the county commissioners for such maps are to be, in any way, excepted from the general restrictions and safeguards provided by the statutes with respect to the making of contracts by the county commissioners, and when such maps are procured by the county commissioners, all provisions of statute respecting contracts by that board, must be complied with.

When the general assembly passed the act above referred to, providing for a new method of assessment for taxation, they expressly repealed many sections of the old law pertaining to these matters. Sections 5549, et seq., of the old law, however, requiring the county commissioners to advertise for bids for the construction of necessary maps for the purpose of appraisement of real estate, on or before June, 1913, and every fourth year thereafter, were not repealed nor amended by the general assembly.

Since these provisions have special application and make direct reference to the quadrennial appraisement of real property, it is difficult to see their application in the present case, and I, therefore, conclude that section 5549 of the General Code

was left unrepealed by the legislature in its session in 1913, for the reason that such repeal might seriously interfere with contracts entered into during that year under this statute.

Since I cannot, therefore, see the application of an authorization for a contract of this nature once in four years under the present system, I conclude that this statute has no application at the present time, and county commissioners are not, therefore, required to comply with its terms in procuring these maps.

Section 2414, and sections 2445 and 5660 of the General Code, are as follows:

> "Section 2414. No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board, unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members present of the board, which consent shall be taken by yeas and nays, and entered on the record.
>
> "Section 2445. No contract entered into by the county commissioners, or order made by them, shall be valid unless it has been assented to at a regular or special session thereof, and entered in the minutes of their proceedings by the auditor.
>
> "Section 5660. The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Such arrangement as existed, in this case, between the county commissioners and the printing company, clearly contemplated the total number of maps supplied and the total amount to be paid for the same, and the arrangement can, by no means, be separated into a number of smaller transactions for orders for a lesser number of maps as they were supplied.

The proposition, therefore, comes clearly and directly within the terms of section 2414, requiring a proposition involving an expenditure of one thousand dollars ($1,000.00) or more, to wait over twenty days after the introduction of the proposition, in the absence of unanimous consent of all members present, shown by yeas and nays entered upon the journal. The arrangement, therefore, was irregular and invalid for this reason. The terms of section 2445, requiring every contract of the county commissioners to be assented to at a regular or special session, and entered in the minutes, has also a direct application, and from the facts before me, evidently was not complied with.

Moreover, it is furthermore manifest, from the statement of facts, that the auditor's certificate, with reference to the existence of a properly appropriated fund for the purpose of the expenditures, was not procured.

It is unnecessary to set forth the decisions of this state, that failure to comply with statutory provisions, pertaining to the execution of contracts by the county commissioners of the nature of those above set forth, renders the contract invalid

and prevents any recovery upon the same, or any recognition of the contract by the courts.

The fact that the courts will not assist in the enforcement of any claim on such a contract, however, does not necessarily operate to prevent the county commissioners from paying, as a moral obligation, what they deem to be a reasonable amount, for property received or things of value obtained by the county by virtue of such irregular transactions.

In Emmert vs. Elyria, 74 O. S., on page 194, the court says:

> "But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not ultra vires. If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

In Caldwell vs. Morgan, 8 N. P. n. s., at page 391, the court says:

> "Where services have been rendered, or property obtained, for which a valid contract could have been made, and the parties cannot be put in *statu quo,* a court of equity will not interfere with the payment of the reasonable value of such services or property. Mere invalidity in the incurring of an obligation, although sufficient to destroy its effect as a legal obligation, where by the granting of an injunction public health or welfare would be seriously or irreparably jeopardized and where strong equities have arisen by reason of the expenditures of money or rendition of services which have and will innure to the benefit of the public, is not sufficient to call into action the powers of a court of equity to enjoin. (Cases cited.)"

In direct answer to your question, therefore, I am of the opinion that the printing company in question has no legal claim enforcible against the county for the maps provided by virute of the arrangement set forth. The county commissioners may, however, in their discretion, pay such sum for the maps furnished as they deem reasonable and proper to reimburse the company in question for the expenses incurred and the services rendered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

986.

MILEAGE FOR TESTIFYING TO AN OFFICER AUTHORIZED TO TAKE DEPOSITIONS—MILEAGE ALLOWED A WITNESS FOR TESTIFYING IN A COURT OF RECORD—NO CONFLICT BETWEEN SECTIONS 3016, 3018 and 4555, GENERAL CODE.

The words "and such mileage," as used in section 3012, *General Code, in the following phrase: for attending a trial before a justice of the peace, or mayor of a municipal corporation, fifty cents for each day and such mileage" refers to the mileage given for testifying before an officer authorized to take depositions, and does not refer to the mileage allowed a witness in testifying in a court of record.*

There is no conflict between sections 3016 *to* 3018 *and* 4555, *General Code, therefore, the payment of witness fees from the county treasury in criminal cases is authorized in all cases of felony and in misdemeanor only when recognizances are taken, forfeited and collected, and no conviction had. The effect of section* 4555, *General Code, is solely to require a certificate of the mayor as a condition precedent to the payment of such fees as are authorized by sections* 3016 *to* 3018, *General Code.*

COLUMBUS, OHIO, June 17, 1914.

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

GENTLEMEN:—Under date of May 2nd, you submit the following:

"1. What mileage can be legally allowed and paid to witnesses in the various courts, and for testimony given, as set forth in sections 3012 and 3014, G. C.?

"We are of the opinion that it is the general practice all over Ohio to allow witnesses mileage both ways in all cases. It seems to be clear that mileage can only be allowed one way for testifying before an officer authorized to take depositions and before a coroner, but what is meant by the words *'and such mileage,'* with reference to witnesses attending a trial before a justice of the peace, or mayor of a municipal corporation?

"2. In view of the provisions of sections 3016, 3017 and 3018, G. C., it appears that fees of witnesses in misdemeanor cases are *not* payable from the county treasury when testifying before justices of the peace, mayors and police justices, yet section 4555, G. C., seems to authorize a mayor to to certify such fees out of the county treasury. Because of these apparent conflictions this department requests your ruling or opinion upon the questions herein set forth."

Section 3012 of the General Code is as follows:

"Each witness in civil causes shall receive the following fees: For each day's attendance at a court of record, to be paid on demand by the party at whose instance he is summoned, and taxed in the bill of costs, one dollar, and five cents for each mile from his place of residence to the place of holding such court, and return; for testifying before an officer authorized to take depositions, under a subpoena, seventy-five cents, and five cents for each mile from his place of residence to the place of taking depositions, to be paid on demand by the party at whose instance he is summoned; for attending a coroner's inquest, one dollar for each day and the same mileage allowed a witness in the taking of depositions, to be paid from the county treasury;

for attending a trial before a justice of the peace, or mayor of a municipal corporation, fifty cents for each day and such mileage. No mileage shall be allowed if the distance from the place of residence of the witness to the place where called to testify is less than one mile."

Under this statute it is clear that a witness testifying in a court of record is entitled to 5 cents per mile both going to and *returning from* the place of holding court. For testifying before an officer authorized to take depositions, and for attending a coroner's inquest, however, it is clear that authorization for payment of mileage for the return journey is absent, and a witness in each of these cases, therefore, can be allowed his 5 cents per mile only for the journey from his place of residence to the place where testimony is given.

You desire a construction, however, of the term "such mileage" under the clause authorizing the payment of the same attending a trial before a justice of the peace or a mayor of a municipal corporation. I am of the opinion that the word "such," as used in this connection, can very clearly refer only to its relations in the clause immediately preceding the term as it is used in the statute. By no mode of construction could the word "such," as herein used, be refused relation to an antecedent immediately preceding and given a relation to an antecedent employed in a prior clause of the statute.

For testifying before a justice of the peace or a mayor, therefore, a witness is entitled to such mileage as is prescribed in the case of testimony rendered at a coroner's inquest, that being the same, by the terms of the statute, as is allowed a witness in the taking of depositions, to wit: 5 cents per mile only from place of residence to place of giving testimony.

Answering your second question. Sections 3016 and 3018 of the General Code are as follows:

"Section 3016. In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury.

"Section 3018. In felonies, fees of witnesses before justices of the peace, mayors and police justices, shall be paid upon the allowance of the commissioners from the county treasury, on the certificate of such officer, notwithstanding the state has failed."

Under these sections payment of witness fees from the county treasury in criminal cases is authorized in all cases of felony, and in misdemeanors only when recognizances are taken, forfeited and collected upon failure of conviction.

Section 4555, General Code, to which you refer, is as follows:

"In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate from the county treasury."

This statute requires fees of witnesses in state cases to be paid from the county treasury upon the certificate of the presiding officer at the trial.

I am of the opinion that the effect of this statute is not to authorize the payment of fees, but rather to specify the mode of procedure requisite for the payment

of such fees as are authorized by sections 3016 and 3018 above quoted. The effect of section 4555, General Code, therefore, is to require a certificate of the mayor as a condition precedent to the payment of such fees as are authorized by the above sections, to wit: those that accrue in the prosecution of felonies before a mayor, and in those misdemeanors only where recognizances are taken, forfeited and collected and no conviction had.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

987.

MATTRESS INSPECTION LAW—LABELING OF PILLOWS NOT REQUIRED BY LAW.

Under sections 12798-1 *and* 12798-3, *the mattress inspection law, it is not compulsory to place a label on pillows, which are made or stuffed with material other than feathers, similar to that prescribed for mattresses.*

COLUMBUS, OHIO, June 17, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On April 9, 1914, you submitted to this department a request for an opinion as follows:

> "A question has been raised as to the proper interpretation of the mattress inspection law with reference to labeling of pillows.
>
> "I would be pleased to have you advise me whether or not in your opinion, under the provisions of sections 12798-1-2-3 of the General Code, it is compulsory to place a label similar to that prescribed for mattresses on pillows which are made or stuffed with material other than feathers."

Sections 12798-1 and 12798-3 provide:

> "Section 12798-1. Whoever manufactures for sale, offers for sale, sells, delivers or has in his possession with intent to sell or deliver any mattress which is not properly branded or labeled as hereinafter provided, or which is falsely branded or labeled, or whoever used, either in whole or in part, in the manufacture of mattresses any cotton or other material which has been used or has formed a part of any mattress, pillow or bedding, used in or about any public or private hospital, or in or about any person having infectious or contagious disease, or whoever dealing in mattresses has a mattress in his possession for the purpose of sale or offers it for sale without a brand or label as herein required, or removes, conceals or defaces the brand or label thereon, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than six months or both."

Section 12798-2 prescribes the form of label to be placed on mattresses, and is not pertinent to the question you raise.

It should be borne in mind that these are criminal statutes and must be strictly construed. The only reference in this law to pillows is the provision in section

12798-1, whereby the use in the manufacture of mattresses, of any cotton or other material that had theretofore been used or formed a part of a pillow, etc., used in hospitals, or in or about any person having contagious or infectious diseases, is made a criminal offense. This provision, however, does not of itself require the labeling of pillows. It is the placing in mattresses of material theretofore used in certain designated pillows that is made a crime, and not the failure to brand or label the pillows themselves.

One of the elements of the definition of a mattress given in section 12798-3, viz.: that it shall be a quilted pad, is lacking from a pillow, and I am, therefore, of the opinion that this law does not require the labeling of pillows, regardless of the material of which they may be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

988.

COLLATERAL INHERITANCE TAX—VALUING ESTATE—COLLATERAL RELATIVE—MASSACHUSETTS RULING—RULE FOR DETERMINING VALUE OF ESTATE.

Where A bequeathed a certain sum to B in trust the income to be paid to C, a collateral relative, during C's life, and at the death of C said trust to be discharged, and the principal sum to be paid to D, another collateral relative; the proper way of ascertaining the value of D's estate, dependent upon a prior taxable estate, is to take the value of the prior estate together with the sum of $500.00 *from the appraised value of the whole estate, that is the whole inheritance subject to taxation. The Massachusetts rule is followed in this opinion.*

COLUMBUS, OHIO, June 17, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Your letter of April 23rd, receipt whereof has been acknowledged, requests my opinion upon the following question arising under the collateral inheritance tax law:

> "'A' bequeaths the sum of $10,000.00 to 'B' in trust, the income thereof to be paid to 'C,' a collateral relative, during 'C's' life; at the death of 'C,' the trust is to be discharged and the principal sum paid to 'D,' another collateral relative of 'A.'
>
> "What is the rule valuing 'D's' estate?"

One way which will readily occur to a person seeking an answer to your question is the determination of the present worth of the principal sum of the estate; that is, the computation of that amount, which, at a given rate of interest, will produce the principal sum of the estate in the period of time corresponding to the expectancy of life of the owner of the beneficial interest of the life estate. (In re estate of Dows, 167 N. Y., 227). In no event, I think, ought the remainderman be subject to taxation on the full value of his estate, at the death of the testator.

However, section 5333, General Code, as amended 103 O. L., 463, must be considered. That section provides:

"When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate, shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

It is clear, of course, that this statute does not, in terms, govern the ascertainment of the value of a subsequent estate save when the prior estate is not taxable. However, in Dow vs. Abbott, 197 Mass., 283, under statutes, in this respect identical with those of Ohio, the supreme judicial court of Massachusetts held that the section corresponding to section 5333, as amended, should be applied in a case like that stated by you. In the language of Rugg, J., "the statute makes no specific provision for a case exactly like this, but the valuation can be ascertained according to the method pointed out in R. L. c. 15 section 2 * * * for analagous cases," (the statute referred to being the one which corresponds to section 5333, General Code, and the case before the court being one in which the prior and ultimate estate were subject to taxation).

I can find no other authorities upon the question. Under similar statutes the supreme court of Illinois holds that a section corresponding to section 5333, General Code, should be strictly construed. —(In re Kingman, 220 Ill., 563.) Such a strict construction would, of course, lead to a result opposite to that indicated by the Massachusetts decision above cited and would support the view that the actual present value of the subsequent estate should be ascertained in the way pointed out in In re Estate of Dow, supra. However, the Illinois decisions are not on the exact point, and for various reasons I have come to the conclusion that the Massachusetts rule should be followed in Ohio.

Among the reasons which have led me to adopt this conclusion I may state that the Ohio Statute makes specific provision for the computation of future values of annuities and life estates, (section 5353 of the General Code), the provision being that such computation shall be at five per cent. compound interest. There is no like provision for computing present worth of vested estates to be enjoyed *in futuro*. It does not seem possible to me that the legislature would have adopted the statutory rate and method of computation above referred to, had it not been intended that the same rate and method, if applicable at all, should be used in computing present worth. We are thus forced to the conclusion that in order to make the statute harmonious, the analogy of either section 5353, or that of section 5343, or that of both, must be applied to a case which neither one of them covers, viz.: the ascertainment of the value of a future estate dependent upon the value of a life estate which is taxable. That is to say, if neither statute controls, we have no statutory rate of interest for the computation of present worth, and it seems unlikely that the legislature intended a different rate of interest to be used in computing present worth from that which it has prescribed for the valuation of life estates and annuities; and if section 5343 be held applicable, it is equally as reasonable to hold section 5333, as amended, applicable.

Therefore, I am of the opinion that the way to ascertain the value of a vested future estate, dependent upon a prior taxable estate, under the collateral inheritance tax law, is to ascertain the value of the prior estate and to take that value, together with the sum of $500.00, from the appraised value of the whole estate, meaning, of course, the whole inheritance subject to taxation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

989.

MEMBER OF THE GENERAL ASSEMBLY—RIGHT TO SERVE UPON COUNTY BOARD OF EDUCATION.

There are no provisions in the constitution prohibiting a member of the board of education from serving upon the county board of education.

COLUMBUS, OHIO, June 17, 1914.

HON. JOHN H. LOWRY *Member, House of Representatives, Napoleon, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 11th, wherein you request my opinion upon a question stated in your letter as follows:

> "Will you kindly inform me if there are any provisions in the constitution prohibiting a member of the legislature from serving upon the county board of education?"

A county board of education is provided for in sections 4728 to 4734, General Code, inclusive.

Section 4728, General Code, provides as follows:

> "Each county school district shall be under the supervision and control of a county board of education composed of five members who shall be elected by the presidents of the various village and rural boards of education in such county school district. Each district shall have one vote in the election of members of the county board of education except as is provided in section 4728-1. At least one member of the county board of education shall be a resident of a village school district if such district is located in the county school district and at least three members of such board shall be residents of rural school districts, but no more than one member of the county board of education shall reside in any one village or rural school district within the county school district."

Section 4728-1:

> "All school districts other than village and city school districts within a civil township shall be jointly entitled to one vote in the election of members of the county board of education. The presidents of the board of education of all such districts in a civil township shall meet for the purpose of choosing one from their number to cast the vote for members of the county board of education. If no such meeting is held in any year for the purpose of choosing one from their number to cast the vote of such boards, the president of the board having the largest tax valuation shall represent all such districts of the civil township at the election of the county board members. A board of education of a rural district having territory in two or more civil townships shall vote with the boards of education of the districts of the civil township in which the greater part of its taxable property is located."

Section 4729:

> "On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county

school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter one member of the county board of education shall be elected in the same manner for a term of five years. The presidents of the various boards of education within the county school district shall be paid their necessary and actual expenses incurred while meeting for the purpose of electing members of the county board of education. Such expenses shall be allowed by the county auditor and paid out of the county treasury upon the order of the chairman and clerk of the meeting."

Section 4730:

"The county auditor of each county shall issue the call for the first meeting, giving at least ten days' notice of the place where such meeting will be held. The call for all future meetings shall be issued by the county superintendent. The meeting shall organize by electing a chairman and a clerk. The vote of a majority of the members present shall be necessary to elect each member of the county board. The members of the county board so elected, may or may not be members or officers of any village or rural board of education. The result of the election of members of the county board of education shall be certified to the county auditor by the chairman and clerk of the meeting."

Section 4734:

"Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board."

The foregoing sections provide the manner in which the county board of education is to be elected and the length of the term of each member; it also provides for the payment of their expenses. No salary is provided for in any of these sections.

The question may arise as to whether or not the members of the county board of education are chosen by election, or by appointment. In the case of State of Ohio vs. Squire, 39 O. S., 197, the terms "appointment" and "election" are defined as follows:

"The word appointment as used in the statutes generally means the designation of a person to hold an office of trust, by an individual, or a limited number of individuals to whom an appointment or selection has been delegated.

"The word election is properly applied to the choice of an officer by the votes of those upon whom the law has conferred the right of electing such officer."

The statutes have conferred the right of electing the members of the county board of education upon the presidents of the various village and rural boards of

education and the county school districts, and provides that a vote of the majority of the members present shall be necessary to elect each member of the county board.

There is no question but what the selection of the county board of education is by election and not by appointment. Consequently the inhibition contained in section 19 of article II, constitution of Ohio, which provides:

> "No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected."

does not prevent a member of the general assembly from being elected to the county board of education, since the members of this board are elected and not appointed.

Article II, section 4 of the constitution of Ohio, which provides:

> "No person holding office under the 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."

will not prevent members of the general assembly from being elected to the county board of education, because the office of member of the county board of education is not a lucrative office, nor do I find any other provision in the constitution that would prevent a member of the general assembly being elected to this office.

Therefore, I am of the opinion that there is no provision in the constitution that will prohibit a member of the present general assembly from being elected to the county board of education, regardless of the fact that the act providing for the county board of education was passed during a special session of the general assembly, held during the year 1914.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

990.

REMOVAL OF MEMBER OF A CITY SCHOOL BOARD FROM DISTRICT—EFFECT OF SUCH REMOVAL.

The removal from a city school district, indefinitely, of a member of a board of education creates a vacancy in said board.

COLUMBUS, OHIO, June 19, 1914.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of April 7, 1914, you submitted for an opinion the following request:

"A legally elected member of the Canton board of education has temporarily removed from the city of Canton. Under these conditions is he still a member of the city board of education, with all the rights and powers of a member of the city board?"

In reference to the qualifications of members of school boards, of city school districts, section 4704 of the General Code, prior to its recent amendment, provided as follows:

"Members elected at large must be electors of the city district, and members elected from subdistricts must be electors of the city subdistricts from which they are chosen or of the territory attached to the subdistrict for school purposes. *A removal of a member of the board from such subdistrict, territory or city school district shall vacate his office.*"

Section 4218 of the General Code, in reference to the qualifications of members of council of villages, contains a provision very similar to that contained in section 4704, General Code, supra. Said section 4218 reads as follows:

"Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia or to be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required *or removes from the village, shall forfeit his office.*"

Said sections are similar in this respect—that one provides that the removal of a member of the board from such subdistrict, subterritory or city school district, shall vacate his office, while the other (section 4218) contains the provision that if a member of the village council removes from the village, such removal shall operate as a forfeiture of his office.

In an opinion rendered by this department, on October 25, 1911, to Hon. John S. Roller, city solicitor of Lowellville, Ohio, this department in substance held, that when a member of a village council removes from the village with his family, even though such removal is only temporary and is for an indefinite period of time, he thereby changes his domicile and forfeits his office.

Because of the similarity in the provisions of the two sections as above pointed out, the reasoning in said opinion would apply equally as well to section 4704, General Code, as it existed prior to its last amendment, as it does to section 4218, General Code, which is construed in said opinion. Said section 4704 of the General Code was amended April 28, 1913, and appears at page 277 of the 103rd volume of Ohio Laws; and as the same is now amended its provisions have been entirely changed and relates to an entirely different subject-matter than that contained therein prior to its said amendment. So that said section does not now specifically provide that the removal from a city school district of a member of the board of education of a city school district shall have the effect of vacating his office therein. The only other provisions upon this subject relating to members of boards of education, are those contained in section 4748 of the General Code, which provides as follows:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected

or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

In the statement of facts attached to your inquiry, it appears that the member of the board of education of the Canton city school district has removed from such school district for an indefinite period of time and that he is now living on a farm outside of the city school district of the city of Canton. It is to be noted that section 4748 of the General Code, supra, specifically provides that a vacancy in any board of education may be caused by removal from the district. According to the facts above referred to, the member in question has removed from the school district wherein he was formerly elected as a member of the board of education. It is my opinion that the word "may" used in said section should be read as "shall." In accordance with this view, as heretofore stated, it is my opinion therefore, in direct answer to your inquiry, that the removal of the said member of the Canton board of education indefinitely from the city school district of Canton, creates a vacancy in said board and therefore he is no longer a member of the Canton city board of education, with all the rights and power of a member thereof.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

991.

POLICE JUDGE MADE PRESIDING JUDGE OF MUNICIPAL COURT MAY RECEIVE ADDITIONAL COMPENSATION—SUCH COMPENSATION NOT TO BE RECEIVED UNTIL THE ORGANIZATION OF THE COURT, JANUARY 1, 1914.

1. *The police judge may by law be the presiding judge of the municipal court and may receive additional compensation under section* 47, *Cincinnati municipal court law, but such additional compensation is not established by section* 20 *of article II of the constitution of Ohio.*

2. *The Cincinnati municipal court was not organized until January* 1, 1914, *there being no judge prior to that time, the judge of the police court would not be entitled to any salary other than that of police judge until the complete organization of the court on January* 1, 1914.

COLUMBUS, OHIO, June 19, 1914.

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

GENTLEMEN:—Under date of April 9, 1914, you write as follows:

"The Cincinnati municipal court law, filed with the secretary of state on May 2, 1913, became a law on August 1, 1913, but no appointment of as-

sociate judges, as provided for in section 45 of said act, was made by the governor, and in fact said municipal court was not organized until January 1, 1914, when the elective associate judges entered upon their term of office. During the time from August 1, 1913, until January 1, 1914, the justices of the peace of said city of Cincinnati (Cincinnati township) continued to serve and to transact their usual judicial functions and to receive the salaries provided by ordinance during the fiscal year 1913, and the Cincinnati police court continued in actual operation without any change of method and without exercising additional jurisdiction. Judge Fricke was elected police judge under the old law at the November election, 1911, and was commissioned and assumed his judicial office for a term of four years beginning January 1, 1912. Section 2 of said municipal court law denominates the present police judge of Cincinnati as the presiding judge of the municipal court until the expiration of his present term.

"*Question.* May said police judge, made by law presiding judge of said court, receive the additional compensation or increase of salary provided in section 4 of said municipal court law, or would such increase of salary be prohibited by section 20 of article 2 of the constitution of Ohio?

"*Question.* If said judge is legally entitled to such increase of salary, may he receive the same from and after August 1, 1913, or will he be denied such increase until the organization of the court on January 1, 1914?"

1. The law in question is an act providing for enlarging and extending the jurisdiction of the police court in the city of Cincinnati, and changing its name to the "municipal court of Cincinnati." This court is to consist of five judges, one of whom shall be the presiding judge, and the present police judge of Cincinnati shall be the presiding judge of the municipal court until the expiration of his present term, and all of said judges are to be qualified electors of the city of Cincinnati, and shall have been admitted to the practice of law for not less than four years. Additional judges provided for by the act, including the presiding judge after the expiration of his term as police judge, shall be elected by the electors of the city of Cincinnati, at the municipal election of 1913, two judges are to be elected for four years and two for two years, and at each regular municipal election next preceding the expiration of the terms of office of each judge, including the present police judge, a successor shall be elected for a term of four years.

The salary of the judge of a municipal court shall be $4,000.00 per annum, $3,000.00 of which shall be paid out of the treasury of the city of Cincinnati and $1,000.00 out of the treasury of Hamilton county. The presiding judge shall receive a salary of $6,000 per annum, of which $4,000.00 shall be paid from the city treasury and $2,000.00 from the county treasury.

The municipal court shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors or violations of ordinances as heretofore had by the police court of Cincinnati, and in addition thereto shall have certain civil jurisdiction which is definitely set out in the law. In all actions and proceedings of which the municipal court has jurisdiction, all laws conferring jurisdiction upon the court of common pleas, a police court or a justice of the peace, prescribing the force and effect of their judgments, orders or decrees, shall be held to extend to the municipal court, unless inconsistent with the act or plainly inapplicable.

The presiding judge shall have the general superintendence of the business of the court, and may classify and distribute among the judges the business pending in said court. He is to render a complete annual report to the city council showing the work performed by the court, a summary of its expenses, the number of cases heard, decided and settled, the number of decisions reversed or affirmed, the number

of days and hours of attendance in court of each judge, and such other data as council may require. Each judge is to devote an equal length of time to the conduct of the criminal branch of the court as nearly as practical. The judges are authorized to sit separately or otherwise, shall meet at least once a month, and at such other times as the presiding judge may determine, for consideration of the business of the court; shall prescribe forms; establish a system for the docketing of causes, motions and demurrers; adopt rules governing the practice and procedure, and designate the mode of keeping the record of proceedings. The judges or a judge may summon and impanel jurors, tax costs, compel the attendance of witnesses, jurors and parties, issue process and exercise all powers conferred upon courts of common pleas, the judges thereof, justices of the peace, police courts or such other powers as are necessary for the exercise of the jurisdiction conferred by the act and for the enforcement of the orders of the court.

The present clerk of police court must act for the municipal court until his successor is elected and qualified. Before entering upon the duties of his office the clerk shall give bond in the sum of not less than $10,000.00, to be determined by the judges of the court, which bond is to be given for the benefit of the city of Cincinnati and for all persons who may suffer loss by reason of the default of any of the conditions of the bond. A vacancy in the office of clerk shall be filled by the mayor of Cincinnati.

The chief deputy clerk and not less than three other deputy clerks shall receive such compensation as may be fixed by the council, which shall not be less than $1,500.00 a year, $900.00 of such compensation to be paid by the county of Hamilton, which shall also pay $300.00 to each of the three other deputy clerks. The other deputy clerks shall receive not less than $1,200.00 per annum.

All deputy clerks, the bailiff and deputy bailiffs are to be nominated by the clerk and confirmed by the council of the city of Cincinnati. Every police officer of the city of Cincinnati is ex-officio a deputy bailiff of the municipal court.

The council of the city of Cincinnati is to provide suitable accommodations for this court and necessary supplies, etc. The solicitor of the city of Cincinnati is to be the prosecuting attorney thereof and council shall provide for the appointment of interpreters and stenographers and fix their compensation, which shall be payable out of the city treasury.

Provision is made for the removal of proceedings from courts of justices of the peace to the municipal court, and there shall be no future elections of justices or constables in Cincinnati township. Until the beginning of the terms of office of the judges elected at the first municipal election after the passage of this act, the law provides that the governor shall appoint four persons to act as judges of the municipal court who shall receive compensation proportionately equal to the salaries provided in the act, and who shall have the power and authority therein vested in regularly elected judges in conformity with the provisions of the act.

I have detailed at some length the powers, duties, method of organization and jurisdiction of this court for the reason that all of this is pertinent to the discussion which shall follow.

While you do not state what salary the police judge was receiving at the time of the passage and taking effect of the law in question, I assume from your question that it was less than the amount prescribed in the law.

In state ex rel. Fox vs. Yeatman, et al., 89 O. S. ____, the supreme court held that the law here under consideration was a valid enactment, one of the objections urged being that the legislature by designating the judge of the police court as presiding judge of the municipal court had exercised the power of appointment. The court held that the presiding judge did not hold an office additional to the office of judge, and consequently there was no merit in the contention discussed.

I call attention to this in order that you will be advised that the supreme court has upheld the constitutionality of this law.

Your first question calls for the consideration of section 20 of article II of the constitution of this state. This section reads 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 first thing to be determined in construing this constitutional provision is what officers are comprehended within the inhibition contained in the italicized language. Under a similar constitutional provision it has been held in Nebraska that this limitation prohibited the change in compensation of those holding offices created by the constitution, but this decision is contrary to the holding of the supreme court of this state in State ex rel. vs. Raine, 49 O. S., 580, wherein it was held that section 29 of article II of the constitution of this state was contravened by the allowance of $1,000.00 per annum to each county commissioner for expenses incurred by him in the discharge of his duties, unless it can be successfully maintained that county commissioners are constitutional officers because they are *referred to* in section 7 of article X of the constitution of this state, and as county officers have *recognized existence* under the constitution by virtue of their being such officials. The article of the constitution just referred to requries that provision be made for the election of such county and township officers as may be necessary, and when the general assembly has designated these officers, they receive, in a sense, constitutional recognition.

As it is not necessary to pass upon this point in order to arrive at a conclusion in this matter, I shall not here discuss the soundness of the suggested distinction between the Ohio decision and that of Nebraska, which latter may be found reported sub nom. County vs. Timms 32 Neb., 272.

In State vs. Kalb 50 Wis. 178, the following syllabus may be found:

> "An act of the legislature creating a county court of limited civil and criminal jurisdiction and fixing the salary of the judge, payable out of the county treasury, may be amended so as to change the salary of the judge of such court during the term for which he has been elected; and the constitutional provision which forbids 'the compensation of any public officer to be increased or diminisheed during his term of office,' is inapplicable to such case."

The reasoning of this case, however, is not entirely applicable to the law of Ohio as announced in the case of State ex rel. vs. Raine, supra, unless the foregoing suggested distinction between the Ohio and Nebraska cases may also be made between the decision just cited and the Raine case.

We are not, however, without precedent in Ohio upon this question. In the case of State ex rel. Ferry vs. Board of Education 21 C. C., 785, it was held that section 20 of article II of the constitution did not refer to such offices as a member of a board of examiners or *to officers of a municipal corporation.*

The matter was directly decided by the court of common pleas of Montgomery county, Ohio, in the case of State ex rel. Thompson vs. Wall, et al., wherein the municipal court law of Dayton was involved. That law is very similar to the Cincinnati law excepting that it makes provision for the fixing by council of the salaries of the judges in not less than a specified sum. In compliance with this act

council fixed salaries by ordinance and the relator, who was a judge of the Dayton municipal court, presented a voucher for $291.66, the installment of his salary for the month of January, 1914, and demanded a warrant for that sum. The director of finance and city accountant of the city of Dayton refused to issue such warrant upon the ground that the law was unconstitutional in that it directed council to fix the relator's salary, the contention being that the act was in contravention of section 20 of article II, upon the ground that under this section the salary should be fixed by the legislature. In answer to this it was said that the judges of the municipal court were municipal and not state officers, and they were not included within the term "officers" as used in the said section. The court recognized the fact that the jurisdiction of the municipal court was of a dual character, but held that this did not alter the aspect of the case, and that a judge of such court was a municipal and not a state officer.

In this view the court was supported by State ex rel. vs. Churchman, 3 Pennewill (Del.) 361, wherein it was distinctly held that the judge of a municipal court was an officer of the municipal corporation even though criminal jurisdiction in cases of violation of state laws was vested in such court. The court there held that the agents and officers of a municipality do not cease to be corporate officers and corporation agents, and did not lose their character of officers of the corporation by reason of their exercise of power and their performance of duties other than corporate.

The supreme court of Illinois in Wolf vs. Hope, 210 Ill. 50, held that the judge of the municipal court is a municipal officer, and the fact that he had power to interchange with and perform the duties of circuit, superior, county and probate courts throughout the state, was without significance. See also Cooke vs. Sennet, 136 Ill., 314.

It having been established that the judges of the municipal court are municipal rather than state or county officers, it follows that the next point in logical order for decision is whether section 20 of article II applies to municipal officers.

It must be remembered that the constitution did not create the municipalities of the state, but rather recognized them as already in being, or, as has been well expressed in State ex rel. vs. Hawkins 44 O. S., 98, 110:

> "Not one of the officers of a city or village has any recognized existence in the constitution. It is different as to county and township officers."

It is also held in the foregoing decision that section 6 of article X did not extend to officers of a municipal corporation,

> "for the obvious reason, as already stated, such officers have no recognized existence in the constitution. They are to be created and provided for by the legislature."

If they do not come within the purview of one section of the constitution because they have no recognized existence under that organic instrument, it should follow that they do not come within the purview of any other section unless they are expressly mentioned. There is no express reference to them in the section here under discussion, nor in any other part of the constitution touching the matter in hand. From this it should logically follow that section 29 of article II is not applicable to municipal courts. Upon this point Judge Snediker says, in State ex rel. vs. Wall, et al., supra:

> "In our opinion only such officers are referred to as are incumbents of offices created by the constitution itself. The relator is not such an officer.

> The court here created by the legislature is under its fullest control, and the final determination of such court may properly be left to the legal authorities by the body which had full power to give the court its existence, regulate its jurisdiction, fix its terms, etc."

This theory has been followed in this state so long that "the memory of man runneth not to the contrary." The general assembly has not attempted to fix the compensation of municipal officers, but has left that to the local authorities almost invariably, and this constitutional construction, which has been continued from the time of the adoption of the constitution, should receive weight in a matter of this kind.

The first and second clauses of the section are correlative and if the one is inapplicable to municipal officers it must necessarily follow that the other cannot apply. The word "therein," occurring in the last clause, has reference to "term" and "compensation," as used in the first clause. This shows how closely knit and interwoven are the two phrases.

Another matter to be taken into consideration is that the jurisdiction conferred upon the police judge by the municipal court act is much broader than that theretofore vested in him, it includes new duties which were not incident to the original position and which were not within the scope of the office. This is not a case where after the commencement of the term the police judge is called upon to exercise a power which already inhered in his office. The jurisdiction of a police judge does not potentially embrace the exercise of such civil jurisdiction as has been conferred by the municipal court law, It entails work which did not belong to the office of police judge, and which could not have been contemplated at the time the salary of the judge of police court was fixed. In other words, the additional duties required by the passage of the municipal court law were not germane to the old office. Under such circumstances it is fundamental, we think, that additional compensation may be allowed for the added duties without any infringement of the constitutional provision, if such provision were here applicable. It has been held under a similar constitutional provision that when new duties are imposed, which are not within the scope of the office, and extra compensation is provided, such increase is not violative of such constitutional inhibition.

Love vs. Baehr, 47 Calif., 364.
County vs. Fels., 37 Pac., 780.
County vs. Collinge, 28 Pac., 175.
Thomas vs. O'Brien, 129 S. W., 103.
State vs. Carson, 6 Wash., 250.

This doctrine has received approval in the following Ohio cases:

Lewis vs. State, 21 C. C., 410.
State ex rel. vs. Coughlin, 6 N. P. n. s., 101.

In passing it is interesting to note that in the case of Commonwealth vs. Mathues, 210 Pa. St., 372, the supreme court of Pennsylvania held that a constitutional provision like the one here under discussion was not applicable to the judiciary as it was discussed in a separate constitutional provision. Under this decision the judges of the supreme court of Pennsylvania were permitted to receive increased compensation under a statute passed after their taking office.

Therefore, it is my opinion that the police judge made by law the presiding judge of the municipal court, may receive the additional compensation provided in section

4 of the Cincinnati municipal court law, and such additional compensation is not prohibited by section 20 of article II of the constitution of Ohio.

2. From the statement of facts submitted by you, it is apparent that the municipal court was not organized until January 1, 1914, as no judges were appointed as provided in the act, no action was taken by the presiding judge under the new law, and none of the jurisdiction, powers or duties of the municipal court are exercised or performed until the elected judges were inducted into office. While in their popular senses the words "judge" and "court" are often used interchangeably, I do not think that in the present instance they should receive such construction. As Judge Story well says in United States vs. Clarke, 25 Federal Cases No. 14804,

> "a court is not a judge, nor a judge a court. A judge is a public officer who by virtue of his office is clothed with judicial authorities."

"Court," as used in its technical sense, is a judicial assembly. When a judge is called a "court," he is only rightly so called when the tribunal over which he presides is in session.

State vs. Woodson, 161 Mo., 444.

In 8 Am. Eng. Enc. of Law, 2nd edition, 22, a court is defined as "a body in the government, organized for the public administration of justice at the time and place prescribed by law."

In re Choate, 18 Civ. Pro. Rep. (N. Y.), 186, it is held that a judge is a constituent part of the organization, but he is not the court, which consists of the entire judicial organization for the trial of cases and which is present whenever these constituent parts are actually performing the functions devolving upon them by law.

In Greenwood vs. Bradford, 128 Mass., 296, Chief Justice Gray said:

> "The court as used in the statutes means the court held whether by one or more judges, at a term established by law."

In order that the court prescribed by this law shall come into being and organize, it must be composed in the manner prescribed by statute; in order to perform its functions the presence of the officers constituing it is necessary. From the statement made by you it appears that there was no judicial organization in the manner prescribed by law, and the proper statutory officers had not been chosen. Section 2 distinctly states that the municipal court shall consist of five judges, while as a matter of fact, there was only one. In granting jurisdiction formerly exercised by the police courts, it is vested in the *municipal court,* and not in the judge thereof. In section 9, extending to it jurisdiction of the common pleas court, such extension applies to the *municipal court,* and not to the presiding judge. In section 10 the *municipal court* is authorized to render judgment. Civil actions and proceedings are to be commenced in the *municipal court.* The duties of the presiding judge very clearly show that the court must be in existence before he can act, because it is his duty to "classify and distribute among the judges the business pending in said court." While the judges may sit separately or otherwise they are required to meet at least once a month, adopt rules, etc. The clerk and his deputies are important and constituent parts of the court, and before the former can enter upon his duties he must give bond to be determined by the *judges* of the court. From this it is apparent that while the clerk of the police court becomes clerk of the municipal court, he is not authorized to act until the judges approve his bond.

Many other sections might be cited more fully developing the fact that this court was not organized prior to January 1, 1914, but what I have said here suffices, I think, to show that this court was not in actual active existence until January 1, 1914. There being no court prior to that time, the judge of the police court would not be entitled to any salary other than that of police judge until the complete organization of the court on January 1, 1914.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

992.

MINE RESCUE CAR—TRANSPORTATION OF SUCH CAR FREE OF CHARGE BY RAILROADS.

State mine rescue car is a car used for first aid work in mine and other disasters may be transported over the railroads of the state without charge.

COLUMBUS, OHIO, June 19, 1914.

MR. J. M. ROAN, *Chief Deputy Safety Commissioner, Division of Mines, Columbus, Ohio.*

DEAR SIR:—Under date of May 28, 1914, you state that Ohio has procured a car known as the "state mine rescue car," which is used for first aid work not only in mine disasters, but in all other great casualties occurring in mines, factories, hotels or upon railroads. This car is equipped with all of the latest apparatus and devices for first aid work, is kept in Columbus and is ready for immediate use in any disaster occurring in the state. The railroad officials of this state have indicated that they are inclined to favor the free transportation, over their lines, of this car, together with those in charge of the car, when it is to be used in first aid or rescue work, provided the railroads in so carrying the car are assured they will not be violating any law.

You ask for my decision as to the legality of the free transportation of such car and its attendants, under the circumstances set out, when the car is being used for the purpose of aiding those who have been injured in a disaster.

You have limited this request to the transportation of the car within the boundaries of the state.

Section 915 of the General Code of Ohio, as amended 103 O. L., 468, requires the chief inspector of mines to provide and maintain, at the expense of the state, a rescue car, fully equipped with certain designated devices and all necessary instruments, chemical tests, supplies and applicances. This car shall be stationed at a point designated by the chief inspector of mines, and may be transferred, by his direction, at any time to any point within the state, for the purpose of facilitating the efficient inspection of mines and conducting rescue work, and to demonstrate the various appliances and instruct persons in their use in first aid and rescue work. It and its equipment are to be continuously in charge of one person, who is required to give bond for the faithful discharge of the duties of his office.

It will be noted that this car is not only for the purpose of conducting rescue work, but also for the purpose of facilitating the inspection of mines, but it is only with the former that your request deals, and consequently, I shall only discuss that phase of the question.

The statute is part of the code of laws dealing with mines and mining, and if construed in a narrow sense would only permit the use of the car in connection with mine disasters, but as the statute is humanitarian in its purpose, and as it will be of great benefit and advantage to the people of the state of Ohio, if given a wider and broader scope than that of solely affording first aid to those injured in mine accidents, it should follow that it should receive a liberal construction in order that the humane and worthy object for which it was designed may be given as complete attainment as possible.

The chief inspector of mines may, at any time, transfer it for the purpose of conducting rescue work; and in defining rescue work, the statute is not in any way limited to mines, and consequently, under the circumstances, I do not think that I should be warranted in restricting its meaning because of the fact that it appears among other statutes dealing exclusively with mines, or because the equipment set out in the statute is especially adapted to mine rescue work. So to construe the law would be to disregard that warning so beautifully expressed ages ago: "The letter killeth, but the spirit giveth life."

In addition to this, great consideration should be given the construction placed upon the statute by your department, and from your letter, it is clear that you have construed the statute so as to permit the use of the car in cases of all disasters.

I make this preliminary statement for the reason that the character of the car has great bearing upon the construction of the statutes with which your request directly deals.

Section 516 of the General Code prohibits free transportation, by railroad companies, to passengers, except, among other designated persons, to

"persons exclusively engaged in charitable and eleemosynary work"

and section 517 expressly states that the preceding section shall not be construed to prohibit any railroad company from carrying passengers free in order to provide relief in cases of general epidemics, pestilence, or other calamitous visitation.

These sections indicate that it was not the intent of the general assembly, in prohibiting free transportation, to deny such free transportation, when the purpose thereof was to help those who were a proper subject of charity or aid by reason of some calamity which had overtaken them.

The whole question, however, seems to me to be governed by section 614-77 of the General Code. This statute deals with the public service commission and railroad companies, and provides:

> "Nothing in this act contained shall prevent any public utility or railroad from granting the whole or any part of its property for any public purpose, or granting reduced rate or *free service of any kind* to the United States government, *the state government,* or any political division or subdivision thereof, *or for charitable purposes* * * *."

As the rescue car referred to in your communication is maintained by your department under authority of the state, any use of such car is the use of a governmental agency, and the free transportation of such agency would be the rendering of free service to the state government, and consequently would come within the purview of the language just quoted. This would not only include the transportation of the car itself, but would also include the carriage of those whose duty it is to see that such car and its equipment are used in the proper way in the furnishing of first aid to the injured, and in rescue work,

In addition to this it must be, I think, conceded that when this car is in use in the manner set out in your communication, it is being operated for charitable purposes. When it is used for the purpose of relieving those who have been injured, or rescuing those who are in danger, it must assuredly be treated as promoting the welfare of the community, or some indefinite part of it. It bestows relief in a manner otherwise impossible.

This doctrine has also received recognition in section 22 of the interstate commerce act, adopted by the congress of the United States, the following language appearing therein:

> "Nothing in this act shall prevent the carriage, storage or handling of property, free or at reduced rates, for the United States, *state* or municipal governments, *or for charitable purposes.*"

For the foregoing reasons, I not only think it legal for railroad companies to transport such car and its attendants without charge, but would regard such action on the part of the railroad companies as eminently just and proper and as deserving of the highest commendation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

993.

CHILD LABOR—PROHIBITED IN CERTAIN INSTITUTIONS UNTIL CERTAIN AGE IS REACHED—PERMITTED IN OTHER KINDS OF EMPLOYMENT WHEN THE SCHOOLS OF THE DISTRICT IN WHICH SUCH CHILD RESIDES ARE NOT IN SESSION.

Under the provisions of section 12993, *General Code, no male child under fifteen years or female child under sixteen years of age shall be employed or suffered to work in the twenty-five establishments or businesses enumerated in the first paragraph of said section; this prohibition applies, no matter whether or not the public schools are in session.*

When an employment does not come within the descriptive terms of the first paragraph of the section in question, no child under fifteen years of age may be employed or suffered to work in such establishment not so included, when the public schools of the district in which such child resides are in session.

COLUMBUS, OHIO, June 19, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of May 19, 1914, you ask for my interpretation of section 12993 of the General Code and refer to the first and second paragraphs thereof, saying:

> "what we would like to know is, should the words 'during any of the hours when the public schools of the district in which he resides are in session,' be construed as qualifying the language used in the first paragraph of this section? In other words, is section 12993 to be construed in such a manner as to permit a male child under fifteen years or a female child under sixteen years of age to work in any occupation or establishment enumerated in said section during any of the hours when the public schools of the district in which the child resides are in session?"

Section 12993, General Code, reads as follows:

> "No male child under fifteen years or female child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any (1) mill; (2) factory; (3) workshop; (4) mercantile or mechanical establishments; (5) tenement houses, manufactory or workshop; (6) store; (7) office; (8) office building; (9) restaurant; (10) boarding house; (11) bakery; (12) barber shop; (13) hotel; (14) apartment house; (15) bootblack stand or establishment; (16) public stable; (17) garage; (18) laundry; (19) place of amusement; (20) club; (21) or as a driver; (22) or in any brick or lumber yard; (23) or in the construction or repair of buildings; (24) or in the distribution, transmission or sale of merchandise; (25) nor any boy under fifteen or female under twenty-one years in the transmission of messages.
>
> "It shall be unlawful for any person, firm or corporation to employ, permit or suffer to work any child under fifteen years of age in any business whatever during any of the hours when the public schools of the district in which the child resides are in session."

It is the evident intent of the general assembly that no male child under fifteen years, or female child under sixteen years of age shall be employed or suffered to work in the twenty-five establishments or businesses enumerated in the first paragraph of said section; and that this prohibition applies no matter whether or not the public schools are in session. There is a positive denial of the right of employment of the said minors, there being no exception to or limitation of the operation of the act.

The second paragraph of this section cannot be construed as in any way modifying or restricting the first paragraph, but, on the contrary, is intended to apply to those employments which are not comprehended within the first paragraph. The object of the law is to preclude the employment of male children under fifteen years and female children under sixteen years of age in any of the designated employments and to prevent the employment or working of any child under fifteen years of age in any business not enumerated in the first section, during the hours when the public schools are in session. In other words, when an employment does not come within the descriptive terms of the first paragraph of the section in question, no child under fifteen years of age may be employed or suffered to work in such employment not so included, when the public schools of the district in which such child resides are in session. When the work is in connection with any of the employments referred to in the first paragraph, no male child under fifteen, or female child under sixteen years of age, under any circumstances, can be suffered to work therein.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

994.

WHERE A VILLAGE THAT IS SUPPLIED WITH WATER BY A MUNICIPALITY HAS A WATERWORKS SYSTEM.

Where a municipality having a waterworks, supplies water to another municipality, a village under the authority of section 3973, *General Code, and the municipality thus supplied constructs a system of pipes for distributing such water to its inhabitants, it has "waterworks" within the meaning of section* 4357, *General Code.*

COLUMBUS, OHIO, June 20, 1914.

HON. E. C. IRVINE, *Solicitor for Village of Bexley,* 8 *E. Long St., Columbus, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of April 9, 1914, asking opinion of me, in which you advise me as to the following facts:

> "In the summer of 1912, the village of Bexley of this county, took the necessary steps to provide a water supply for the inhabitants of the village, and after issuing bonds therefor, commenced to complete the construction of a system of water pipes throughout the village for the distribution of water to the residents. Instead of sinking wells, and installing machinery to pump water through said system of pipes, the village negotiated with the city of Columbus to furnish the necessary supply delivered by meter into the pipes of the village. Under the direction of a former solicitor of the village, the council established and appointed a board of trustees of public affairs."

The question submitted is whether the village council was authorized to create a board of trustees of public affairs under the facts and circumstances above stated.

Section 4357, General Code, provides as follows:

> "In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4361, General Code, has since been amended, but at the time of the creation of the board of trustees of public affairs of the village of Bexley, it read as follows:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

Among the enumerated powers of municipal corporation, section 3619, General Code, provides:

> "To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs, and waterworks, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor."

In pursuance of this power, municipalities are further authorized to appropriate, enter upon and hold real estate, either within or without the corporate limits, for the purpose of providing for a supply of water for itself and its inhabitants, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs, reservoir sites and waterworks and for the protection thereof (sections 3677, G. C., sub 13; 3678, G. C.), while by section 3939, such corporations are authorized to issue and sell bonds for erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof.

Authorizing the contract between the village of Bexley and the city of Columbus, pursuant to which the conditions arise which occasioned the appointment of a board of trustees of public affairs for the village, section 3973, General Code, provides:

> "A municipality which has waterworks may contract with any other municipality for the supplying of the latter with water upon such terms as are agreed upon by their respective councils."

Precisely then, the question presented is whether a municipal corporation which is supplied with water by another such corporation, under the provisions of this section, has by reason of the construction of a system of water pipes, to distribute the water to its inhabitants, a waterworks within the meaning of section 4357, Gen-

eral Code, above noted. It is apparent that a municipality thus supplied with water has not waterworks in any complete sense such as is possessed by the municipality supplying such water, within the contemplation of section 3973, yet it is likewise apparent that a municipality thus supplied with water, which it distributes to its inhabitants, can be said to have waterworks as compared with the condition of a municipality which has no distributed municipal water at all. Again, the same original act of the legislature, which authorized one municipal corporation to ask for a supply of water from another (66 O. L., 208, 209), recognized that the corporation just supplied might have waterworks as a result of facilities installed for the purpose of distributing the water thus supplied to its inhabitants. Section 355 of this act has been carried into the General Code as section 3976, which provides that where a contract entered into by one municipal corporation for the supply of water to another, shall be terminated by annexation, "so much of the debt incurred by either, in the construction of waterworks, as remains unpaid, shall thereafter be a charge upon the united corporation, to the same extent that the separate debt of either, incurred as aforesaid, was, before the union, a charge upon the corporation which constructed it."

Looking to the provisions of section 4357 alone, it is not apparent that waterworks, the construction of which by the village, authorizes the council to establish a board of trustees of public affairs, is in contemplation of the section any different from waterworks, the purchase or lease of which by the village authorizes the council to establish such board. Section 4357 was originally enacted as section 205 of the Municipal Code of 1902. By section 45 of the Municipal Code, since carried into the General Code as section 3809, municipalities were authorized to contract for the leasing of the waterworks plant of any person, firm or company therein situated. The natural significance of the term "waterworks plant" would seem originally to include the source or means of water supply, as well as the means of distributing the same. Looking to the provisions of section 4357 therefore, it is not in and of its own terms apparent that the legislature had in contemplation a situation such as here presented in the village of Bexley. In construing the provisions of this section, however, it is to be presumed that the legislature had knowledge of the existing legislation upon the subject-matter, and in this connection I know that section 3974, General Code, provides with reference to water supplied to one municipality by another that "the amount to be paid for such supply shall be raised by such municipality in the manner provided for the payment of the expense of conducting and managing waterworks, constructed wholly by a municipality." That is, the municipality thus supplied with water must pay for such supply through water rents to be fixed and collected by proper municipal authorities. Since the enactment of the Municipal Code of 1902, and the amendatory provisions of the Paine law, the only authority with respect to the fixing and collection of water rents is the director of public service in cities and the board of trustees of public affairs in villages, no authority in either instance being vested in the city or village council with respect thereto.

Hutchins vs. Cleveland, 9 C. C. (n.s.),226; 79 O. S., 478.

Looking to the significance of the term "waterworks," it is now apparent that it necessarily includes within its signification the source or means of water supply, such as wells, pumps, etc. For instance, as a public utility, a waterworks company is defined as one engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state (614-2, G. C.); while for purposes of taxation, the legislature has defined a waterworks company in the same terms (section 5416, G. C.).

These considerations lead me to the conclusion that the village of Bexley has waterworks such as, under the provisions of section 4357, General Code, authorized the council of the village to establish a board of trustees of public affairs.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

995.

ARTICLES OF INCORPORATION—NATIONAL MUTUAL AUTOMOBILE INSURANCE ASSOCIATION—PURPOSE CLAUSE DISAPPROVED.

The purpose clause of the proposed articles of incorporation of The National Mutual Automobile Insurance Association is broader than the provisions of section 9593, General Code, which covers such class of corporations, and is, therefore, disapproved.

COLUMBUS, OHIO, June 20, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of May 28th, transmitting to this department, for examination and approval, the proposed articles of incorporation of The National Mutual Automobile Insurance Association, the purpose of which is as follows:

> "Said corporation is formed for the purpose of insuring its members against loss sustained by them, on automobiles owned by them and insured in this association, by reason of direct loss or damage caused by fire, arising from any cause whatever, including explosion, self-ignition or lightning, while within the limits of the United States (exclusive of Alaska, the Hawaiian Island, the Phillipine Islands and PortoRico) and Canada, including while in building, on road, or railroad car or other conveyance, on ferry or inland steamer, or on coastwise steamer between ports within said limits. And also against loss or damage by theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured."

This association falls within the class of mutual protection associations and is governed by section 9593, General Code. This section is very lengthy and I shall not quote it in full. It provides, however, that any number of persons of lawful age, not less than ten in number, residents of this state or an adjoining state, and owning insurable property in this state, may form such an association and may insure against loss by fire the property of its members located in this state.

The proposed articles of incorporation attempt to confer authority upon a mutual company to insure against loss by fire the property located outside of this state and in transit; also to insure against loss or damage by theft, robbery or "pilferage." Furthermore, the articles are signed by only seven persons and the certificate does not state whether or not the persons are of "lawful age."

For the foregoing reasons, I am unable to approve the articles of incorporation and return them herewith.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

996.

COLLATERAL INHERITANCE TAX—"ADOPTED CHILD" DOES NOT INCLUDE "STEP-CHILD" UNLESS SUCH CHILD IS ADOPTED.

The term "adopted child" as used in section 5331, *General Code, as amended in* 103 *O. L.,* 463, *providing for collateral inheritance tax against property passing to others than the father, mother, husband, wife, lineal descendant or adopted child of descendant, is not broad enough to include a step child where no proceedings have been had to adopt the child.*

COLUMBUS, OHIO, June 20, 1914.

HON. E. C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 9th, requesting my opinion upon the following question:

> "Section 5331, G, C., as amended in 103 Ohio Laws, page 463, provides for collateral inheritance tax against property passing to others than the father, mother, husband, wife, lineal descendant or adopted child of the decedent. Is the term 'adopted child' as used in this statute broad enough to include a step-child where no proceedings have been had under the statute to adopt that child?"

The amended statute, insofar as it is material, reads as follows:

> "All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. * * *"

The original section provided a specific exemption in favor of "a person recognized as an adopted child and made a legal heir under the provisions of the statutes of this state." (Reference being, of course, to section 8598, General Code, which provides procedure for designating an heir at law, who shall stand in the relation of an adopted child.) Under the original section, then, the conclusion would follow that a step-child, not formally adopted or recognized, under the statute, as an heir at law, would not be entitled to the benefit of the exemption. A decision to this effect was found In re Will of William Hooper, 4 N. P., 186, which holds that legacies to step-sons are taxable, although there is no reason given in the report of the case.

In my judgment, the exclusion of reference to the person recognized as legal heir, from the amended section, has the effect of narrowing, rather than broadening its exemptions. I believe that the term "adopted child," as it remains in the statute, is to have the same narrow meaning as it evidently had under the original section.

Accordingly, I am of the opinion, then, that the term in question is not broad enough to include a step-child where no proceedings have been had to adopt that child.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

997.

SPECIAL ELECTION—WHEN A PETITION IS SIGNED BY TWENTY PER CENT. OF THE ELECTORS SUCH ELECTION MAY NOT BE HELD IF REGULAR ELECTION OCCURS NOT LATER THAN NINETY DAYS AFTER THE PETITION IS FILED—REFERENDUM PETITION.

When ten per cent. of the electors file with the city auditor or village clerk a referendum petition within thirty days after an ordinance has been filed with the mayor, such petition cannot be voted upon at any election, except at the regular or general election occurring subsequent to forty days after the filing of the petition with the auditor or clerk.

When twenty per cent. of the electors file a referendum petition with the auditor or clerk, requesting the submission of such ordinance at a special election, the same may be submitted at a special election to be held on the fifth Tuesday after the petition is filed.

COLUMBUS, OHIO, June 20, 1914.

HON. M. C. GOWEY, *Legal Adviser for the Village of North Lewisburg, North Lewisburg, Ohio.*

DEAR SIR:—Under date of May 14th, you write requesting my opinion as to whether a village council can call a special election on a referendum petition within thirty days after its filing, or is compelled to wait until the next general election.

Sections 4227-2 and 4227-5 of the General Code, as they appear in 104 Ohio Laws, page 238, are as follows:

"Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided.

"When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition.

"No such ordinance or measure shall go into effect until approved by the majority of those voting upon the same. Nothing in this act shall prevent a municipality after the passage of any ordinance or other measure from proceeding at once, to give any notice, or make any publication, required by such ordinance or other measure.

"Section 4227-5. Whenever twenty per cent. of the electors of any municipality file a petition with the city auditor if it be a city, or village

clerk, if it be a village, proposing or against an ordinance or other measure, requesting in the petition that the ordinance or measure be submitted to the electors of the municipality at a special election, the auditor or village clerk, after ten days, shall certify the same to the board of deputy state supervisors of elections who shall submit the same at a special election to be held on the fifth Tuesday after the petition is filed. The petition shall not be submitted at a special election if a regular or general election will occur not later than ninety days after the petition is filed but shall be submitted at the regular or general election."

Under these statutes it is clear that when a petition is signed by ten per cent. of the electors and filed with the clerk within thirty days after the ordinance has been filed with the mayor, such petition cannot be voted on at any election except a regular or general election occurring subsequent to forty days after the filing of the petition with the clerk. Under section 4227-5, however, when twenty per cent. of the electors file a referendum petition with the village clerk, requesting the submission of the ordinance at a special election, the board of elections may submit the same at a special election to be held on the fifth Tuesday after the petition is filed. The same may not be presented at such time, however, at a special election, if a regular or general election will occur not later than ninety days after the petition is filed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

998.

BLANKET BOND FOR OHIO NATIONAL GUARD OFFICERS—LEGALITY OF SUCH BOND—PAYMENT OF PREMIUM FOR SUCH BOND.

The giving of a blanket bond by the adjutant general's department to bond all officers, quartermasters and clerks of the Ohio National Guard is proper and an expenditure for the premium thereof is a proper charge.

COLUMBUS, OHIO, June 25, 1914.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus.*

DEAR SIR:—I acknowledge receipt of your letter of June 20th, submitting to this department a blanket bond to be given by The Illinois Surety Company to bond all officers, quartermasters and clerks of the Ohio National Guard, and wherein you request my opinion as to whether the expenditure for the premium on said bonds would be a proper expenditure and charge.

In view of the decision of the court of appeals, eighth district, that the expense of bonds of officers, etc., of the Ohio National Guard is properly included in the appropriations for the incidental expense of military organizations, especially inasmuch as the military code governing such matters has affirmatively declared such expenditure to be a proper one, and in view of the order which was transmitted with your inquiry which recites that your department will take care of the expense of a blanket bond and ordering officers, captains, quartermasters and treasurers to take no action respecting the securing of their official bonds as such, I am of the opinion that the giving of such a blanket bond is proper and that an expenditure for the premium thereof is a proper expenditure and charge.

I have carefully examined the bond which you have submitted and the same seems to me in proper form save and except that I suggest that you add to the first paragraph on page three after the word "intention," striking out the period after such word, the following: "So to terminate. Provided that this bond shall be and remain in full force and effect for the full period of thirty days from and after receipt of notice of such said intention to terminate." With such addition the bond seems to me to be satisfactory and a valid obligation. We are herewith enclosing you the papers and bond submitted.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

999.

MUNICIPAL ROAD DISTRICTS—TAXES LEVIED FOR SPECIAL ROAD IMPROVEMENT PURPOSES—TOWNSHIP TRUSTEES—BOND ISSUE UNDER LONGWORTH ACT—COUNCIL—BUDGET ORDINANCE SHOULD BE PUBLISHED.

1. *A municipal road district formed under sections 3734 to 3736, General Code, is not entitled to specific distribution of taxes levied for special road improvement purposes.*

2. *Township trustees may not issue bonds, under the Longworth act, for the purpose of providing for the township's assumed proportion of the expense of a road improvement, under sections 6903, et seq., General Code.*

3. *Where bonds have been offered for sale, and bid for, and awarded, but have not been delivered nor paid for, there is no liability against the duplicate of the taxing district.*

4. *Under such circumstances, the contract to be paid for from proceeds of bonds cannot lawfully be entered into by a public officer.*

5. *Council, in making up its annual budget for the use of the budget commission, should act by ordinance, and the ordinance should be published.*

COLUMBUS, OHIO, June 26, 1914.

HON. W. O. WALLACE, *Solicitor for the Village of Columbiana, Columbiana, Ohio.*

DEAR SIR:—I have acknowledged receipt of your letter of May 26, 1914, in which you request my opinion upon several questions arising under a state of facts set forth in some detail therein, as follows:

The village of Columbiana is located in Fairfield township, Columbiana county, Ohio. Some years ago the council of the village passed an ordinance creating the village a special road district, under the provisions of what are now sections 3734-3736, inclusive, General Code.

Subsequently, the township, including the village of Columbiana, by electoral vote, authorized the township trustees to make a special levy for road purposes, in an amount not to exceed six mills.

Still more recently, to wit, in the year 1914, the trustees of the township passed a resolution declaring that it was necessary to improve by paving, as might be agreed upon between the trustees and the county commissioners, a certain road in the township, outside of the corporate limits of the village. The resolution declares that the board of trustees requests the county commissioners to improve

said road, under the provisions of section 6903, et seq., General Code, and agrees, on behalf of the township, to assume and pay the total cost and expense of the improvement not assessed on specially benefited property, as provided in section 6905, General Code.

Subsequently, and in evident pursuance of the purpose to proceed with the improvement of said road, the trustees attempted to issue, and did issue the bonds of the township under the supposed authority of sections 3295 and 3939, et seq., of the General Code. The bonds, after being offered to the liability board of awards (the industrial commission) and refused by them, were bid off by a certain bank and awarded to it, but some question having arisen, the bonds have not been delivered and the bank refuses to pay for them until the dispute is settled.

The current expenses and sinking fund requirements of the village and school districts are such as, with the anticipated county and state levy, together with any levy that might be necessary to provide for the interest and sinking fund requirements of the bonds above referred to, would produce an aggregate levy in excess of the limitations of the Smith one per cent. law. That is to say, if taxes are to be levied by the township, within the limits of the corporation, for the purpose suggested, and if such taxes obtain preference over the current expenses and sinking fund levies of the village, the municipality will suffer.

The questions that you submit are as follows:

(1) Does the creation of the village, as a special road district, have the effect of excluding it from subjection to taxes levied by the township trustees for the purpose of retiring township bonds issued for road improvement purposes?

(2) Does a vote to permit an extra levy authorize the trustees to issue bonds of the township in anticipation of such special levy?

(3) Does the Longworth act, under which the bonds in question were issued, authorize the township trustees to issue bonds for the purpose of paving public roads in the township?

(4) Do taxes for the purpose of retiring bonds issued by a township, under the circumstances mentioned, take precedence over levies to meet prior indebtedness and current expenses of a village in the township?

(5) May the budget commission lawfully permit such a township levy to be made against the property on the duplicate of a village, when the effect of so doing would be to reduce the village levies for necessary current expenses, and the payment of existing indebtedness?

(6) When the issuance of bonds has been authorized, assuming their legality, and the bonds have been bid for and awarded to a prospective purchaser, but the latter has not accepted them, nor paid for them, do the bonds constitute an indebtedness of whatever district is required to pay them?

(7) Would a contract, entered into for the expenditure of money to be derived from such a bond issue, be lawful, if made prior to the delivery of and payment for such bonds?

You also ask another question not arising under the foregoing facts, as follows:

(8) Should the annual budget of the council be passed as a resolution and published as provided by law for ordinances and resolutions of a general nature?

I find that I shall have to eliminate your second question for two reasons:

(1) You do not state under what authority of law the action which you describe, namely, the submission to the electors of the proposition to levy special road taxes, was taken.

Without an exhaustive examination of the statutes, I may say that I know of no authority to submit such a proposition to the electors, under the circumstances mentioned by you; but my statement here is not to be regarded as the expression of an opinion.

(2) The facts submitted by you show that the trustees are attempting to issue bonds, under the Longworth act, for the purpose of paying the assumed part of the cost and expense of a road improvement, under section 6903, et seq., General Code; therefore, whatever may be the authority of the township trustees to levy extra road taxes by reason of the special vote to which you refer, the bonds in question are clearly not issued in anticipation of such taxes.

For these reasons, and especially the second one, I feel that I must put aside your second question on the ground that it is not presented by the facts which you submit.

Your first question involves considerations of the following sections of the General Code:

> "Section 3734. The council may form road districts within the limits of the corporation, and when contiguous territory is attached to the corporation for road purposes, such power shall extend to the territory so attached.
>
> "Section 3735. No tax assessed upon property within the territory so attached to a corporation, shall be applied otherwise than within the territory in which it is assessed. All taxes charged for road purposes on the property within the limits of the corporation, or the territory so attached, and collected by the county treasurer, shall be paid to the corporation treasurer, to be specially appropriated by the council to street and road purposes within the corporate limits and territory so attached. The trustees of the township in which such territory is located, and the council, may agree upon a different distribution or division of the funds.
>
> "Section 3736. The council and the trustees of townships, respectively, in which such corporation is situated, when it has not already been done, where from the spareness of population the public interest requires it, shall attach to the corporation any territory lying contiguous thereto, for such purposes, and any portion of the territory so attached may be detached, and replaced under the control of the township trustees for road purposes, by the council, with the concurrence of the township trustees."

These sections, and especially the provisions thereof which exempt the territory within such a specially created road district from taxation for road purposes not to be applied within the territory of the district, were interpreted by the supreme court, in the early case of Lima vs. McBride, 34 O. S., 338. Without quoting from the decision, I may say that the holding is that these sections do not have the effect of exempting the territory of the corporation, when it has been constituted as a special road district, from taxation, for special road improvements or repairs, but only from general road levies. The requirement, in effect, is that the general road levies of the county and township, made within the territory of the village or the district, shall be accounted for and paid into the treasury of the village, to be used for road purposes therein. But, as the section was interpreted in the case cited, this does not prevent the taxation of property within the district for a special road purpose, or entitle the village treasury to share in the proceeds of the tax for such a special purpose.

Your first question, then, is to be answered by saying that if the trustees have authority to issue bonds for general road purposes and levy taxes to retire the same, perhaps an affirmative answer could be given to your question, though this is not decided; but that where it appears, as it does from the facts you submit, that the effort is to provide specially for the improvement of a designated road, the statutes cited do not apply.

Your third question is answered, generally, in an opinion to Honorable Louis P. Metzger, formerly prosecuting attorney of Columbiana county, a copy of which is enclosed herewith. In it I hold, as you will observe, that the Longworth act does not confer upon township trustees the authority to make any particular improvement for which bonds may be issued, as provided for therein; but that authority to make the improvement, as distinguished from authority to borrow the money, must be sought elsewhere; and if it cannot be found, the power to borrow the money by issuing bonds, under sections 3295 and 3939, General Code, which is, of course, dependent upon such other power, must be likewise denied.

The question whether or not, in the given case, township trustees may issue bonds for road improvements, under the Longworth act, then resolves itself into the further question as to whether or not the trustees are proceeding under statutes authorizing the township, as such, to improve roads. Inasmuch as your statement of facts discloses the exact sections under which the trustees are assuming to proceed, viz.: 6903, et seq., General Code, it remains to be inquired whether township trustees may issue bonds, under the Longworth act, for the purposes of said section.

I quote the pertinent provisions of the statutes thus involved:

"Section 6903. On a petition therefor signed by the owners of at least a majority of the foot frontage on a county road or part thereof, the *county commissioners* may do any one or more of the following acts or things:

"(1) Cause the county surveyor to establish a grade along it, or part thereof, subject to their approval.

"(2) Cause it or part thereof to be widened, altered or established to a greater width than sixty feet and not more than one hundred feet, to be determined by the viewers as provided in this chapter.

"(3) Grade, drain, curb, pave and improve it or part thereof.

"Section 6904. The county commissioners may assess the damages on account of the widening, altering or establishing of such road, or part thereof, and the costs and expenses of any or all of the improvement or such part of said damages, costs and expenses as they deem equitable under the circumstances upon the taxable property abutting upon the road or part thereof, either according to the foot frontage or according to the benefits. The commissioners shall be an assessing board for the purpose of assessing the damages, costs and expenses, as herein set forth, upon the abutting property as aforesaid.

"Section 6905. The board of county commissioners may enter into an agreement with the board of trustees of any township or the council of any village, or both, into or through which a state or county road improvement is contemplated, whereby said board of trustees or council may assume and pay such a proportion of the costs and expenses of such improvement not assessed upon abutting land in accordance with section 6904 of the General Code, as may be agreed upon between said board of county commissioners and said board of trustees or council, and such agreement or agreements may be entered into at any time before the contract for said improvement is let.

"Section 6906. The county commissioners may order such part of the damages, cost and expense of such improvement as they deem equitable, to be paid out of the county treasury, or any state and county road improvement fund.

"Section 6912. The assessment so made shall be certified by the commissioners to the auditor of the county, who shall place it on the tax list

against such taxable property as other taxes, and it shall thereupon become a lien thereon, and be collected in not to exceed ten annual installments.

"Section 6912-1. After so certifying said assessment to the auditor of the county, the commissioners may, in anticipation of the collection of all moneys from all sources, required to be raised for said improvement, whether by assessment, taxation, or by agreement with the township trustees or village council, borrow a sum of money sufficient to pay the entire estimated cost and expense of the improvement, and may issue and sell negotiable notes or bonds of the county, bearing a rate of interest not to exceed five per cent. per annum. For the purpose of paying their respective shares of the principal and interest on the notes or bonds authorized to be sold, the county commissioners and township trustees may levy a tax upon all the taxable property of the county or township in addition to all other taxes authorized by law of not to exceed two mills in any one year until said notes or bonds and interest are paid.

"Section 6912-2. The commissioners shall cause the damages, if determined, to be paid and the improvement made forthwith, and may add interest at the rate of not to exceed five per cent. per annum to all unpaid installments of the assessment, and to all sums agreed to be paid by the township trustees or village council, and collect said interest, together with the assessment or amounts so agreed to be paid.

"Section 6913. The total amount of notes and bonds of the county issued and outstanding on the account of road improvement as herein provided shall not be in excess of one per cent. of the total tax duplicate of the county."

The following facts are apparent, from the examination of these sections:

(1) The improvement constitutes a county enterprise, not a township undertaking.

(2) The statutes provide, specifically, for the issuance of bonds and the power is to be exercised by the county commissioners, not the township trustees. Bonds are to be in an amount sufficient to pay the entire estimated cost and expense of the improvement, and are to be met by taxes levied by the trustees (in case they assume any part of the county's share), and by the assessments as levied by the commissioners. In my opinion, these sections constitute special authority in the county commissioners and township trustees, respectively, and upon the most familiar principle of statutory interpretation, such a special provision is to be regarded as an exception to a general provision such as is found in section 3939, G. C.

I am of the opinion, therefore, that township trustees have no authority to issue bonds, under the Longworth act, for the purpose of paying the proportion of the cost and expense of a road improvement, under sections 6903, et seq., General Code, which is assumed by the township, but that the improvement is a county enterprise and bonds must be issued by the county commissioners.

This question, of course, is answered upon the assumption that the bonds issued are for the purpose stated, and no other purpose. The resolution issuing the bonds, a copy of which you enclose, does not specifically state that the bonds are so issued, but the purpose of the issuance is therein described, as follows:

"For the purpose of improving highways lying within the said township of Fairfield."

The transcript submitted with the bonds, however, for the use of prospective lenders, includes the resolution adopted under section 6903, et seq., General Code,

and I have, therefore, assumed, in answering your question, that the sole purpose for which the bonds are issued, is to provide a fund to pay the township's assumed proportion of the road improvement, under those sections. As already stated in my opinion, the proceedings are not lawful.

Your fourth and fifth questions, in the face of the conclusion which I have just reached, need not be answered unless your sixth and seventh questions are answered in the affirmative. I, therefore, pass to a consideration of these questions.

I am of the opinion, in answer to your sixth question, that until the bidder for the bonds has accepted and paid for them, i. e., has loaned its money to the township on the sale of the bonds, no liability as against the township or the duplicate of the village, can arise.

Your seventh question is determined by consideration of section 5660, General Code, which provides as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Inasmuch as the bonds in question have not been "lawfully authorized," and inasmuch, further, as, in my judgment, they have not yet been sold, nor are they in process of delivery, I am of the opinion that the commissioners, or the commissioners and trustees are without authority to enter into a contract for road improvement, at the present time, upon the facts submitted by you.

Inasmuch, therefore, as the proceedings of the trustees thus far had, as set forth in your statement of facts, are not lawful, and no liability has been created against the tax duplicate of the village thereunder, I need not answer your fifth and sixth questions, which relate to the respective rights of the township and the village, and the powers of the budget commission in relation thereto.

Your eighth question involves a consideration of section 3794, General Code, in connection with the Smith one per cent. law, so-called section 5649-3a, General Code. These sections are as follows:

> "Section 3794. On or before the first Monday in July, each year, council shall cause to be certified to the auditor of the county, the rate of taxes levied by it on the real and personal property in the corporation returned on the grand duplicate, who shall place it on the tax list of the county in the same manner as township taxes are by law placed thereon. The ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made and the per cent. thereof, and if he finds that the tax levy so certified to him exceeds the aggregate limit allowed by law, the county auditor shall not place it on the tax list, and the levy for such

municipal corporation shall not be valid or collectable against any real or personal property in the corporation. If such levy is in excess of the limit allowed by law, the auditor shall immediately notify the council making it, and within ten days after the receipt of such notification council shall revise its levy so as to bring it within the law.

"Section 5649-3a. On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes, within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth: * * *.

"Such budget shall be made up annually at the time or times now fixed by law when such boards or officers are required to determine the amount in money to be raised or the rate of taxes to be levied in their respective taxing districts.

"The county auditor shall provide and furnish such boards and officers blank forms and instructions for making up such budgets."

While the question is not free from doubt, I am of the opinion that the effect of the Smith one per cent. law on the previously enacted section 3794, General Code, is merely to constitute the levying ordinance the budget for the purpose of the county auditor and the budget commission. That being the case, I am of the opinion that it is, at least, safer for the municipal budget to be passed as an ordinance, as required by section 3794, which has never been expressly amended or repealed. Inasmuch as an ordinance of this character is clearly one "of a general nature," I am of the opinion that under section 4227 and relating sections, it must be published as other ordinances of the same character.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1000.

JUVENILE JUDGE—ALLOWANCE UNDER MOTHERS' PENSION LAW—WHEN SAME BECOMES AVAILABLE.

If a juvenile judge has made allowance under the mothers' pension law, prior to the time when the money to pay such pension first becomes available, pensions under the allowance will start, not from the date of adjudication and allowance, but from the date when the money first becomes available.

COLUMBUS, OHIO, June 26, 1914.

HON. GEORGE M. HOKE, *Probate Judge, Tiffin, Ohio.*

DEAR SIR:—Under date of January 22, 1914, your letter, receipt of which has been acknowledged, requests my opinion as follows:

"In case a widow, under the mothers' pension law, should be adjudged a certain amount as pension, say February 1, 1914, will her pay start from

the date of the adjudication and allowance, or will it start on the day when the money for same first becomes available?"

This question seems to me to be of considerable difficulty. The so-called mothers' pension provisions found in 103 O. L., 877, consist of sections 1683-2 to 1683-9, inclusive. The material provisions of these sections are as follows:

"* * * The juvenile court may make an allowance to each of such women, as follows: Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may from time to time extend such allowance for a period of six months, or less."

This last provision is somewhat inconsistent with section 1683-4 which provides that:

"Whenever any child shall reach the age for legal employment, any allowance made to the mother of such child for the benefit of such child shall cease. The juvenile court may, in its discretion, at any time before such child reaches such age, discontinue or modify the allowance to any mother and for any child."

Section 1683-5 provides:

"Should the fund at the disposal of the court for this purpose be sufficient to permit an allowance to only part of the persons coming within the provisions of this act, the juvenile court shall select those cases in most urgent need of such allowance."

Section 1683-9 provides:

"It is hereby made the duty of the county commissioners to provide out of the money in the county treasury such sum each year thereafter as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

So far as the same constitutes a legislative interpretation of the foregoing provisions, the following, enacted by the last general assembly, at its extraordinary session (104 O. L., page 199), may be of interest:

"For the purpose of providing a sum which will meet the requirements of the juvenile court until the proceeds of the tax required to be levied under the provisions of section 1683-9 of the General Code, shall become

available, any board of county commissioners may transfer from any surplus moneys in the county treasury to the credit of any fund therein to a fund for the use of the juvenile court under the provisions of sections 1683-2 to 1683-9, inclusive, of the General Code, the creation of which for such purpose is hereby authorized. *The moneys so transferred shall be paid as provided in section* 1683-9 *of the General Code, upon the order of the juvenile judge, under allowances made either before or after this act shall become effective.*"

While this supplementary act recognizes the validity of allowances made prior to its passage, yet, it does not imply the power to pay from the fund, the creation of which it authorizes, the full amount of what might be deemed the deferred installments. Its force is prospective only, and so far as it operates on such allowances previously made, it would, of itself, authorize only the payment of the monthly allowance from the date when the funds became payable.

In my mind, section 1683-5, supra, is of controlling significance. The plain inference from this section is that the juvenile judge has no authority to make a final and binding allowance to any person when he has not, at his command, funds sufficient to pay it. Surely, if it is the duty of the juvenile court to select certain cases, when the fund at his disposal is not sufficient to permit allowances to all qualifying persons, it must then follow that he is without power to create a *liability* by making an allowance when there are no funds, whatever, available.

I think it follows as a conclusion, from the considerations upon which I have commented, that an allowance made at a time when no funds are at the disposal of the juvenile court, cannot create such a liability or claim as would permit a subsequent payment of deferred installments on account of such allowance, when the funds once become available. This conclusion is not inconsistent with the provisions of the temporary act authorizing transfers to be made for the purpose of creating such a fund.

I am, therefore, of the opinion that if the juvenile judge has made an allowance prior to the time when the money to pay mothers' pensions first became available, payments under the allowance will start, not from the date of adjudication and allowance, but from the date when the money first becomes available.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1001.

MUNICIPAL OFFICERS—RIGHT TO BE INTERESTED OR CONNECTED WITH CONTRACTING FOR SUPPLIES WHILE IN OFFICE.

A corporation of which a member of the sinking fund trustees or trustees of a municipal library is a stockholder cannot legally sell merchandise to the city with which he is officially connected, or be interested in any way in contracting for the purchase of property, supplies or fire insurance while such member is in office. Such officers may not be interested in contracts during the term for which they were elected, but may after the expiration of their term.

COLUMBUS, OHIO, June 26, 1914.

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

GENTLEMEN:—Under date of May 28th, you request my opinion as follows:

"May a firm, or corporation, of which a member of the sinking fund trustees, or a trustee of a municipal (Carnegie) library is a stockholder, legally sell merchandise of any character to the city with which he is officially connected, or be interested in any way in contracts for the purchase of property, supplies or fire insurance?

"May such officers be interested in contracts of any nature during the term for which they were elected, or for one year thereafter?"

Sections 12910 and 12912 of the General Code are as follows:

"Section 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

"Section 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services, while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

Trustees of the sinking fund are provided by sections 4507, et seq. of the General Code, and library trustees are provided by section 4004 of the General Code. I am of the opinion that the incumbents of these positions are holders of an office of trust, within the meaning of section 12910 of the General Code, and that they are officers of a municipal corporation, as intended by section 12912 of the General Code. Such officers, therefore, are prohibited by the first section, from being interested, in a pecuniary way, in contracts for the purchase of property supplies or fire insurance made with the city with which they are connected, and by section

12912 of the General Code, such officers are prohibited from being pecuniarily interested in the profits of any contract to which the municipal corporation is a party, while they are in office. A purchase of merchandise would be such a contract.

The holding of stock in a corporation purchasing such merchandise, or contracting for the selling of property supplies or fire insurance to the municipal corporation would constitute an interest in the profits of such contract on the part of such officers. I am of the opinion, therefore, that such contracts would be invalidated by virtue of the statutes above quoted.

I have heretofore held that the prohibition of section 12912, with reference to interest in the profits of a contract by a municipal officer, supplies only to contracts entered into during his term of office. Such contracts entered into after the expiration of such term could not be affected.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1002.

ORDINANCE—EFFECT OF THE REPEAL OF AN ORDINANCE AND THE SIMULTANEOUS RE-ENACTMENT OF A NEW ORDINANCE—EFFECT ON OFFICE OR EMPLOYMENT WILL BE BY VIRTUE OF THE OLD ORDINANCE WHEN SUCH OFFICE OR EMPLOYMENT IS RETAINED BY THE NEW ORDINANCE.

The repeal of an ordinance and the simultaneous re-enactment of a new ordinance does not deprive one of an office or employment held by virtue of the old ordinance, when such office or employment with similar duties is retained by the new ordinance.

Where an ordinance provides for the organization of a police department with a chief of police, lieutenant of police and five patrolmen, and this ordinance is repealed and a new ordinance simultaneously enacted providing for a chief of police and five patrolmen, the officers of lieutenant of police and sergeant of police are abolished and the incumbents of these positions and are not reduced in rank. They would be placed at the head of an appropriate eligible list for appointment.

COLUMBUS, OHIO, June 26, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of June 2, 1914, Hon. David H. James, City Solicitor of Martins Ferry, Ohio, states and inquires:

> "On March 5, 1910, the council of this city passed an ordinance, section two of which ordinance provided that in the police department there should be one chief of police and seven patrolmen and fixed the salaries of said officers.
>
> "May 4, 1914, said council passed another ordinance amending said section two of said original ordinance and repealing said original section two. Said section two as amended provides that in the police department there shall be one chief of police, one lieutenant, one sergeant and five patrolmen, and fixes the salaries of said officers.
>
> "Now there is pending before council an ordinance which provides that in the police department there shall be one chief of police and five patrolmen

and fixes the salaries of said officers? Said ordinance contains a section repealing said section two of the ordinance passed March 5, 1910, as amended May 4, 1914.

"All the officers now in the police department have qualified and hold their positions under the provisions of the civil service laws. Both the present lieutenant and sergeant of police have been promoted to their present positions from the office of patrolman.

"I desire your opinion as to whether, upon the final passage of said ordinance now pending, the persons now holding the positions of lieutenant and sergeant of police, respectively, must necessarily be removed from the service and the five persons now holding the positions of patrolmen be reappointed, or whether the director of public safety may reappoint as patrolmen any five of the seven persons now holding the positions of lieutenant, sergeant and patrolmen, at his discretion.

"This request is made at this time at the instance of the city council."

In an opinion rendered to Hon. Howard E. MacGregor, city solicitor of Springfield, Ohio, under date of September 26, 1912, it was held that council had a right to abolish a position in the police department. The position involved in that opinion was that of inspector of police, and it was held that upon abolition of that position the incumbent loses all right thereto and that he has no legal right to any other position. A copy of that opinion is herewith enclosed.

The opinion above referred to construed the old municipal civil service act and the ordinance in question therein was not a general ordinance reorganizing the entire police department. It was assumed that the ordinance was applicable only to the position of inspector of police.

In the case submitted the ordinance applies to all the positions in the police department, some of which are retained and otherwise abolished. The effect of the proposed ordinance would be to abolish the positions of lieutenant and sergeant of police and retain the positions of chief of police and patrolmen. The repealing part of the ordinance and the new provisions take effect at the same time. There is no interim.

In case of State ex rel. vs. Bish, 22 Ohio Dec., 480, the second syllabus reads:

"A municipal council by virtue of General Code 3617 and 4374, providing for a police department, has authority to provide by ordinance for the number, salaries, etc., of members of such department and to repeal at the same time a former ordinance under which the department was operated; hence, such action having been taken, all the members of the police force lose their positions as of the date of such repeal, then it becomes the duty of the director of public safety to appoint members thereof pursuant to the contemplated reorganization and upon such salaries as council has provided. General Code, 4484, refers only to individual removals for cause."

No authority is cited in the opinion in support of this conclusion. In that case the question involved was the right to increase the salaries of policemen after they were appointed. No question was involved as to abolishing an office. The conclusion of that case as to the right to increase or diminish salaries has been followed by this department. In reaching that conclusion, however, it is not necessary to hold that a repealing ordinance and a simultaneous re-enactment of the old ordinance, or a part thereof, abolished all right to offices secured under and provided for under the old ordinance and retained in the new.

The rule is stated at section 238 of Lewis' Sutherland on Statutory Construction, second edition, as follows:

> "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost; corporate existence is not ended; inchoate statutory rights are not defeated; a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend."

In State ex rel. vs. Baldwin, 45 Conn., 134, it is held:

> "It is provided by section 1, chapter 2, title 3, of the General Statutes of 1875, that county commissioners shall be appointed by the general assembly for New Haven county, their powers and duties and terms of office being fixed by later sections of the same chapter. In 1877 the legislature passed an act as follows: 'Sec. 1. So much of sec. 1, ch. 2, tit. 3, of the General Statutes as provides that county commissioners shall be appointed for New Haven county is hereby repealed, and the board of county commissioners of New Haven county is hereby created, to be appointed by the general assembly, and said board shall perform in and for New Haven county all the duties and have all the powers provided by chapter 2, tit. 3, of the General Statutes for county commissioners.' Later sections made the same provisions as the former law with regard to their number and terms of office, and the act was made to take effect on its passage. *Held, that the instantaneous re-enactment of the second section of the same act that was repealed by the first, rendered the repeal inoperative and left the former law in force, and that the commissioners appointed under the old law and whose terms had not expired remained in office.*"

The above case directly involved the right of the former incumbents to retain their positions, as new officers had been appointed by virtue of the new act.

In the White Sewing Machine Company vs. Harris, 252 Ill., 361, the general rule is stated in the syllabus as follows:

> "Where there is an express repeal of a statute and a re-enactment of all or a portion of it at the same time, the re-enactment neutralizes the repeal so far as the provisions of the old law are unchanged in form or substance; and offices are not lost, statutory rights are not defeated, statutory powers are not taken away or criminal charges affected by the repeal and re-enactment of the provisions upon which such matters respectively depend."

No right of office was involved in the above case.

On page 366 the court cite State vs. Baldwin, supra, as to offices and a number of other cases as to other classes of legislation.

The conclusion reached in State vs. Bish, supra, that all incumbents lose their offices when the ordinance organizing a police department is repealed and re-enacted

in part at the same time, is not supported by the weight of authority. Such a conclusion would lead to confusion under the civil service act.

Section 16 of the civil service law, section 486-16, General Code, provides in part:

> "Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; and whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments."

By virtue of this provision the incumbent of a position which is abolished is placed at the head of an appropriate eligible list to be certified for reappointment as in case of original appointments.

It is my opinion that the repeal of an ordinance and the simultaneous reenactment of a new ordinance does not deprive one of an office or employment held by virtue of the old ordinance, when such office or employment with similar duties is retained by the new ordinance.

The effect, therefore, of the proposed ordinance would be to retain in office the chief of police and the fire patrolmen.

The provisions of the new civil service act do not provide for the status of an incumbent of a position which is abolished, except as provided in section 16, supra.

The lieutenant and sergeant of police in question would not be reduced in rank, but they would lose all right to a position and would be placed at the head of the eligible list as provided in section 16 of the civil service act.

Enclosure.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1003.

COUNTY COMMISSIONERS—LEVY FOR SOLDIERS' RELIEF COMMISSION.

County commissioners are not required to levy the exact amount which the soldiers' relief commission finds to be necessary for its purpose, even though such an amount would require a levy less than one-half of one mill.

COLUMBUS, OHIO, June 26, 1914.

HON. JAMES A. TOBIN, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your letter of June 3, already acknowledged, requests my opinion upon the following question:

> "Under section number 2936 of the General Code, have the county commissioners any discretion as to the amount of levy to be made for the soldiers' relief fund, or are they compelled to levy the amount certified to

them by the soldiers' relief commission, provided it is under the five-tenths of a mill, as provided for in said section?"

Section 2936, General Code, provides as follows:

"On such last Monday in May the commission shall meet and determine from such lists the probable amount necessary for the aid and relief of such indigent persons for the ensuing year, together with an amount sufficient in the judgment of the commission, to furnish relief to any such indigent persons not named on such lists, whose rights to relief shall be established to the satisfaction of the commission. After determining the probable amount necessary for such purpose, the commission shall certify to the county commissioners, who, at their June session shall make the levy necessary to raise the required relief, not to exceed five-tenths of a mill per dollar on the assessed value of the property of the county hereinafter authorized."

The "commission" referred to therein is the soldiers' relief commission, which is composed of three persons residents of the county, the members of which are appointed by the judge of the common pleas court.

The section as I have quoted it is a relatively old one and was last amended in 94 O. L., 158. It is to be read in connection with section 2942, General Code, which provides as follows:

"The board of county commissioners of each county shall levy, in addition to the taxes now levied by law for other purposes than those herein provided, a tax not exceeding five-tenths of one mill per dollar on the assessed value of the property of the county, to be levied and collected as provided by law for the assessment and collection of taxes, for the purpose of creating a fund for the relief of the honorably discharged soldiers, indigent soldiers and marines of the United States, and the indigent wives, parents, widows and minor children under fifteen years of age, of such indigent or deceased soldiers, sailors or marines, to be disbursed as hereinbefore provided."

This section was last amended in 99 O. L., 526. These sections, one of which seems to impose a duty and the other of which seems to create a power, which, so far as the section is concerned, is a duty only so far as making some levy is concerned, both provide a maximum limitation upon the amount of the levy of which they respectively speak, viz., five-tenths of a mill.

Both of these sections were last amended prior to the enactment of the so-called Smith 1% law which in its original form, so far as this question is concerned, was passed in 102 O. L., 266. Section 5649-3 of this measure provided in part as follows:

"The maximum rate of taxation in any taxing district for any purpose, as now fixed, shall be and is hereby changed so that such maximum rate, as levied on the total valuation of all taxable property in the district for the year 1911 and any year thereafter would produce no greater amount of taxes, than the present maximum rate for such purpose, if levied on the total valuation for all taxable property therein for the year 1910, would produce. Any minimum rate required by law to be levied for any purpose, is hereby reduced in like proportion that the maximum rate is herein reduced.

"If in any year the taxing district shall desire to raise a less amount of

taxes for a particular purpose than was levied for such purpose in the year 1910, the amount of taxes that may be levied for another or other purposes may be correspondingly increased. * *"

The effect of section 5649-3 upon the sections immediately under consideration is very evident. The five-tenths of a mill limitation was abolished and in its stead while section 5649-3 was in force there was created a limitation consisting of an amount equal to such amount as would have been produced by extension of a five-tenths of a mill levy upon the duplicate of the county for the year 1910.

Thus while there was no express amendment, and the amendment was in a way an implied one, yet the intention of the legislature to abolish the five-tenths of a mill limitation found in sections 2936 and 2942, respectively, is made very clear by the language found in section 5649-3.

However, the amount limitation which the Smith law substituted for the rate limitation was not a hard and fast one as is apparent from the language of the second paragraph of section 5649-3 above quoted. That is to say, if in any year the taxing authorities should desire to raise more for one purpose than had been levied in the year 1910 they could do so provided less was raised for another purpose than had been levied in that year. Apparently a situation of this sort constituted an exception to the limitations upon maximum and minimum rates for particular purposes found in the first paragraph of the same section. It is not necessary of course to decide this point in passing upon your question.

I mention section 5649-3, whatever may be its exact meaning, as showing that the legislature really did do away with the half-mill limitation, which is found in the soldiers' relief statutes, when the Smith law was adopted. Later the legislature passed what was known as the Kilpatrick law, 103 O. L., 552. This act, which is effective for the first time this year, repealed section 5649-3, General Code.

The effect of such a repeal is to restore the law as it existed before the repealed statute was enacted. Such a result is prohibited by article II, section 16 of the constitution, the provisions of which have been, in other respects, held to be directory merely, but which has not been construed by the courts in this respect. However, under similar constitutional provisions it has been held that where the first repeal is by implication merely, the repeal of the act which has the implied repealing effect, results in a revival of the original act. Wallace vs. Bradshaw, 54 N. J. Law, 175; State vs. King, 104 Tenn., 156; Zickler vs. Union Bank & T. Co., 104 Tenn., 277. *Contra* Renter vs. Bauer, 3 Kan., 505.

In the opinion of State vs. King, supra, is found the following language:

> "Whatever may be the law as to the revival of laws which have been expressly repealed by repealing the repealing act, it has been held in this state, and we think upon sound principle, that when a law has been repealed by implication merely, the repeal of the act which thus impliedly repeals the former law revives such law, and this for the reason such former law was never, in fact, repealed, but its operation merely suspended or interrupted by the adoption of another rule."

Although as I have already stated the intention of the legislature, when it enacted section 5649-3 was to do away with all specific limitations, it seems to me clear that within the rule as laid down by the decisions cited, its effect upon statutes creating such limitations is technically that of implied, rather than expressed repeal or amendment. The courts treat such implied amendments or modifications as suspensions of other laws rather than abolishments thereof.

While there have been no decisions in this state, as already stated, there is some

evidence of the trend of judicial thought in Ohio on this subject which shows that it is in the direction indicated by the decisions cited from other states. Bank vs. Russell, 1 O. S., 313; Colston vs. Hastings, 11 O. D., 125.

I am, therefore, of the opinion that at the present time sections 2936 and 2942 of the General Code are to be regarded as unaffected by the action of the legislature in passing and subsequently repealing section 5649-3 of the General Code.

However, these sections remain subject to whatever modification of their force and effect may have been worked by the remaining provisions of the Smith law. I need not detail such provisions. Suffice it to say, that they impose certain maximum limitations upon the aggregate amount which may be levied within a taxing district by all the levying authorities thereof, and create the tribunal known as the budget commission whose duty and power it is to reduce levies submitted to them so that all shall come within such limitations.

Under this law it is obvious that all levies alike are subject to revision by the budget commission excepting those specifically excluded from its jurisdiction by sections 5649-3a, i. e., the state levies and levies and assessments in special road districts, etc. The inference is, as I have already stated, that all other levies are subject to revision. At least this is true of all current levies. Probably it would not be true of levies for interest and sinking fund purposes made in pursuance of legislation under article XII, section 11 of the constitution as amended, but that question is not involved here.

It is clear, therefore, that whether the commissioners, as such, have discretion with respect to the amount of the levy for soldiers' relief purposes, the budget commission not only possess but are required to exercise revisionary authority with respect to such levy. Hence, it is, that the estimate of the soldiers' relief commission, whether or not it was originally absolutely binding upon the levying authorities, no longer is so. If the commissioners may not reduce it, the budget commission at least may do so.

But I am of the opinion that the commissioners have the authority to reduce the amount asked for and to place at a lower figure the amount which they will levy for soldiers' relief.

To give to the county and township soldiers' relief commissions absolute control of the county duplicate in any particular would come dangerously near to constituting them officers of the county, and in as much as they are appointed and not elected, such a conclusion would tend to put in question the constitutionality of the entire law by reason of the provisions of article X, sections 1 and 2 of the constitution, requiring all county officers to be elected by the people. It is true that the state government and its legislature are the repository of the state's sovereignty and that all power to levy taxes is an attribute of that sovereignty, so that the state may, where principles of local self-government are not concerned, coerce local levying agencies into making a levy for an object which constitutes a state purpose. It will not do, however, to hold that soldiers' relief constitutes a state purpose, and that the commissions are merely state agents for that purpose, and are, therefore, not county officers, or agents of the county, because such a conclusion would render the law unconstitutional on another ground, viz., the fact that it clearly authorizes levies at different amounts in different counties, whereas if the purpose is a state one, then under article XII, section 2, the levy must be made, if at all, by a uniform rate upon all property on the grand duplicate of the state. Hubbard vs. Fitzsimmons, 57 O. S., 436.

I conclude, therefore, that the soldiers' relief commission is not an official body, or at least that its members do not constitute county or state officers, that conclusion being necessary in order to sustain the constitutionality of the law. The commission not constituting a board of officers may, nevertheless, constitute an

agency of the county (not of the state, of course) for the purpose of distributing certain funds. The rule of law might be stated thus: The county commissioners must levy such sum as will provide for the needs of those entitled to soldiers' relief. Such needs are to be determined by the soldiers' relief commission, which is merely a subordinate tribunal whose sole duty is to ascertain facts. I cannot accept this view, however. It is clear to me that under section 2936 a high degree of official discretion is required to be exercised by somebody. This official discretion involves the exercise of the levying power. The levying power, in my judgment, is such an attribute of sovereignty as cannot be placed in non-official hands. The power to levy is essentially legislative and may be delegated to local tribunals having quasi legislative functions, but not to non-official bodies or official bodies not made up of officers.

Therefore, I reach the conclusion that under the sections as they stand, and despite their language, the county commissioners have final discretion as between themselves and the soldiers' relief commission as to the amount that is to be levied for this purpose.

I might add that even if this were not so the Smith law, already mentioned, requires all county levies to be compassed within a space of three mills. It seems to me that it would be held, that in the face of such a limitation, other statutes like sections 3936 and 2942 would have to be construed so as to permit the commissioners to limit their gross levy to the statutory rate instead of leaving that duty to be discharged by the budget commission; nor do I think that the joint effect of the limitation of the Smith law, and of the statutes under consideration, is such as to entitle the soldiers' relief commission *as a matter of right* to one-sixth of the entire current levy of the county.

For all these reasons I have reached the conclusion that while the commissioners are required to exercise reasonably the discretion which is imposed in them, and while they may not discriminate against the needs of the soldiers' relief commission, they may not be required to levy the exact amount which that commission finds to be necessary for its purpose, even though such an amount would require a levy of less than one-half of a mill.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1004.

CHIEF OF POLICE—RIGHT TO SUSPEND PATROLMAN—DIRECTOR OF PUBLIC SAFETY—JURISDICTION OVER PATROLMAN.

The chief of police having found that the facts in a case did not warrant the suspension of a patrolman, and dismissing the charge, the director of public safety has no jurisdiction to make a contrary finding; the action of the chief of police in ordering a suspension being final.

The director of public safety is unauthorized to direct the chief of police to suspend a patrolman, therefore, the patrolman, if suspended, would be entitled to reinstatement.

COLUMBUS, OHIO, June 26, 1914.

HON. C. E. VAN DEUSEN, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—Your letter of May 27, 1914, is received in which you state and inquire:

"A complaint was duly lodged with the director of public safety against a patrolman. The director of public safety placed the written charges against the patrolman in the hands of the chief of police and directed an investigation. The chief of police caused an investigation to be made of the charges and having gone into the matter fully, found that the facts in the case did not warrant a suspension of the patrolman, or any other disposition, and formally dismissed the proceedings.

"Thereafter the director of public safety requested that all the evidence and matters and things connected with the investigation be placed in his hands for review, and upon review, made a finding contrary to that made by the chief of police and directed the chief to suspend the patrolman for a period of two weeks without pay.

"The chief of police claims to have original and final jurisdiction in cases where the charges against a patrolman do not warrant suspension or other disposition.

"Query:—

"First. Having found that the facts in the case did not warrant a suspension and the charges being dismissed by the chief of police, can the director of public safety make a contrary finding?

"Second. If the director of safety has a right to review such matter, can the chief, as a matter of law, suspend the officer and pass judgment as authorized by the director?

"Third. In the event that the chief should suspend the officer, as authorized by the director, as in the case above cited, would such suspended patrolman have recourse upon the chief for his act, and would he have the right of reinstatement by law?"

Section 4372, General Code, provides:

"The chief of police shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes."

Section 4379, General Code, provides:

"The chief of police and the chief of the fire department shall have *exclusive right to suspend* any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause."

By virtue of these sections the chief of police has the "exclusive" right to suspend a patrolman.

Section 4380, General Code, provides:

"If any such employe is suspended as herein provided, the chief of police or the chief of the fire department, as the case may be, forthwith in writing, shall certify such fact, together with the cause for such suspension to the director of public safety, who within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon, which judgment, if the charge be sustained,

may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final except as otherwise provided in this subdivision. * * *"

This section applies when an employe is suspended by the chief of police or chief of the fire department.

Section 4505, General Code, provides in part:

"Any person in the police or fire department who is suspended, reduced in rank or dismissed from the department by the director of public safety may appeal from the decision of such officer to the civil service commission within ten days from and after the date of such suspension, reduction or dismissal, in which event said director shall, upon notice from the commission of such appeal, forthwith transmit to the commission a copy of the charges and proceedings thereunder. * * *"

This provision applies when the suspension is made by the director of public safety and not when made by the chief of police.

The effect of these statutes is that the chief of police makes the suspension in the first instance and certifies such suspension to the director of public safety. The director of public safety then investigates the cause of suspension and makes his finding, which may be suspension, reduction in rank or dismissal, or the finding of the chief of police may be reversed. The finding of the director of public safety suspending, reducing in rank or dismissing the employe is appealable to the civil service commission.

In the case at bar the chief of police has declined to suspend. Therefore, section 4380, General Code, does not apply.

In State ex rel. vs. Baldwin, 77 Ohio St., 532, it is held:

"Under the new Municipal Code the mayor —has authority to remove an officer or appointee in the police department, upon inquiry into the cause of suspension, by the chief of police, of such officer or appointee; but he is without original jurisdiction to inquire into charges against such an officer (other than the chief of police) or appointee, and upon such an inquiry he is without authority to remove an officer or appointee."

The statutes under consideration in the above case were substantially the same as at present, so far as the case at bar is concerned, except that the chief of police certified the suspension of an officer to the mayor, and the mayor made the inquiry now required of the director of public safety.

In the case of State, ex rel. vs. Kohler, 11 Nisi Prius, N. S., 497, Estep, J., on page 502, quotes from the opinion in State vs. Baldwin, supra, and then says:

"The chief of police under section 4379, General Code, has the initiative. The director of public safety cannot begin a proceeding against an officer of the police department for any of the causes specified in that statute, but obtains his jurisdiction to try and determine charges by reason of the certification provided for in 4380, General Code."

Section 4380, General Code, only requires a certification to the director of public safety when a suspension is made by the chief of police. It does not require a certification of charges against an officer when the chief of police does not suspend such officer. There is no provision of statute which authorizes the director

of public safety to require the chief of police to certify to him the proceedings of the chief, when the chief declines to suspend an employe or officer.

The director of public safety cannot act upon his own initiative in making suspension of an employe or officer who is under the control of the chief of police.

In answer to your first inquiry, the director of public safety had no jurisdiction to order the chief of police to make a suspension. The refusal of the chief to make the suspension in the first instance was final.

This disposes of your second inquiry.

There are two parts to your third inquiry. You ask if the patrolman would have recourse upon the chief for his act. I do not deem it necessary to answer this question.

As the suspension ordered by the director of public safety is unauthorized, the patrolman, if he was suspended, would be entitled to re-instatement.

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

1005.

CITY COUNCIL—AUTHORITY TO AUTHORIZE CONFESSION OF JUDGMENT FOR DAMAGES CAUSED BY THE WRONGFUL ACT OF A POLICE OFFICER.

The city council is without authority to authorize and direct the solicitor of said city to confess judgment against said city in an action brought for damages caused by the wrongful act of one of its police officers, since there is neither legal nor moral obligation on the city to pay a claim of such kind.

COLUMBUS, OHIO, June 26, 1914.

HON. CLYDE SHERICK, *City Solicitor, Ashland, Ohio.*

DEAR SIR:—Under date of May 20, 1914, you submit to this department an ordinance passed by the council of the city of Ashland, authorizing and directing the solicitor of said city to confess judgment against said city for the sum of $3,000.00 in a certain action pending against the city for damages caused by the wrongful act of one of its police officers.

You submit a copy of the ordinance, and a copy of the petition in said damage suit, and you state as follows in your letter of inquiry:

> "The whereas clauses as are contained in said ordinance No. 116 are in part explanatory of the origin of the suit which is now pending in the court of common pleas, in and for Ashland county, Ohio, wherein Jessie Ebert as administratrix of the estate of Cloyd Ebert, deceased, is plaintiff and the city of Ashland, Ohio, is defendant."

The further facts of the case are as follows:

> "On the 23rd day of July, 1912, one Cloyd Ebert together with five or six other men, met together on what is known in this city as Moss Hill, which is an unfrequented place, within the corporate limits of the city of Ashland, and which place lies immediately south of the C. & S. W. Ry. Co.'s

right of way, and which right of way is bounded on the north by the city's burial ground. On the night of the day above mentioned, T. L. S., then a police officer, in the course of his regular duty, together with C. W., a brother officer, followed two unmarried couples to said burial ground believing that they were resorting to that place for the purpose of prostitution, prior complaints having been made by various parties to the police department that such practices were going on there frequently, the officers seeing a light and hearing voices crossed the right of way of said railway and went up said hill and on the top thereof found a beer party going on, in which party was C. E., who, with the others, seeing the officers, started to run, and failing to halt upon the command of the officers, were fired upon by the said T. L. S., which resulted in the wounding of the said C. E., and from which wound he died within the year.

"T. L. S. was indicted, tried and convicted of second degree murder and is now in the penitentiary.

"It has come to my knowledge that evidence was introduced in said criminal action showing that C. E., and those with him, had jointly purchased the beer in Mansfield, Richland county, Ohio, which is wet territory, and had had the same shipped to this county and city, which is dry territory; and that there was some evidence introduced to the effect that the officers met with resistance, such as breaking away and being struck with stones.

"Feeling in my mind that the city of Ashland is not legally responsible for the killing of C. E., and being now placed in a peculiar situation by reason of the fact that the retiring council of 1913 passed ordinance No. 116, herein enclosed, authorizing and directing me, the incoming solicitor to confess a judgment for $3,000.00, I would be pleased to have you render me a written opinion as to what is my duty in said case now pending as solicitor of the city of Ashland, Ohio, and that the copy of the petition herein, may then be returned to me."

The petition charges negligence in the city of Ashland through its officers in the appointment of the officer who did the wrongful act. The negligence alleged against the city is not material to a solution of the question you submit.

The city of Ashland in the appointment of patrolmen and policemen acts in its governmental capacity and it thereby exercises a part of the sovereignty of the state.

It is well established in Ohio that a municipal corporation is not legally liable for the torts of its officers and agents when acting in its governmental capacity.

The leading case in Ohio upon this question is that of Western College, etc., vs. The City of Cleveland, 12 Ohio State, 375. This case has been followed and cited with approval by the supreme court in a number of decisions.

The principle therein enunciated is applied to a guard of a workhouse in Bell vs. The City of Cincinnati, 80 Ohio State, 1, wherein it is held:

"1. By paragraph twenty (20) of section 1536-100, Revised Statutes (section 7, Municipal Code), a municipal corporation is authorized to establish, maintain and regulate a workhouse therein; and by section 1536-677, Revised Statutes (section 141, Municipal Code), the directors of public service are invested with the management and control of such workhouse in behalf of the corporation, and in so managing and controlling said workhouse, the municipal corporation, through its directors of public

service, acts in a governmental capacity, and not in a proprietary or business relation to the inmates or persons in its employ.

"5. One employed and acting at the time as a guard of prisoners working in a stone quarry within the corporation, and who is injured by explosion while attempting to remove the lid of a box of percussion caps to be used in setting off a blast in the quarry, cannot recover damages of the municipal corporation for injuries sustained by the explosion."

On page 17, Price, J., says:

"If the relation the city bore to the workhouse and quarry was governmental, and their operation and control were the exercise of governtal power, the city is not liable to plaintiff, even if he was injured through the neglect and want of care of some other or superior officer of the institution, where the statute creates no such liability. This has been held in numerous cases, such as Western College vs. Cleveland, 12 Ohio St., 375; Wheeler vs. Cincinnati, 19 Ohio St., 19; City of Cincinnati vs. Cameron, 33 Ohio St., 336; Robinson vs. Greenville, 42 Ohio St., 625; Frederick, Admx., vs. Columbus, 58 Ohio St., 538.

In the case at bar the policeman when he committed the tort complained of, was in the employ of the city in its governmental capacity and there is no legal liability against the city for damages caused by said wrongful act.

Council, however, has authorized a confession of judgment. There is no legal liability of the city which council was authorized to recognize, and the only other ground upon which the ordinance can be sustained is that there is a moral obligation of the city to pay for the injuries incurred.

In Ohio the courts have held that council has a right to recognize and pay a moral obligation.

In State, ex rel., vs. Brown, 4 Cir. Dec. 345, it is held:

"Where equity and justice require the payment of a claim against a municipal corporation, though it may not be collectible at law, an ordinance of such city or village legally passed, directing and authorizing its payment, is legal and valid."

In State, ex rel., vs. Wall, 15 Ohio Dec., 349, it is held:

"A municipal corporation may recognize and pay claims against it of a moral and equitable nature, whether required by law to do so or not."

These decisions are based upon the principle that equity and justice require the payment of the claim.

In the case at bar, the officer who committed the tort has been convicted of a serious crime on account thereof. This shows that he was clearly in the wrong and that he acted beyond the discretion of his official duty. The offense charged against the person killed was a misdemeanor and the arresting officer was not authorized to shed blood in making an arrest of one charged with the commission of a misdemeanor. (See 3 Cyc., page 892.)

The city has received no benefit from the wrongful act and equity and justice do not require payment by the city of the claim in question.

There is no moral obligation upon the part of the city to respond in damages for the tort complained of.

In the absence of both a legal and a moral obligation, council is not authorized to make payment of a claim, or to direct a confession of judgment thereof., The ordinance in question is ultra vires and is beyond the power of council to enact.

The solicitor is not authorized thereby to confess judgment. It is, therefore, your duty to refuse to confess judgment and you should defend the pending action.

Enclosed find copy of petition as requested by you.

Enclosure.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1006.

SCHOOLS—BOARD OF EDUCATION CANNOT BE COMPELLED TO PAY TUITION OF PUPIL ATTENDING SCHOOL IN ANOTHER TOWNSHIP WHEN THE PUPIL LIVES MORE THAN ONE AND ONE-HALF MILES FROM A SCHOOL IN HIS OWN TOWNSHIP.

When a pupil lives more than one and one-half miles from the school to which he is assigned and has been attending a nearer school in another township, when such other township centralizes its schools, and thus makes the centralized school further than the school to which he has been assigned, the board of education of his township cannot be compelled to pay tuition to the centralized school under the provisions of section 7735, General Code.

COLUMBUS, OHIO, June 26, 1914.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of January 9, 1914, you submitted for an opinion the following request:

> "The home of a certain pupil living in township B is over one and one-half miles from the nearest school in his township. There is a nearer school in the adjoining township A. The pupil attends the nearer school in township A under section 7735. The schools of township A are now centralized in a building located at a greater distance from the pupil's home than his own school, and the board of education of township B refuses to pay the tuition of said pupil who is attending school in township A. Can the board of education of township B be compelled to pay the tuition in question?"

Section 7735 of the General Code, provides as follows:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attend-

ance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

This section has been construed by our supreme court in the case of Boyce vs. Board of Education of Mt. Carmel special school district, 76 O. S., 365, wherein it appears that the plaintiff brought suit in the court of common pleas for a writ of mandamus to compel defendant in error to admit his children of school age to the school located in the Mt. Carmel school district. The plaintiff in error alleged that the children resided with him in Beachwood special school district in Union township; that there is but one school in the district in which he resides, which is located more than a mile and a half from the relator's home and that that is the school to which his children are assigned, relator alleging that such children were entitled to admission to the school under the control of the defendants for the reason that the school so controlled by the defendants was the nearest school to his residence outside of his own school district, and in an adjoining school district. The petition admitted that the school to which such children were assigned was nearer his residence than the one to which he sought to have them admitted, but claimed that if his children were compelled to attend the school in the district where they resided, they would be required to travel along the public highway, which was shaded for a great distance with woods on either side, and quite lonesome and dangerous for children to travel without protection. The alleged right was based upon section 7735 of the General Code (4022a, Rev. Statutes). In the syllabus of the case the court held as follows:

"Section 4022a, Revised Statutes, does not require the board of education of a school district to admit children to a school outside of the district in which they reside, unless the school in their own district is more than a mile and a half from their residence and more remote from their residence than the school to which admission is sought."

And at page 368 of the opinion, the court says:

"It is equally clear from the language which the legislature has employed that the only purpose to be accomplished by the section is to relieve school children from the necessity of attending a school in their own district which is more than one mile and a half from their residence if there is a nearer school in another district. Since the petition admits that the school which is under the control of the defendants is more remote from the residence of the relator than is the school of the district in which he resides, the circuit court correctly determined that the statute does not authorize the transfer."

It appears in your inquiry that the pupil living in township B lives more than one and one-half miles from the nearest school in his township and that prior to the centralization of the schools in township A such pupil lived nearer a school in said adjoining township A than he did to the school provided in his own township. It further appears that since the schools in township A have been centralized, the schools in township A so centralized are located a greater distance from such pupil's home than his own school and that therefore the board of education of township B wherein such pupil resides refused to pay the tuition of said pupil who is attending school in township A. Inasmuch as such pupil not only lives more than one and one-half miles from the nearest school in his own township, but also

lives a greater distance from the centralized school of township A than he does from his own school, it would seem to follow that such pupil, therefore, comes within the holding of the court in the case of Bryce vs. Board of Education of Mt. Carmel special school district, supra, and that the Board of Education of township A is not legally required to admit such child to such school. If this is true, then the converse is also true and the Board of Education of township B cannot legally be required to pay the tuition of such pupil in attending the school located in township A, for the reason, as stated by the court, that the schools in township A since their centralization, are now more remote from the residence of such pupil than the school in the district in which he resides.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1007.

COUNTY COMMISSIONERS—AUTHORITY OF COUNTY COMMISSIONERS TO TURN OVER TO A MUNICIPALITY ITS SHARE OF THE TAX LEVY FOR ROAD PURPOSES—AUTHORITY TO TURN OVER ITS PROPORTIONATE SHARE OF COUNTY BRIDGE FUND.

County commissioners had no authority to turn over to a municipality, which has not established the city into a road district, its proportionate share of a tax levy for road purposes.

County commissioners have no authority to turn over to the city its proportionate share of the county bridge fund, under section 2421, *General Code, since under our present statutes no city or village is entitled to demand or receive any portion of the county bridge fund.*

COLUMBUS, OHIO, June 26, 1914.

HON. H. B. EMERSON, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—On April 21st you requested my opinion upon the following questions:

(1) "Have the county commissioners authority under the law to turn over to a municipality its proportionate share of the taxes levied for road purposes?

(2) "Have the county commissioners authority to turn over to the city its proportionate share of the county bridge fund?"

I know of no statute which authorizes county commissioners to turn over to a municipality in the county any portion of the taxes levied by them on the general duplicate of the county for road purposes.

It is apparent from a perusal of your letter that you had in mind the provisions of sections 3734 and 3735, General Code, which are as follows:

(3734) "The council may form road districts within the limits of the corporation, and when contiguous territory is attached to the corporation, such power shall extend to the territory so attached.

(3735) "No tax assessed upon property within the territory so attached to a corporation shall be applied otherwise than within the territory in which it is assessed. All taxes charged for road purposes on the prop-

erty within the limits of the corporation, or the territory so attached, and collected by the county treasurer, shall be paid to the corporation treasurer, to be specially appropriated by the council to street and road purposes within the corporate limits and territory so attached. The trustees of the township in which such territory is located and the council, may agree upon a different distribution or division of the funds."

You state that the council of the city of Bellefontaine has not taken advantage of the power granted to it by these statutes, to establish the city into a road district nor to attach contiguous territory thereto for such purpose. Since this has not been done, I do not deem it necessary to decide whether, in the event such district were formed, it would be obligatory upon the county treasurer to pay over to the treasurer of the corporation the portion of the tax levied by the county commissioner for road purposes on the property therein.

Your second question involves a consideration of section 2421, General Code, which provides:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on 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 cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levies upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

The foregoing was formerly section 860 of the Revised Statutes. Section 2824, Revised Statutes, provides that the commissioners of any county could levy annually, a tax for road and bridge purposes at a certain rate, based upon the value of the taxable property of the county. The county commissioners were required to set aside such portion of said fund as they deemed proper for the construction and repair of bridges. Said section also provided that the county commissioners, upon demand, should turn over to certain named cities and villages, a portion of the bridge tax to be used exclusively for the building and repair of bridges wholly within such municipality. Section 2824 was expressly repealed by section 13767, General Code. That portion of section 2824 which provided for the levying of the annual tax by the county commissioners for road and bridge purposes, was re-enacted as section 5635 of the General Code, but the provision for turning over a portion of the bridge tax to certain cities and villages, seems to have been left out of the General Code entirely. Under our present statutes no city or village is entitled to demand or receive any portion of the county bridge fund, and I am of the opinion, therefore, that county commissioners are without authority of law to turn over to them any part of said fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1008.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—NO JURISDICTION OVER CEMETERIES—POWER TO LEVY AND COLLECT TAX FOR CARING FOR CEMETERIES.

The board of trustees of public affairs have no jurisdiction over cemeteries, therefore, no power to assess lot owners for caring for the same. A village has the power to levy and collect a tax for the keeping of a cemetery clean and in good order.

COLUMBUS, OHIO, June 26, 1914.

HON. W. O. WALLACE, *City Solicitor, Columbiana, Ohio.*

DEAR SIR:—I have your letter of May 26th in which you inquire:

> "I desire your opinion in regard to the duties of board of trustees of public affairs in the care and maintenance of a cemetery in the village of Columbiana, a small portion of the cemetery being in the township outside of the village, the cemetery having been purchased by the council of the village.
>
> "Does the board of trustees of public affairs have complete control of the cemetery, and do they have power to make assessment against the lot owners for the care of same? Does the village council have authority to make levy on tax duplicate to assist in keeping cemetery clean and in order when the revenues from the cemetery are not sufficient to meet current expenses?
>
> "While there is an endowment fund created for care of cemetery lots does the board having charge of cemetery have right to expend any of the principal for purpose of improvement of cemetery?"

The council of the village having purchased the cemetery, and having power to provide for the interment of the dead either within or without the corporate limits, under section 4154, General Code, it necessarily follows that the fact of a portion of the cemetery being outside the village has no effect upon the control or management of the cemetery.

Section 4154 above referred to, reads:

> "The council may provide place for the interment of the dead outside of the corporate limits, and the police powers of the corporation shall extend to those places."

Section 4357, General Code, reads:

> "In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

From this it is apparent that boards of trustees of public affairs in villages are only to be appointed where the village owns water works, electric light, natural or artificial gas plant, or other similar public utility, and the duties of such boards are prescribed in amended section 4361, now found in 103 O. L., 561.

Inasmuch as the duties of said board as set forth in said section, do not include anything in regard to cemeteries, and it is provided in section 4175, General Code, that the mayor of a village owning a public burial ground or cemetery shall appoint a board of cemetery trustees, it necessarily follows that the board of trustees of public affairs has nothing whatever to do in connection with cemeteries, and, therefore, no power to assess lot owners for the care of the same.

Section 4155, General Code, reads:

> "The council of a municipality owning a public burial ground or cemetery, whether within or without the corporation, may pass and provide for the enforcement of ordinances necessary to carry into effect the provisions of this chapter, and regulate such public burial grounds and cemeteries, the improvement thereof, the burial of the dead therein, define the tenure and conditions on which lots therein shall be held and protect such burial grounds and cemeteries and all fixtures thereon."

While this section does not in express terms authorize the levying of a tax upon the general duplicate of the village for the keeping of cemeteries in repair, yet when considered in connection with the powers granted under section 3784, which reads:

> "Each municipal corporation shall have special powers, to be exercised as provided by law, to levy and collect taxes upon the real and personal property within the corporation for the purposes of paying the expenses of the corporation, constructing improvements authorized, and exercising the general and special powers conferred by law,"

it must be concluded that the village possesses the power to levy and collect a tax for the keeping of such cemetery clean and in good order, and to protect it from becoming overgrown with briers, shrubs, brush and thus becoming unsightly, and an eyesore to all coming within sight of it.

As to your last question, it is impossible to answer the same in the absence of specific knowledge of the character of the endowment fund in question, for it must be conceded that where in the will, deed, or other writing, the expenditure is limited as to purpose, no portion of the principal fund may be used except for the purposes mentioned in the instrument creating it.

Believing that this answers your questions, I am,

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1009.

ARTICLES OF INCORPORATION—POWER OF CORPORATIONS ORGANIZED FOR FURNISHING ABSTRACTS OF TITLE.

A corporation organized for the purpose of preparing and furnishing abstracts of title may not so amend its articles of incorporation as to acquire power to act, generally, as a title guarantee and trust company, nor so as to acquire the single power of guaranteeing titles.

COLUMBUS, OHIO, June 26, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of May 18th enclosing a letter from The Land Title Abstract Company and correspondence in connection therewith including a letter addressed to you from Messrs. Tolles, Hogsett, Ginn & Morley, attorneys of Cleveland.

The correspondence presents the following question:

> "May a corporation organized with original power to promote the purpose 'of searching land titles and land and other records; preparing, procuring and furnishing abstracts and certificates of title to real property; preparing, procuring and furnishing abstracts and certificates of title to bonds, mortgages and other evidences of indebtedness and affecting investments in the same; purchasing and owning real estate as a place for carrying on its business, and doing any and all things necessary or incidental to such business' by amendment to its articles of incorporation acquire power to guarantee titles?"

Two sections of the General Code must be considered in connection with this specific question as follows:

> "Sec. 8719. A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> "1. So as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public.
>
> "2. So as to change the place where it is to be located, or its principal business transacted.
>
> "3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.
>
> "4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed.
>
> "Sec. 9850. A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

Sections 9851 to 9856, inclusive, may be mentioned. These sections provide the conditions upon which a corporation may do business as a title guarantee and trust company. They are material in the present connection only in so far as they tend to show the peculiar nature of the power to guarantee titles.

As far as section 9850 itself is concerned, it clearly established the conclusion that a company formed for the principal purpose of guaranteeing titles may engage in the business of preparing abstracts and, indeed, in all the related activities contemplated in the declared purpose of the incorporation of the company which raises the present question. It follows from this that if the purpose of guaranteeing titles may lawfully be added to the purpose for which the company was originally formed the resultant enumeration of purposes would be substantially that outlined in section 9850, General Code. That is to say, a corporation might have been originally formed for the purpose of doing the things described by the proposed reformed or amended articles of incorporation of the company in question.

This situation at once brings into play the principle which has been explicitly laid down by the supreme court in the interpretation of section 8719 in the case of Picard vs. Hughey, 58 O. S., 577. The principle may be stated thus:

> "Whatever powers might be granted to a single corporation by its original articles of incorporation, may be acquired by amendment by a corporation possessing a part only of such powers under its original charter."

If this principle is of universal application it furnishes a complete answer to the question submitted, and supports the contention of the company that it is entitled to amend its articles of incorporation in the manner stated.

But I am certain that the principle has no such universal application whatever may have been the language used by the court in the decision of Picard vs. Hughey, *supra*. It certainly can have no application in a type of extreme case which could easily be imagined; such as, for example, where a power is by express provision of statute conferred upon one kind of a corporation as an incidental power subordinate to the described principal purpose, and of itself a proper purpose for which a corporation might be formed. I am sure that it would not do to say that if a corporation were formed for such a purpose it would not substantially change the objects of its incorporation by attempting to add to its articles, the power to pursue the paramount object, especially when the pursuit of such an object constitutes a special franchise. As an instance of what I have in mind see sections 8145 and 9170, General Code.

The case I have described is an extreme one, yet in certain aspects it is similar to the question submitted. One reason for denying the right of a company organized for the purpose of constructing a telegraph line to acquire by amendment the right to operate a railroad would be that the operation of a railroad is a peculiar franchise, so that it is the paramount power granted under section 8145, the power to construct telegraph lines being in the nature of an incidental one. Therefore, though a railroad company whose articles of incorporation might lack specific mention of power to construct telegraph lines, might so amend its articles as to acquire such power by specific grant, a company organized for the mere purpose of operating telegraph lines might not acquire the peculiar franchise to operate a railroad in the sense above described by amending its articles of incorporation. Such a change, for the reasons stated, would probably be held to be a "substantial" one within the meaning of section 8719, General Code.

How different, then, is it with the question as submitted? The inquiring corporation now has those powers enumerated under section 9850, which constitute, broadly speaking, the *incidental* powers of a title guarantee company. That is to say, it has those powers which a title guarantee company would have if incorpor-

ated for the mere purpose of guaranteeing titles, without specific mention of such powers in its articles of incorporation. Of what nature then is the business of guaranteeing titles? Obviously, it is a species of special franchise, similar to that of banking, possessing in some respects the attributes of insurance. Section 9851, for example, requires as a condition of doing business a deposit with the treasurer of state of securities as in the case of banking and insurance companies.

Section 9853 speaks in so many words of the "issuance of policies of title insurance," indicating the character of that branch of the business of such company.

Section 9856 requires annual reports to be made to the auditor of state in the same manner as safe deposit and trust companies are required to report.

So that it follows from all these provisions that if I am right in my assumption with respect to section 9816 the principle which I have laid down would apply equally well with respect to section 9850, General Code.

But the authorities in this state clearly indicate the correctness of the view just suggested. The case already cited, Picard vs. Hughey, must be read in connection with State ex rel. vs. Taylor, 55 O. S., 61. So much is perfectly apparent from an examination of Judge Bradbury's opinion in the Picard case at page 598. In other words the court in deciding Picard vs. Hughey, so far from overruling the then very recent case of State ex rel. vs. Taylor, expressly reaffirmed its decision in that case and adhered to the principle therein announced.

The actual *decisions* in the two cases may be described as follows:

In State ex rel. vs. Taylor, it was held that a corporation organized for the purpose of manufacturing gas and electricity, and furnishing these commodities for light, heat and power, might not acquire by amendment, power to construct and operate a traction railway, such a change being regarded as "substantial" within the meaning of present section 8719.

In Picard vs. Hughey, it was held that a corporation organized for the purpose of furnishing gas for light, might, by amendment, acquire power to furnish electricity for similar purposes; such a change not being regarded as "substantial" within the meaning of section 8719.

Wherein, then, lies the distinction between the two cases? I think the distinction is found in a principle which is to be regarded as a limitation upon the broad language stated by Bradbury J., at page 597 of Picard vs. Hughey, the purport of which has been above abstracted.

Furthermore, I think the principle which I have in mind is suggested at page 65 of the opinion of Spear J., in State ex rel. vs. Taylor. Discussing the nature of the power originally granted to the corporation in that case in connection with the powers sought to be added thereto by amendment, he says:

> "It would seem that a company organized for the principal purpose of acquiring and operating a street railway by electricity might naturally, having obtained authority to do so, join with the incidental purpose of furnishing light and power within the location where it is authorized to operate. And no substantial reason is perceived why, if a company had been incorporated for either of the main purposes here indicated, it might not, by proper amendment, be also authorized to join the incidental purpose referred to."

Thereupon Judge Spear proceeds to hold that while furnishing light, heat and power is incidental to the operation of a railroad, the operation of a railroad is not incidental to the furnishing of light, heat and power.

It will thus be seen that the court in the Taylor case has carefully distinguished between the main or principal purpose or powers and incidental ones.

There are statutes which I need not mention authorizing the combination of more than one main or principal purpose in the charter powers of a single corporation, constituting exceptions to the general rule laid down by section 8623, General Code, as interpreted in the Taylor case, supra. If the general principle announced in the Picard vs. Hughey case applied in cases arising under such statutes, it would result, in my judgment, in permitting a corporation organized for one of the related *main* purposes to acquire by amendment the power to pursue both or all of them. An instance of this kind is found in section 9510, General Code. Let paragraph 2 of that section be taken as an example. It prescribes a number of different co-ordinate purposes which a single insurance company, other than life, may lawfully be authorized to pursue. I think it is clear that if a corporation be originally organized for the purpose of pursuing a part only of these enumerated objects it may, by amendment, acquire authority to pursue any or all the others. But there are other statutes which define the incidental powers of corporations organized for certain purposes. Such incidental powers are those which would be possessed by a corporation organized for the main purpose therein mentioned without specific mention in the articles of incorporation. Under the doctrine evolved from the two decisions just discussed, a corporation organized originally for the main purpose specified in such a statute may, if it desires, have written in its articles of incorporation the express power to pursue the incidental purposes (although such action would amount to nothing in a legal sense, the power being possessed without specific enumeration); but a corporation organized for the purpose of doing some of the things declared to be incidental, to such a specific main purpose cannot under the decision in State ex rel. vs. Taylor, as I understand it, by amendment, acquire authority to pursue the principal or main purpose. How, then, is it with respect to section 9850, General Code?

I have possibly already indicated my conclusion respecting this statute. I am of the opinion that if a corporation was organized with the following purpose clause, viz., "said corporation is formed for the purpose of doing business of a title guarantee trust company," it would have all the powers enumerated in section 9850, General Code, without specific mention in such articles of incorporation. I do not go so far as to hold that all of the enumerated powers found in section 9850 are co-ordinate; but I am sure that the power of preparing and furnishing abstracts and certificates of title to real estate, bonds, mortgages and other securities is an incidental one, whether in the most exact sense of the word or not. At least it is not co-ordinate with the power to guarantee titles which is a special franchise, such as, in my opinion, cannot be exercised by an individual.

Viewing the question from a somewhat more liberal angle it seems to me that in the very nature of the case the addition of the power to guarantee titles to that respecting the preparation of abstracts would constitute a substantial change in the purpose for which the corporation is formed, for the reason that the preparation of abstracts and the making of certificates thereto involves the assumption of a certain degree of contingent liability on the part of the corporation; whereas the guaranteeing of titles through the issuance of policies of title insurance involves the incurring of the highest degree of contingent liability, viz., that of an insurer.

From the standpoint of the stockholders (from whose point of view and not that of the third person dealing with the corporation the amendment sought is, it seems to me, to be regarded) such a change would involve the addition of an investment risk of a character quite different from that originally contemplated. Furthermore, the requirement that assets of the corporation be converted into securities to be deposited with the treasurer of state as a condition precedent to engaging in the business of guaranteeing titles of itself fundamentally changes the nature of the investment from the standpoint of the stockholders.

From still another point of view, it may be said that the trust company feature of the group of powers enumerated in section 9350 is of equal importance to the power of guaranteeing titles and that the kind of company which sections 9850 and 9856, inclusive, contemplate is neither a title guarantee company, with incidental power to furnish abstracts, etc., nor an abstract company, with incidental power to guarantee titles, but a title guarantee *and* trust company. Therefore, I question very seriously whether a single corporation can lawfully be formed and do business under these sections with the declared purpose of merely furnishing abstracts and guaranteeing titles. Whether or not this is so, the fact that the title guarantee features are bound up with the trust company features, as they are in the statute, further supports the view that the status of such companies, from the viewpoint of the franchise conferred, and from the viewpoint of the investment risk involved, is a peculiar one; so that to add to the charter powers of a mere abstracting company all the other powers mentioned in section 9850, whether co-ordinate or not, would be to effect a substantial change in the objects of its incorporation.

Upon the principles above announced, then, I am of the opinion that a corporation organized for the purpose of preparing and furnishing abstracts of title, may not lawfully acquire, by amendment to its articles of incorporation, the power of guaranteeing titles and of exercising the other peculiar franchises enumerated in section 9850, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1010.

CENTRAL STANDARD TIME—APPLICATION OF SUCH TIME TO BANKS.

Banks are without power to act under any other than central standard time, and also the provision of law dealing with banks must be construed with a view of the application of such time under section 5979, *General Code.*

COLUMBUS, OHIO, June 26, 1914.

HONORABLE EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have at hand the following communication:

> "This city having adopted eastern standard time, the question has arisen among the banks as to whether or not we have a right to advertise and follow eastern time.
>
> "May I trouble you to ask your opinion on the same that I may have it to use in connection with adjusting our hours and in having the four banks act together.
>
> "The question has been raised today whether or not we can close on Saturday at 12 o'clock eastern time, while the law says it is a half holiday from twelve on, presumably meaning central standard time; also in your opinion is it necessary and are we obliged to advertise on our doors central standard time in connection with eastern time, or, in other words, is it illegal for us to adopt and follow eastern standard time?"

with respect to which an opinion is desired.

Under date of February 4th, I rendered an opinion to the Honorable Herman Fellinger, member of the general assembly, Cleveland, Ohio, wherein the powers of municipalities with reference to the adoption of eastern time and the consequences of such action with reference to matters under the jurisdiction of the general assembly, is dealt with.

I feel that this opinion covers the ground of your inquiry. You will note that section 5979 of the General Code expressly requires banks to be regulated by the central standard time prescribed by this statute.

I am of the opinion, therefore, that banks are without power to act under any other than central standard time, and all provisions of law dealing with banks must be construed within view of the application of such time.

I am enclosing a copy of the opinion above referred to.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1011.

STATE BOARD OF HEALTH—EMPLOYMENT OF A PLUMBING INSPECTOR IN A MUNICIPALITY.

The state board of health is without authority to direct a municipality to pass an ordinance relative to the employment of a plumbing inspector for such municipality.

COLUMBUS, OHIO, June 26, 1914.

HONORABLE DAVID R. GILBERT, *City Solicitor, Warren, Ohio.*

DEAR SIR:—Under date of May 25 you submit the following request for an opinion:

> "As city solicitor of the city of Warren, I have been requested by our board of health to communicate with you with reference to a certain matter arising under the rules and regulations of the state board of health covering the construction, installation and inspection of plumbing and drainage.
>
> "I have before me a copy of a proposed order sent by the state inspector or some officer to me as solicitor. Section 9 of the said proposed order reads as follows:
>
> "'Sec. 9. (Plumbing Inspector.) The board of health shall appoint for the purpose of the enforcement of these rules and regulations and the provisions thereof, an inspector of plumbing. Said inspector of plumbing shall be a practical plumber with at least seven (7) years' experience, selected from those persons who are well informed as to practical plumbing, skilled and well trained in matters pertaining to the sanitary regulations concerning plumbing work. The inspector so appointed shall not, during his term of office, be engaged or interested in the plumbing business or the sale of any plumbing supplies, nor shall he act as agent, directly or indirectly, for any person or persons so engaged. The salary of the inspector shall be _____ hundred dollars ($_____) per annum, payable semi-annually.'
>
> "The question that I desire an opinion upon is this: This section, as you will notice, provides for an inspector to be a practical plumber with at least seven years' experience. I am informed that to obtain such a man would

mean that the salary would necessarily be in the neighborhood of $1,200.00 per year. This means a great hardship where in a city like Warren, we are all working on small salaries. The mayor of the city receives only $1,200.00, and he is the highest paid officer. The solicitor works on a salary of not over one-half what the mayor gets. To pay a plumber for inspecting sewers $1,200.00 seems outrageous. Can you cite me to any law that requires our board of health to employ an inspector under these circumstances? I will say this, we have had in the city of Warren for years a most excellent board of health and sanitary code, which has been regarded as a model of completeness. We have connected with our board of health as an officer one Thomas B. Webb, who has been a very efficient man, a man who has heretofore acted as inspector of plumbing, and if we are compelled to provide for an inspector our board desires to continue him in that capacity in connection with his other duties as sanitary policeman."

The statutes of Ohio do not confer power upon the state board of health to dictate to municipal corporations of their boards of health, the form and substance of the rules and regulations which are to be adopted by such board. The proposed regulation sent by the state board of health is undoubtedly intended merely in the way of a suggestion or a recommendation. The city board of health is in no wise obliged to enact or enforce the proposed regulation. They may accept or reject the same, or change or modify it as they deem best for the accomplishment of the purposes of the city.

If the present sanitary code existing in Warren appears ample to the authorities in charge, and if your present plumbing inspector is properly accomplishing the necessary ends, there is no reason whatever for any change to be made in these matters.

Suffice it to say that the enactment of such rules and regulations for the inspection of plumbing and the licensing of inspectors, as may be necessary, rests in the first instance with the city board of health, and while these officers are performing their duties in a reasonably efficient manner, their action is controlling and subject to no power of veto or substitution by the state board of health.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1012.

BANKS AND BANKING—COMMERCIAL BANK AND SAVINGS BANK—TEN PER CENT. RESERVE TO BE MAINTAINED BY SUCH BANKS.

Where a banking institution has the power of a commercial bank and also of a savings bank, it is not entitled to maintain simply a reserve of ten per cent. on the whole of its time deposits under section 9764, General Code. The ten per cent. reserve of the time deposits applies only to the savings department of such institution.

COLUMBUS, OHIO, June 26, 1914.

HONORABLE EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of May 19, 1914, you request my opinion as follows:

"Referring to section 9764 of the General Code, which requires that savings banks shall carry at least ten per cent. of time deposits, beg to in-

quire whether this refers to savings banks strictly or commercial banks and savings banks combined.

"That is where a bank has the power of a commercial bank and also a savings bank, is it entitled to claim this reserve of ten per cent. on its time deposits?"

Section 9702, General Code, provides as follows:

"Any number of persons, not less than five, a majority of whom are citizens of this state, may associate and become incorporated to establish a commercial bank, a savings bank, a safe deposit company, a trust company, or to establish a company having departments for two or more, or all of such classes of business, upon the terms and conditions and subject to the limitations hereinafter and by law prescribed."

It appears from the provisions of this section that a single banking company may be authorized to conduct both a commercial and savings bank business.

With respect to the reserve required to be maintained by commercial and savings banks respectively, section 9759, General Code, and section 9764, General Code, as amended 104 O. L. 186, provide:

Section 9759:

"Commercial banks shall keep as reserve at least fifteen per cent. of their total deposits, at least six per cent. of that part of such deposits which is payable on demand, and at least four per cent. of that part of such deposits which are time deposits shall be kept in the vaults of the bank in lawful money, national bank notes or bills, notes, and gold or silver certificates issued by the United States. That part of such reserve not so kept, shall be kept, subject to demand, in other banks or trust companies, designated by resolution of the board of directors for that purpose, a copy of which upon its adoption, shall be forthwith certified to the superintendent of banks, and the depository thus designated shall be subject to the approval of the superintendent of banks."

Section 9764:

"Savings banks shall keep as reserve at least ten per cent. of their time deposits, and at least fifteen per cent. of their demand deposits; at least six per cent. of that part of such deposits which is payable on demand, and at least two per cent. of that part of such deposits which are time deposits shall be kept in the vaults of the bank in lawful money, national bank notes, or bills, notes and gold or silver certificates issued by the United States; not more than three-tenths of such reserve for time deposits may be invested in the securities named in paragraphs "b" and "c" of section 9758 of the General Code or the bonds of any city or county within this state; that part of such reserve not so kept or invested, shall be kept subject to demand in other banks or trust companies, as designated by resolution of the board of directors for that purpose, a copy of which, upon its adoption, shall be forthwith certified to the superintendent of banks and the depositary thus designated shall be subject to the approval of the superintendent of banks."

The reserve required to be maintained by both commercial and savings banks is computed and determined on deposits in such respective institutions, the receipt

of which in both is, in a measure, authorized and regulated by statutory provisions. Both kinds of banking institutions possess, of course, a considerable measure of implied power with respect to these and other matters incident to the nature of their business and the efficient exercise of their granted powers; but special statutory provisions with respect to deposits in commercial and savings banks may be noted.

Section 9757, General Code, provides:

> "A commercial bank may receive deposits on which interest may be allowed. All deposits in such banks shall be payable on demand without notice, except when the contract of deposit otherwise provides. * * *"

As to savings banks, it is, by section 9763, provided generally that such banks may receive money on deposit. It is further provided (section 9767) that the board of directors shall prescribe the terms on which deposits shall be received and paid out, and that a passbook shall be issued to each depositor in each department, containing the rules and regulations adopted by the board of directors governing such deposits, in which shall be entered each deposit made, the interest allowed thereon, and each payment made to each depositor (section 9768); and it is further provided that no payment or check against any savings bank account shall be made or paid unless accompanied by and entered in the passbook issued therefore, except for good cause and on assurance satisfactory to the officers of the bank. Special provision is made, however, giving to savings banks authority to issue time certificates of deposit or certificates for deposit specially issued according to the rules and regulations governing savings deposits.

From the foregoing statutory provisions it is manifest that an intention is evinced to observe a distinction with reference to deposit in commercial and savings banks, and it is quite apparent that this distinction follows when both kinds of banking business are done by one institution under separate departments. In such case the reserve to be maintained by the institution as a whole, must be that maintained by its separate departments conducted as if they were separate institutions.

With respect to the particular question presented by you, I am of the opinion that where a banking institution has the power of a commercial bank, and also that of a savings bank, it is not entitled to maintain simply a reserve of ten per cent. of the whole of its time deposits, but that the ten per cent. reserve of time deposits applies only to the deposits in the savings department of such institution.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1013.

CHIEF INSPECTOR OF MINES—HIS DUTIES RELATING TO OIL AND GAS WELLS ON LANDS INTERLAID WITH WORKABLE SEAMS OF COAL.

Under the provisions of section 914, *General Code, the chief inspector of mines upon receiving a notice from a person, firm or corporation intending to drill oil or gas wells which will likely penetrate working seams of coal, shall make a record thereof, and shall comply with the provisions of the section relating to the manner in which to proceed. It is the duty of the chief inspector of mines to see that the provisions of the General Code relating to the drilling and operating or abandonment of such wells are complied with.*

COLUMBUS, OHIO, June 29, 1914.

Industrial Commission of Ohio, Department of Inspection, Columbus, Ohio.

GENTLEMEN:—Under date of May 4, 1914, you state that drillers of oil and gas wells are drilling through territories underlaid with coal, regardless of suggestions made by your department and the mine operators, as a result of which an explosion involving the loss of life may occur. You ask if you have power to locate these wells and to insist upon records being kept and mining maps presented to your department. You also say that no record is kept of strata through which the oil and gas wells are passing, and consequently you are unable to obtain information as to the seams or thickness of coal through which the wells pass. This latter information you think the state should have in order to protect itself against dangers when casing is being withdrawn, as if you knew the workable seams, when the well is abandoned you would insist upon the well being plugged a safe distance below the lowest workable seam.

I think that your question is answered by the sections of the General Code, to which I shall here refer.

Section 973 provides that a written notice shall be given to the mine inspector before drilling a gas or oil well within the limits of any coal producing county. It is the duty of the person, firm or corporation causing any well to be drilled, to have prepared an accurate map of a scale of one inch to four hundred feet, showing the location and number of wells, the property lines of the property upon which they are to be located in the township, section and quarter section in which such well is being drilled, together with the measurement from the section line and the quarter section line, and a sworn statement of the maker of the map, which map is to be kept on file in the office of the state mining department, and open for inspection at all reasonable hours. The original map is to be retained by the owner or surveyor, and a blue print filed with the chief inspector of mines, and another with the county recorder, within sixty days after the passage and approval of the act, or after commencing to drill the well, and if drilling is still continued on the property already surveyed, a complete blue print must be filed at the end of each year.

The following language is taken from this section:

> "No oil or gas well shall be drilled nearer than three hundred feet to any opening to a mine used as a means of ingress or egress for the persons employed therein, nor nearer than one hundred feet to any building or inflammable structure connected therewith and actually used as a part of the operating equipment of said mine.

"In the event that a well being drilled for oil or gas penetrates the excavations of any mine, it must be cased with casing of approximately the same diameter as the diameter of the hole, the hole to be drilled thirty feet or to solid slate or rock and not less than ten feet below the floor of such mine, and the casing shall be placed in the following manner: one string of casing shall be placed at a point above the roof of said mine so as to shut off all of the surface water and then the hole drilled through said mine and another string of casing put in and the bottom of the second string of casing, or the one passing through said mine shall not be nearer than ten feet or more than thirty feet from the floor of the mine where it passes through the same.

"When any well which has been drilled for oil or gas is to be abandoned and has passed through the excavations of any coal mine from which the mineral coal has not all been removed, the person, firm or corporation owning said well shall leave in said well the casing passing through said mine from a point not less than ten feet nor more than thirty feet below the floor of said mine and extending above the roof of said mine five feet and a seasoned wooden plug or iron ball shall be driven to a point forty feet below the floor of the mine and shall then fill the hole and casing left in with the cement or a seasoned wooden plug or iron ball shall be driven on top of the same, and the hole shall then be filled for a distance of not less than twenty feet with cement. If any oil or gas well has passed through a workable vein or seam of coal it shall when it is abandoned be plugged in the following manner: a seasoned wooden plug or iron ball shall be driven to a point thirty feet below the lowest workable seam of coal and the hole filled with cement to a point twenty feet above the first seam of coal and another wooden plug or iron ball driven and the hole filled for a distance of twenty feet with cement.

"The property owner or owners shall report to the chief inspector of mines of the commencing to drill of any well or wells for oil or gas on his or their property and shall report at the end of each year thereafter if drilling is continued the number of wells drilled on his or their property, the date drilled and by whom drilled.

"When any oil or gas well is to be abandoned, the person, firm or corporation having drilled or operated such well, shall notify the chief inspector of mines, at least ten days in advance so that he may direct one of his district inspectors to be present at the time of abandonment."

Section 976 prescribes a penalty of not less than one hundred dollars, nor more than five hundred dolars for the first offense, and a fine of not less than two hundred dollars, nor more than one thousand dollars, or imprisonment not less than thirty days nor more than six months, for a second offense in case any person, firm or corporation violates or wilfully refuses or neglects to comply with the provisions of the foregoing quoted section.

Section 914 provides that the chief inspector of mines, upon receiving notice from a person, firm or corporation of an intention to drill an oil or gas well which will likely penetrate a workable seam of coal, shall make a record thereof, *and if such well is to be drilled so as to comply with the provisions of this act relating thereto, he shall give his permission to the parties to proceed.* He shall keep on file in his office all the papers and maps pertaining to oil and gas wells, and see that the provisions relating to the drilling, operating and abandonment of such wells are complied with.

From these sections you will see the statute is specific as to the manner in

which wells shall be drilled in coal producing counties. Such well must not be drilled nearer than three hundred feet to any opening of any mine used as a means of ingress or egress for persons employed therein, or nearer than one hundred feet to any building or inflammable structure connected therewith. When the well is drilling for oil or gas and penetrates the excavations of a mine, the manner of a casing is specifically prescribed by the section which I have quoted; and when the well is to be abandoned the statute clearly defines the manner in which the mine may be protected. This statute outlines in detail the duty of your department, as well as the obligation imposed upon the owner of the well. You should see that the provisions of this statute are complied with, and when this is done, the owner of the well has complied with his statutory duty.

I note that you say that the owners of wells are neglecting the keeping of a record of the strata through which the oil and gas wells are passing. The statute provides that if the oil or gas well passes through a workable seam of coal it shall, when abandoned, be plugged in a specified manner. As there may be some doubt as to what constitutes a workable vein or seam of coal, I can readily see that your department should be advised by the driller of the well when any stratum of coal is penetrated in order that it may determine whether or not such stratum is a workable vein, as otherwise it would not know whether or not this statute was being complied with when the well was abandoned.

As your department is now under the charge of the industrial commission, I think it well to call your attention to the powers reposed in that commission with reference to prescribing reasonable standards for the maintenance of places of employment in order to render them safe. Among other powers reposed in the commission is that prescribed by paragraph 10 of section 22 of the industrial commission act (103 O. L. 102), wherein this language is used in defining the powers of that commission:

> "to collect, collate and publish all statistical and *other information* relating to employes, employers, employments, places of employments and such other statistics as may be necessary. * * *"

This language empowers the commission to collect any information relating to places of employment, employers and employes, as may be necessary. Should the commission determine that it was necessary to obtain this information in order that it might render a place of employment safe, it would seem that it could require the driller of the well to report fully to it all facts regarding the veins of coal through which the well passes.

There is other language in this act which carries with it similar powers. If from such information the commission is of the opinion that a workable seam or vein of coal has been penetrated, the well should be plugged in the manner required by section 973, it being the duty of the owner of the well to notify your department at least ten days prior to abandonment, in order that one of your district inspectors may be present at the time of abandonment and see that the statutory requirements have been followed.

I have not at length explained the statute in full, as that part quoted is too clear to require interpretation.

In conclusion I should like to call your attention to sections 6311 et seq., which also deal with the drilling of natural gas and oil wells and the abandonment thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1014.

STATE BOARD OF EMBALMING EXAMINERS—STATE TREASURER—THE TERM "OTHER EXPENSES OF THE BOARD" DEFINED.

1. *It is the duty of the state board of embalming examiners to turn over the money in its possession to the state treasurer, even though there has been no appropriation made by the general assembly to take care of the expenses of said embalming board, and even though it is not a matter that can be recognized by the emergency board.*

2. *Since each appointed member of the state board of embalming examiners, except the secretary, receives ten dollars for each day of actual service during the meetings, and mileage at the rate of three cents per mile in attendance upon said meetings, personal hotel bills of said members cannot be paid as "other expenses of the board. The per diem and mileage is the only compensation for members while attending meetings.*

COLUMBUS, OHIO, June 29, 1914.

HON. H. H. SHAW, *Secretary and Treasurer, The Ohio State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—Under date of April 21st you request my opinion as follows:

"We respectfully ask your department for an opinion as to the advisability of the Ohio state board of embalming examiners placing the funds in their possession on deposit with the state treasurer.

"No appropriation has ever been asked for or received from the general assembly as this board has been self-sustaining.

"We would like an opinion as to whether the members of this board other than the secretary-treasurer can legally charge for hotel expenses, incurred at board meetings."

The regulation governing the board of embalming examiners are contained in section 1335 and following of the General Code.

Section 1339 of these provisions is as follows:

"Each appointed member of the state board of embalming examiners, except the secretary, shall receive ten dollars for each day of actual service during the meetings of the board, and mileage at the rate of three cents for each mile of travel in attendance upon such meetings. The secretary shall receive such salary as the board directs, and his necessary traveling expenses incurred in the discharge of his official duties. Salaries, mileage and other expenses of the board, shall be paid from fees received under the provisions of this chapter.

Section 24 of the General Code as amended in 104 O. L., 178, is as follows:

"Sec. 24. On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state, all moneys. checks and drafts received from the state, or for the use of any such officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week from taxes, assess-

ments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified, statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid, the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same.

"Section 2. That said original section 24 of the General Code be and the same is hereby repealed.

"Section 3. All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsitent with the provisions of section 24 of the General Code as herein amended, are, to the extent of such inconsistency hereby repealed.

"Section 4. Immediately upon the taking effect of this act, all moneys, checks and drafts in the possession of any state officer, state institution, department, board, commission or institution, received from the state or for any such state officer, department, board of commission from the sources mentioned in section 24 of the General Code, as herein amended, shall be paid into the state treasury in the manner provided by said section."

Article II, section 22 of the constitution of Ohio, is as follows:

"No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriation shall be made for a longer period than two years."

The intention of the amendment to section 24 of the General Code, as it appears in the 104th volume of Ohio Laws, cannot be subjected to the slightest doubt. The object of the statute as it now appears, is to require such moneys as are received by the board of embalming examiners, to be paid to the treasurer of state.

The provisions of section 3 of this act, to the effect that all sections or parts of sections of the General Code, which provide for the custody, management and control of such moneys, and which are inconsistent with the provisions of this act, are to the extent of such inconsistency, repealed, clearly reverse to such a provision as that set out in section 1338 of the General Code, making the secretary the treasurer, and section 1339 of the General Code, permitting salaries, mileage and other expenses to be paid from fees received. These are provisions clearly for the control and management of funds received which are inconsistent with section 24, requiring such funds to be paid to the state treasurer weekly.

Were it not for this provision of section 3 above set out, it would be readily possible to reconcile the two sections and permit the secretary to keep out of the fees received, a sufficient amount to pay the salary, mileage and expenses of the board referred to in section 1339 of the General Code, but in view of the clear import of section 3, no other construction may be ventured except that the provision providing for the control of the funds by the secretary has been repealed.

I recognize that this construction presents a very apparent hardship in view of the constitutional provision above set forth, prohibiting moneys to be drawn from the treasury except in pursuance of a specific appropriation made by law. Under this requirement, since the legislature has failed to make an appropriation for the said board of embalming examiners, it is clear that we are at the present time presented with no legal method of enabling the members of the board and the secretary to receive their salary and expenses. The only existing remedy would be a presentation of the claims to the legislature, which body might make an appropriation for the amount due. Undoubtedly, through inadvertance, the legislature has failed to care for the state board of embalming examiners as it has other departments of a similar nature. In other cases, the practice is adopted of appropriating receipts and balances and requiring boards of this nature to pay the moneys received into a specific fund, which by reason of the appropriation of receipts and balances is made available for the purpose of drawing therefrom to meet the expenses of the department. Until the legislature makes this provision, or at least until it makes a specific appropriation for the purposes of the board, it will be impossible to legally pay the salaries and expenses authorized by section 1339 of the General Code.

In your second question, you inquire whether members of this board, other than the secretary-treasurer, can legally charge for hotel expenses incurred at board meetings. Under the terms of section 1339 above quoted, the members of the board are entitled to receive $10.00 for each day of actual service during meetings and mileage at the rate of three cents for each mile of travel in attendance on such meetings. By this provision, the intention of the legislature to set forth specifically and in detail the allowance to be permitted the members, is manifest, and the allowance of hotel expenses is clearly not provided for by these terms. In the latter part of this section, the board is authorized to pay salaries, mileage and *other expenses of the board.* I am of the opinion that this term "other expenses of the board" cannot be construed to extend further than a reference to such other expenses of the board as a whole, as are authorized otherwise by the statutes. Such term clearly may not be construed to in any way enlarge the authorization of the statute with reference to expenses permitted individual members of the board. I can find nothing in this statute, therefore, or in any other statute, which authorizes members of the board of embalming examiners to charge for hotel expenses in addition to their compensation whilst attending a meeting. In accordance with the established rule of construction, the manifest intent of the statute is that the compensation allowed to members of the board while in attendance at meetings, is intended to cover expenses incurred.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1015.

VILLAGE SCHOOL—HOW VILLAGE SCHOOL DISTRICT MAY BECOME PART OF COUNTY SCHOOL DISTRICT—RIGHT OF SUCH VILLAGE SCHOOL DISTRICT TO BECOME PART OF THE COUNTY SCHOOL DISTRICT.

1. *If a village school district, containing a village, which according to the last federal census, has a population of* 3,000 *or more, decides by a majority vote of the full membership thereof, not to become a part of the county school district, and notifies the county board of education of its decision before the third Saturday of July,* 1914, *as provided by section* 4688, *General Code, then such village school district cannot after such date through its board of education rescind its action and become a part of the county school district.*

2. *If such village school board, by its own action becomes a part of the county school district, because it does not act in accordance with section* 4688, *General Code, then such village school district cannot through its board of education, at a later date, withdraw from the county school district, and again become a village school district.*

COLUMBUS, OHIO, June 29, 1914.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of April 9, 1914, you submitted the following request for an opinion:

> "*First.* May a village school district after having taken advantage of the provisions of section 4688, Ohio school laws, enacted by the general assembly at its extraordinary session 1914, at a later date return to the county school district?
>
> "*Second.* May such a village school district deciding to remain in the county school district, at a later date withdraw therefrom and accept the provisions of section 4688?"

In reply to your inquiry, section 4688 of the General Code, as passed February 5, 1914 (104 Ohio Laws, page 134), provides as follows:

> "The board of education of any village school district containing a village which according to the last federal census had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

Under the provisions of said section, it appears that in a village school district, containing a village which, according to the last federal census had a population of 3,000 or more, may decide by a majority vote of the full membership thereof, not to become a part of the county school district, but such decision becomes effective only upon giving notice to the county board of education on or before the third Saturday of July, 1914, and when such notice is given, said section specifically provides that the board of education of any such village school shall then be exempt from the supervision of the board. If the board of education of

any such village decides not to become a part of the county school district, in the manner provided by said section, and gives notice thereof, to the county board of education, then it is my judgment that such school district is exempt from the supervision of such county board of education and the action so taken on the part of the board of education cannot be rescinded, for by its action it has decided not to become a part of the county school district. Therefore, answering your first question directly, it is my opinion that if a village school district, containing a village which according to the last federal census had a population of 3,000 or more, decides by a majority vote of the full membership thereof, not to become a part of the county school district, and notifies the county board of education of its decision before the third Saturday of July, 1914, as provided by section 4688, that then such village school district cannot after such date through its board of education, rescind its action and become a part of the county school district. If the board of education of any school district containing a village which, according to the last federal census, had a population of 3,000 or more, fails to take any action in regard to not becoming a part of the county school district, then such village school district, ipso facto, becomes a part of the county school district. The only way such village school district can escape becoming a part of the county school district, is in the manner provided by section 4688, General Code, supra; that is, by its board of education deciding by a majority vote of the full membership thereof, not to become a part of the county school district, and notifying the county board of education of such decision before the third Saturday of July, 1914. If such village school district, by its own action, becomes a part of the county school district, because it does not act in accordance with section 4688, then, in answer to your second question, it is my opinion that such village school district cannot, through its board of education, at a later date, withdraw from the county school district, and again become a village school district.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1016.

MOTHERS' PENSION—PERSONS ENTITLED TO MOTHERS' PENSION—PERSONS NOT ENTITLED TO MOTHERS' PENSION.

1. *The word "poor" as used in section* 1683-2, *General Code, is not to be construed to mean "pauper." A mother is not required to sell her home and use the proceeds thereof to sustain herself and family before being entitled to relief under the mothers' pension law.*

2. *A mother living at home with her parents, who support her and her children, and makes no charge therefor, would not be entitled to relief under section* 1683-3 *of the mothers' pension act.*

3. *If a husband has deserted more than three years before and the mother has secured a divorce, she falls within the provisions of section* 1863-2, *since nothing is said in such statute relative to divorce.*

4. *If the mother is divorced by the husband for her aggressions, and though three years have elapsed, it would not be regarded as desertion on the part of the husband within the meaning of section* 1683-2.

5. *The unmarried mother of illegitimate children is not entitled to an allowance under section* 1683-2, *General Code.*

6. *An adopting mother is not entitled to a pension, since the term "mother" cannot be construed as extending to an "adopting mother."*

7. *A grandmother who is keeping and supporting a child of her son or daughter, when both parents are dead, cannot be regarded as a mother.*

COLUMBUS, OHIO, June 29, 1914.

HON. CHARLES KRICHBAUM, *Probate Judge and Juvenile Judge, Canton, Ohio.*

DEAR SIR:—Receipt of your letter submitting eight separate questions arising under the mothers' pension law has already been acknowledged, and your request for early consideration thereof has been noted.

Your questions are as follows:

"*First.* What is the legal meaning as used in the act, of the word 'poor' (when such women are poor)? Does this mean indigent? We have a number of cases in which the mother owns a home (some subject to a mortgage of about one-half the value), but have no income to support themselves or children, and while they have no income, yet by selling the home, would have sufficient to support themselves for a period. In other words, they are property poor. Do they fall within the meaning of the word 'poor?'

"*Second.* In some cases the mother is living at home with her parents, who support her and the children and make no charge therefor. Is such mother entitled to the pension, provided her case falls within the other requirements of the act?

"*Third.* If the husband has deserted more than three years before and the mother has secured a divorce, does she fall within the provision of the three years' desertion?

"*Fourth.* If the mother is divorced by the husband for her aggressions, and the three years have elapsed, is this within the provision of three years' desertion?

"*Fifth.* Suppose the mother was never married and has illegitimate children, and the putative father is dead or deserted, will she be entitled to the pension?

"*Sixth.* Will an adopted mother (other conditions being met), be entitled to the pension?

"*Seventh.* We have several cases where both parents are dead, and the children are being kept and supported by the grandmother, who is a widow and poor, as well as nearest relation; can a pension be granted to her?

"*Eighth.* Must the two years' residence of the mother and children be for said period, in the county in which the application is filed?"

In an opinion to the bureau of inspection and supervision of public offices, copy of which is enclosed herewith, I have stated reasons for giving to the mothers' pension provisions of the act found in 103 Ohio Laws, 864, a very liberal construction, to accomplish the end sought thereby. My answer to your questions will be based upon such a construction of the statute.

Your first question involves joint consideration of the first sentence of section 1683-2 and the entire section 1683-3, General Code. These provisions are as follows:

"Section 1683-2. For the partial support of women whose husbands are dead, or become permanently disabled for work by reasons of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows. * * * *"

"Sec. 1863-3. Such allowance may be made by the juvenile court, only upon the following conditions: First. The child or children for whose benefit the allowance is made, must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must, in the judgment of the juvenile court, be a proper person, morally, physically and mentally, for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made by the probation officer, an associated charities organization, humane society, or such other competent person or agency as the court may direct, and a written report of such examination filed."

In my opinion, the word "poor," as used in section 1683-2, is not to be given the technical meaning which your question implies. It is not required that the woman be a pauper in order to be entitled to receive the allowance. The contrary, indeed, clearly appears, from the provisions of section 1863-3, which set forth the conditions upon which the allowance is to be made. None of these conditions are such as to require the mother to have the status of a pauper before she is eligible for relief.

Again, I do not believe any interpretation of the law would be favored, which would require a mother to sell a home which she might own, and thus to exhaust her property resources, in order to qualify for relief, for the very reason that the object of the law, itself, as stated in the opinion to the bureau, is to preserve the integrity of the home. To require the mother to sell her homestead property, in order to qualify for relief, would seem to do violence to this underlying principle, and in addition, would merely have the effect of substituting the payment of rent for the payment of interest, taxes, repairs, etc., incident to the ownership of a home, as it is the intention of the statute that the mother shall occupy her own home with her children, and in order to do this, she would either have to own such a home or pay rent to some other owner.

I am of the opinion that the second case described by you is not one properly within the purview of the law. If the mother is living at home with her parents who support her and the child, and make no charges therefor, it is obvious that, in the absence of an allowance, she would not be required to work regularly away from her child, nor does it appear that the allowance is necessarily to save the child, or children, from neglect and to save the breaking up of the home of the woman. Therefore, at least two of the essential conditions, mentioned in section 1683-3, would not be satisfied by the case mentioned by you.

The third case, which you mention, is one which, in my opinion, falls within the provisions of the law. Section 1683-2, the pertinent provision of which has already been quoted, mentions the desertion of the husband, continuing for a period of three years, as a condition of relief. Nothing is said about divorce. If the actual desertion, on the part of the husband, is established, in my mind, it is immaterial whether a divorce has been obtained by the mother on that account or not.

The fourth case stated by you, on the other hand, is one which I think does not come within the provisions of law. By specifically mentioning the desertion of the husband, the general assembly has, in my mind, clearly indicated that other causes, producing separation of husband and wife, while both remain living and in health, are not sufficient foundation for qualification for allowance. In my judgment, the procuring of a divorce, by the husband, for the wife's aggression, could not, in the most liberal view, be regarded as desertion, on the part of the husband, within the meaning of the statute.

Your fifth question may be answered, generally, by the statement that the unmarried mother of illegitimate children is clearly not entitled to an allowance. It is only those women "whose husbands are dead or * * permanently disabled or * * prisoners or * * have deserted," who are entitled to relief. Therefore, if a woman was never married and has illegitimate children, she is not entitled to a pension to enable her to remain at home with them.

Answering your sixth question, I am of the opinion that an adopted mother, other conditions being met, is not entitled to the pension. While the act is to be given a liberal interpretation to accomplish the result at which it is aimed, yet, to my mind, the word "mother" as repeatedly used therein, does not have, naturally, the significance of the term "adopted mother;" and, in my judgment, such a meaning is too artificial to be given to the former term, even under sanction of a liberal interpretation.

For similar reasons, a grandmother, who is keeping and supporting a child of her son or daughter, when both parents of the children are dead, cannot be, in my judgment, regarded as a mother, within the meaning of the act, even though her situation satisfies the other conditions enumerated therein.

Your eighth question is answered in the enclosed opinion to the bureau of inspection and supervision of public offices.

Of course, your questions, many of which are difficult, arise under legislation which is novel, and, so far as I am advised, there are no authorities interpreting such legislation. Consequently, my views cannot be supported by such authorities.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1017.

OIL AND GAS WELLS—IN COAL REGIONS MAPS SHOULD BE FILED WITH THE CHIEF INSPECTOR OF MINES SHOWING THE LOCATION OF SUCH WELLS.

A company maintaining oil or gas wells drilled a number of years prior to the passage and approval of section 973, General Code, as it now stands, should make and file copy of maps showing the location of such wells. Where the sixty day limit for the filing of such maps has expired, they should be filed immediately.

COLUMBUS, OHIO, June 29, 1914.

MR. J. M. ROAN, *Chief Deputy and Safety Commissioner of Mines, Columbus, O.*

DEAR SIR:—Under date of May 21, 1914, you present the following state of facts and questions:

"Section 973 of the General Code reads as follows:

" 'Any person, firm or corporation causing to be drilled any well for oil or gas or elevator well or any test well within the limits of any coal producing county of this state, must give notice, in writing of such fact to the chief inspector of mines, stating the location of the land upon which such well is to be drilled.

" 'It shall be the duty of any such person, firm or corporation to make or cause to be made an accurate map on a scale of one inch to four hundred feet, showing on said map the location and number of wells, * * * The original map shall be retained by the owner or surveyor and one blue print filed with the chief inspector of mines and one with the recorder of the county in which such well is located within sixty days after the passage and approval of this act, or after commencing to drill any oil or gas well, and if drilling is still continued on the property already surveyed, a complete blue print shall be made and filed at the end of each year.' "

"The question has arisen as to whether or not a company, having drilled wells a number of years prior to the passage and approval of this act, should have made and filed maps showing the location of such wells within the sixty-day time limit mentioned above, and having failed to do this, should they do so now?

"In the paragraph first quoted the present tense is used, leading one to believe that the section refers only to wells being drilled at the time the act was passed, and those drilled subsequent to that date; but the last of the second paragraph provides that maps be filed 'within sixty days of the passage and approval of this act,' which may refer to any wells drilled in the past."

In your inquiry you have very accurately stated the difficulties arising in the construction of this law. If the paragraph first quoted stood alone, it would be apparent that the law should be treated as prospective in its nature, and hence as applicable only to those who caused wells to be drilled subsequent to the taking effect of the statute; but the context of the immediately following paragraph seems to express a contrary legislative intent, in that it requires the filing of a blue print, showing the location of the number of wells, with the chief inspector of mines and with the county recorder, *"within sixty days after the passage and approval of this act, or after commencing to drill any oil or gas well."*

If the statute were intended to be purely prospective, it would have been unnecessary for the general assembly to have inserted the language just quoted in the alternative. In other words, there would have been one definite measure of time fixed, or rather one certain period from which time should run, instead of naming two, as is done in the act.

It is hard to understand why the blue print should be filed *either* within sixty days after the passage and approval of the act, *or* after commencing to drill any oil or gas well, unless there were in the legislative mind two classes of wells, viz.: Those in existence at the time the act went into effect, and those which should be thereafter drilled.

In cases of ambiguity, such as the foregoing, in statutes, the authoritative doctrine is that the intention of the general assembly should be ascertained and given effect. In ascertaining such intent, however, there are certain fundamental rules which the courts almost universally adopt. An epitome of those rules which are here applicable may be thus expressed:

Every statute must be interpreted with reference to the object intended to be accomplished by it, and that construction should be given it which is best calculated to advance its objects by suppressing the mischief and securing the benefits intended, the courts going so far as to hold that if the clear object of a statute is inconsistent with its precise words, the latter must yield to the controlling influence of the legislative will as apparent from the tenor of the law. In cases where the meaning of the statute is doubtful, the effect of the construction should be kept in mind to the end that inconvenience, absurdity and prejudice to public interests should be eliminated. In other words, a reasonable result should be produced if possible.

See 36 Cyc. 1108-1112.

Now it does not seem to me that it could have been the legislative intent in this statute to make a distinction between wells which were in operation prior to the taking effect in section 973, and those which were drilled subsequent to that time. Such design on the part of the general assembly would not be promotive of the public interests to the same extent as if the location of *all* wells were to be shown. The legislature clearly had in mind the idea that the designation of the location and number of wells was promotive of the public interest, and the policy and purpose of the act was to require this to be done. Such being the object, the statute should be so interpreted as to accomplish this purpose and suppress the mischief which evidently arose by reason of their being no record of the number and location of wells. The most complete and efficient accomplishment of this purpose is to be attained by records pertaining to all wells. If the law be given such meaning it will prevent inconvenience, absurdity and injustice.

As before suggested these rules would not be applicable if the sense and meaning of the law were plain, but here the letter of the statute being both doubtful and ambiguous, we think that the rules we have suggested should be given due weight.

Merely because the first paragraph of this section seems to be, as you well suggest, in the present tense, it does not follow that it may not be construed in the past tense, for, as stated in Lewis Sutherland's "Statutory Construction," page 795:

> "An act expressed in words of the future tense may still show an intent to have a present effect."

A leading case on this subject is that of Maysville & Lexington R. R. Co. vs. Herrick, 13 Bush (Ky.), 122. Section 10 of article II of chapter 52, of the General Statutes of Kentucky provided that:

> "a married woman who shall come to this commonwealth without her husband * * *"

A Mrs. Herrick went to Kentucky prior to the adoption of the statute just referred to, and it was claimed that she could not take advantage of the act because it was to be given a prospective effect. The court says:

> "To exclude her because the statute speaks of only married women 'who shall come, etc.,' would be to adhere to the letter of the law and to disregard its spirit. * * * A person clearly within this class will not be denied the benefit of a remedial statute by grammatical construction at the expense of the manifest legislative intent."

See also Malloy vs. Railway, 85 N. W., 130.

This intent seems to me to be manifest, as before suggested, by the second paragraph of the section, in stipulating the period from which the time, within which the blue print is to be filed, shall run. If such were not the case, we should have to assume that the legislature inserted the words "after the passage and approval of this act," in the statute without any reason therefor. This language must have contemplated the existence of those wells which had been drilled prior to and were in existence at the time of the passage and approval of the act in question, as otherwise we should have the absurdity of two different periods of time applying to the same wells—that is to say if the law only applied to wells drilled after the enactment thereof, then the person, firm or corporation causing the well to be drilled could file the blue prints either in sixty days after the passage and approval of the act *or* after commencing to drill. As soon as the law had been effective for sixty days, the clause "after the passage and approval of this act" would become obsolete and would be of no force or effect; and not only is this true, but such clause would be absolutely unnecessary, as the other period of time expressed in the law would completely and fully cover every case that could have been contemplated by the former clause which we have just quoted.

It would be an extremely violent presumption to assume that the general assembly inserted, without necessity or reason, language which would, in a short time, become obsolete and ineffective, when the immediately following language amply provided for every situation that might arise.

From these considerations it must necessarily follow that there should be some other purpose and effect given the words "after the passage and approval of this act," and it is my judgment that this purpose was to require the filing of blue prints showing the number and location of wells which had been drilled before the amendment of section 973, 102 O. L., 149.

Another rule of statutory construction which has some bearing upon this case, is that when doubt arises as to the proper construction of a section, regard may be

had to the original law, of which the act was an amendment. The supreme court of this state has frequently decided this question, and I shall here only refer to two decisions.

In Hamilton vs. Steamboat, 16 O. S., 429, there was dispute as to proper meaning of a law. The court on page 433 say:

> "But we think all doubt as to the proper construction of this section may be settled by the application of the rule that, in the construction of revised or *amended* statutes, the original statute will not be regarded as changed further than *clearly* appears to have been intended by the legislature."

In State vs. Commissioners, 36 O. S., 326, it is held that the court is only warranted in holding the construction of a statute which has undergone revision to be changed when the intent of the legislature to make such change is clear, or the language used in the new act clearly requires such change of construction to be made. The intent to give the new act a different effect from the old should be clearly manifest. With this in view it is proper to resort to section 973 as amended 101 O. L., 87. It was there provided that any person, firm or corporation who drills or causes to be drilled * * * any oil or gas well, shall observe the following:

> "Any person, firm or corporation *intending* to drill an oil or gas well * * * shall give notice * * * stating the location. * * *
>
> "The person, firm or corporation *drilling* or operating an oil or gas well shall make or cause to be made a map showing the location of such well and the surface upon which located, and for a distance of 500 feet contiguous thereto. Such a map shall bear the sworn certificate of the engineer and shall be filed with the chief inspector of mines within ten days from the time the drilling of such well is commenced; *provided, however, that wells previously drilled and in operation upon the passage and approval of this act, such map shall be filed within thirty days, and such map shall show the location of each oil or gas well, building and mine opening within the limits of such map.*"

It is apparent from a comparison of these two sections that it was the manifest intention of the legislature to require greater publicity and more detailed information in regard to the location and number of wells in the amended statute than was provided for in the law in existence at the time of the passage of such amendment. There is nothing, however, to indicate that the new law was intended to be less broad or inclusive. The policy actuating the alteration was to require more complete information to be furnished by the person drilling or causing to be drilled any oil or gas well. Therefore, the only change which one can see was clearly intended by the general assembly in passing this law, was to accomplish the purpose of enabling your department to obtain more detailed information than was theretofore possible for it to secure. Such being the case it seems to me that the italicised language just quoted should be treated as a clear indication not only of how the old act should operate, but also as shedding light upon the clause of the new act which I have before discussed, viz., "after the passage and approval of this act." That is to say, in the old statute this language had reference to those wells previously drilled and in operation, the time for filing a map thereof being within thirty days after the taking effect of the law; and it was the intention of the law makers in amending the statute to require the filing of these maps within an extended period of sixty days. The fact that both statutes refer to two separate

periods from which the time shall begin to run, one applicable, in the earlier statute to previously drilled wells, and the other applying to those thereafter constructed—indicates to my mind that it was the obvious aim of the general assembly to continue in the second the policy outlined in the first law. It is not likely that the legislature would pass a statute of this character, under circumstances like this, requiring maps of all wells to be made, and by a subsequent amendment dispense with such maps as to wells drilled prior to the going into effect of the amendatory section. I can conceive of no reason for this, and feel that the general assembly altered the language in this regard for the purpose of rendering the amendment more concise and without any design to exempt any driller from the requirement of making and filing the map.

Therefore, in direct answer to your question, it is my opinion that a company maintaining wells drilled a number of years prior to the passage and approval of section 973 of the General Code, as it now stands, should make and file copies showing the location of such wells, and as the sixty-day limit for so doing has expired, they should now do so.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1018.

CITY SOLICITOR MAY NOT RECEIVE EXTRA COMPENSATION FOR SUPERVISING THE CODIFICATION OF CITY ORDINANCES—THE ASSISTANT CITY SOLICITOR MAY RECEIVE COMPENSATION FOR SERVICES RENDERED IN THE CODIFICATION OF CITY ORDINANCES.

1. *The city solicitor may not legally receive compensation in addition to his regular salary for services rendered in supervising the codification of city ordinances.*

2. *The assistant city solicitor may legally be appointed to membership upon such commission and may receive the compensation fixed for his services in this connection, and in addition to receiving his regular annual salary as assistant city solicitor.*

COLUMBUS, OHIO, June 29, 1914.

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

GENTLEMEN:—Under date of June 2, 1914, you request my opinion as follows:

> "1st. May a city solicitor legally receive compensation, in addition to his regular salary, for services rendered in supervising the codification of city ordinances?
>
> "Council, by ordinance, creates a commission to codify ordinances, vesting the appointing authority in the city solicitor; said solicitor appointing an attorney and one of his assistants to perform said services.
>
> "2nd. May said assistant city solicitor legally receive compensation for service rendered in codification of said ordinances in addition to his regular annual salary?"

First question: Sections 3808 and 12912 of the General Code, are as follows:

> "Sec. 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on

the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.

"Sec. 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

The statutes do not impose upon the city solicitor or his department the duty of supervision or making a codification of the city ordinances. It is not work, therefore, which the salary of the city solicitor is intended as a compensation for. The work is outside of the duty regularly contemplated by his position. Were the city solicitor to receive compensation for such work, therefore, he would necessarily be interested in the profits of work or services for such corporation, in contravention of section 12912, and he would furthermore be interested in the expenditure of money on the part of the corporation other than his fixed compensation, in violation of the explicit terms of section 3808.

I am of the opinion therefore, that a city solicitor may not legally receive compensation in addition to his regular salary for services of this nature. My predecessor has similarly held in an opinion appearing on page 959 of the attorney general's report for the year 1910.

Second question: The assistant city solicitor is an employe of the city solicitor, whose salary is fixed by council under section 4213 of the General Code for assisting the city solicitor in the performance of duties enjoined by statute upon that officer.

Section 4213 of the General Code would prohibit the increase of the salary of such an assistant during the term for which he was appointed, if, in fact, he was appointed for a definite term. The work of codifying ordinances, however, is work not contemplated by his position, and such duties are not compensated by the salary attached to his position. The appointment of such assistant to membership on the codifying commission would not entail the performance of duties incompatible with his position as assistant city solicitor. The compensation fixed for serving as member of this commission will be paid in the capacity of an employment independent from his position as city solicitor and could not be construed as increase of salary during the term fixed for him as such assistant solicitor.

I am of the opinion, therefore, that he may legally be appointed to membership upon such commission, and may receive the compensation fixed for his services in this connection in addition to receiving his regular annual salary as assistant city solicitor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1019.

PLUMBING ORDINANCE—RIGHT OF THE VILLAGE TO REGULATE THE PLUMBING CONNECTED WITH THE EXTENSION OF THE WATERWORKS SYSTEM TO A SUBURB OF SAID VILLAGE—VILLAGE HAS NO RIGHT TO PREVENT BILL POSTING.

1. *The fact that a plumber has procured a license in an outside municipality will not compel the recognition of the license by a municipal corporation.*

2. *Where the waterworks department is furnishing water for a so-called suburb of the village, the village council has jurisdiction over the persons using such water with respect to their plumbing.*

3. *Such municipality has the right to require plumbers under its own ordinance to do the work connected with the supplying of water to such suburb.*

4. *Such municipality can compel the people in the suburb to have their plumbing inspected by the village plumbing inspector before the water is turned on. In the event of their refusing to have their plumbing inspected, water may not be turned on.*

5. *A village has no right to charge a fee to bill posters or persons distributing advertising matter, such being a restriction of interstate commerce.*

COLUMBUS, OHIO, June 29, 1914.

HON. L. E. HARVEY, *Village Solicitor, Bradford, Ohio.*

DEAR SIR:—In your letter of December 12, 1913, you present the following questions:

> "1. We have a plumbing ordinance, requiring all persons to pay a license before doing any plumbing in our village. Some of our people have been employing out-of-town plumbers recently, and these plumbers claim that if they have taken out a license to do plumbing in their home towns, this qualifies them to do plumbing in our town. My contention and advice to our council is that it does not. Is this the right view of the matter in your opinion?
>
> "2. Our waterworks department is furnishing water for a so-called suburb of the village. Does this give our council jurisdiction over the persons using the city water, with respect to their plumbing?
>
> "3. Have we a right to require plumbers under our ordinance to pay a license to do this plumbing?
>
> "4. Can we require these people to have their plumbing inspected by our inspector, before turning their water on?
>
> "5. Can we turn it off if they refuse?
>
> "6. We have also been bothered not a little with bill distributors, who have been distributing advertising matter for out-of-town firms. These distributors contend that we have no right to charge them a fee to distribute their advertising matter. Is this a restriction on interstate commerce that would prevent us from doing this?"

Answering your first question. The authority of a municipal corporation to license plumbers is granted by section 3637 of the General Code. It is fundamental that in the absence of clear and express authorization extending its control, a municipality has jurisdiction in matters of police regulation only within the boundaries of the municipality. The power of a municipality to license plumbers, therefore,

does not extend beyond the boundaries of the municipal corporation. A license is construed as a privilege granted upon payment of a fee by the one complying with the conditions prescribed, which permits to the one so receiving said license powers not possessed by others who do not comply with the same terms. The right to grant this privilege and charge a fee therefor necessarily implies the right to deny the privilege to those not paying the fee or complying with other conditions precedent. One municipality has nothing whatsoever to do with the license privileges of another, and there is no requirement of law making it necessary for one corporation to recognize the licensees of another.

I am of the opinion, therefore, that the fact that a plumber has procured a license in an outside municipality will not compel the recognition of the license by a municipal corporation.

Answering your second question. Sections 3966, 3967, 3968 and 3969 are as follows:

> "Sec. 3966. On the written request of any number of citizens living outside of the limits of a municipal corporation, the corporation may extend, construct, lay down and maintain aqueduct and water pipes to any distance outside the corporate limits not to exceed four miles, and for such purpose may make use of such of the public streets, roads, alleys and public grounds as may be necessary therefor.
>
> "Sec. 3967. When a person or persons at his or their expense have laid down and extended mains and water pipes beyond the limits of a municipal corporation, and the corporation, by resolution of the council, has authorized the proper officer of the waterworks to superintend or supervise the laying and extension of such mains and water pipes, the corporation shall furnish water to the residents and property holders on the line of such mains and water pipes, subject to the same rules and regulations that it furnished water to its own citizens, except that the rates charged therefor shall not exceed those within the corporation by more than one-tenth thereof.
>
> "Sec. 3968. All ordinances, except those relative to taxation or assessment, resolutions, rules and regulations relative to the construction, maintenance and operation of waterworks, mains, hydrants, service pipes and connections, and the protection thereof, shall operate in like manner in the territory outside the municipality when such extensions have been made, and for the enforcement thereof the jurisdiction of the mayor and police shall extend into and over such territory.
>
> "Sec. 3969. The corporation shall take full charge and control of such mains and water pipes, keep them in repair at its own expense, and, in case of annexation to the corporation of such territory, the corporation shall pay to such person or persons a just compensation therefor and shall thereupon become the owner of them."

Under these statutes council and the director of public service of a municipal corporation is given substantially the same control and jurisdiction over matters pertaining to waterworks, with reference to those persons lying outside of a municipal corporation who lay down pipes themselves and receive water from the municipal corporation, as is had by council and the director of public service over persons being supplied with water within the municipal corporation.

Sections 3971 and 3972 of the General Code are as follows:

> "Sec. 3971. A municipality owning waterworks whose territory is contiguous to that of another municipality with the assent of such other munic-

ipality, may establish and maintain such portion of its waterworks as it deems advisable within the limits of such other municipality and may make such use of the public streets, alleys and public grounds thereof as is necessary to construct, lay down and maintain all such aqueducts and waterworks for the conveyance of water along and across such streets, alleys and public grounds.

"Sec. 3972. Such aqueducts and pipes shall be so constructed and laid as not to interfere unnecessarily with the use of such streets, alleys and public grounds as public highways and public grounds. A municipality so establishing a part of its waterworks within the limits of such other municipality shall have jurisdiction to prevent or punish the pollution of or injury to water so conveyed or of the stream or source from which it is obtained or any injury to any portion of the waterworks so located within the limits of such other municipality."

Section 3972 confers upon the municipality supplying water to another municipality jurisdiction over the latter for the purpose of preventing and punishing the pollution of or injury to water so supplied. Your facts do not state whether the parties outside the village who are receiving water therefrom are living within another municipal corporation, or whether they are merely private individuals who are receiving water upon their written request and who have themselves constructed their water pipes. In either event, I am of the opinion that the above statutes amply provide for such jurisdiction on the part of the council of the municipality which supplies the water as will enable it to pass ordinances with respect to the plumbing.

Answering your third question. The licensing of plumbers being a well recognized means of regulating the use of water, I am of the opinion that the statutes above set forth empower the municipality supplying the water to require its own licensed plumbers to do the work connected with the supplying of the water to the suburb.

Your fourth and fifth questions must also be answered in the affirmative for the same reasons and under the same authority.

With respect to your sixth question. Section 3674 of the General Code is as follows:

"To license bill posters, advertising sign painters, bill distributors, card tackers and advertising matter of any article or compound which has not been manufactured or compounded within the corporation limits of such municipality. In granting such license, the council may exact and receive such sums of money as it may think expedient, and may delegate to the mayor thereof the authority to grant, issue and revoke such license. Nothing in this section shall be construed to authorize the council of a municipality to exact and receive a license fee from merchants doing business therein, for advertising their own business."

This section purports to authorize municipalities to license bill posters, bill distributors, etc., but in the latter part of this section the municipality is prohibited from licensing its own merchants doing business within the municipalites. It is settled beyond all doubt that a municipality is without power to enact police regulations of this character which discriminate against business as existing in other states.

Howe Mach. Co. vs. Gage, 25 Law Ed. 755.
Wellton vs. Mo., 23 Law Ed. 347.
Fickland vs. Taxing District Shelby Co., 36 Law Ed. 601.
7 Enc. of U. S. Supreme Court Reports, p. 350.
Stockard vs. Morgan, 46 Law Ed. 785 (see note).
Flateau vs. Village of Mansfield, 14 C. C. 592 at p. 598.
Sipe vs. Murphy, 49 O. S. 536 at p. 546.

Section 3674, above quoted, by prohibiting the municipal corporation from licensing the advertisement of business conducted by its own merchants authorizes only such ordinances as discriminate against those doing business outside of the municipality. Such an ordinance is, therefore, necessarily unequal in its operation, not only with respect to commerce conducted within the state of Ohio, but it also discriminates against interstate commerce. Such an ordinance is clearly impossible under the federal and state authorities. An ordinance of this nature was declared unconstitutional therefor in the case of Angove vs. State, 8 O. N. P. p. 514, the syllabus of which is as follows:

"An ordinance requiring bill posters to take out a license before posting bills or distributing advertising matter, is in conflict with the federal constitution providing that the rights of the citizens of one state shall not be abridged by the residents of another."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1020.

BOND ISSUE—FUNDING BONDS TO REPLACE NOTES ISSUED IN ANTICIPATION OF THE COLLECTION OF SPECIAL ASSESSMENTS—STATUS OF SUCH BONDS—NOTES ISSUED IN ANTICIPATION OF THE COLLECTION OF SPECIAL ASSESSMENTS—ISSUING OF SUCH BONDS AND NOTES BEFORE THE ANTICIPATED LEVY IS ACTUALLY LEVIED.

It is at least bad policy to issue funding bonds under section 3916, *General Code, to replace notes issued in anticipation of the collection of special assessments under section* 3915, *General Code, because such funding bonds have not the status of special assessment bonds, for which special provision is made in the General Code.*

It is lawful to issue notes, under section 3915, *General Code, in anticipation of the collection of special assessments for short terms payable when the assessment is payable, and therefore, on account of the same improvement to issue bonds under section* 3914, *General Code, in anticipation of the duplicate collection and with the proceeds of such bonds to take up unpaid notes.*

Both bonds under section 3914 *and notes under section* 3915, *General Code, may be issued before the anticipated levy is actually levied.*

COLUMBUS, OHIO, June 29, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 10th, requesting my opinion, generally, upon the question as to whether or not the council

of a municipal corporation may fund an issue of notes made in anticipation of the collection of special assessments under section 3915, General Code, such action being taken under section 3916, General Code, provided the amount of the indebtedness is not thereby increased.

On or about the same date on which I received your letter I received other letters pertaining to the same subject and submitting inquiries somewhat more specific than that in your letter.

Thus, Hon. F. M. Hamilton, Jr., solicitor for the village of Lebanon, asks the following question among others:

> "Does the statute providing for the issuing of short term notes in anticipation of the collection of special assessments for street improvement authorize the issuing of such notes for short terms to meet monthly estimates of amounts due contractor, said notes to be taken up and discharged by the issuing of *assessment* bonds after the improvement is completed?"

Hon. E. F. McKee, solicitor of the city of Springfield, asks the following question:

> "1. May bonds be issued in anticipation of special assessments prior to the levy thereof under section 3914?
>
> "2. May notes in anticipation of the collection of special assessments be issued prior to the levy of said assessments under 3915?
>
> "3. Has the city authority, acting under 3915, to issue notes to mature at the time of the completion of the proposed improvement, and then to levy assessments and issue bonds in anticipation of the collection thereof and apply the proceeds of same to the payment of said notes by virtue of section 3914, or is the adoption of one of the authorized methods exclusive of the other?
>
> "4. Has a municipality any power other than that provided in section 3915 to issue its notes in order to provide a fund for the property owners' share of public improvements prior to the completion of the improvement, and which notes might then be taken up by proceeds of a bond issued in anticipation of the collection of special assessments then levied?
>
> "5. If notes are issued by virtue of section 3915 or otherwise if possible prior to the completion of an improvement, and for a short period of time, say not to exceed one year, which will cover the time required for the making of such improvement, and the assessments are payable in either five or ten annual installments, could such indebtedness then be funded or refunded by virtue of the provisions of section 3916 G. C.?"

All these questions involve consideration of a group of statutes consisting of the following sections:

> "Sec. 3914. Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. * * * the assessments as paid shall be applied to the liquidation of such bonds.
>
> "Sec. 3915. Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments. * * * All assessments collected for the improvement, and all unexpended balances remaining in the fund after the cost and expense of the improvement have been

paid, shall be applied to the payment of the notes and the interest thereon until both are fully provided for. * * *

"Sec. 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually.

"Sec. 3917. No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

I find it most convenient to discuss the language of the sections as I have quoted them before undertaking separate consideration of the different questions submitted.

Analyzing section 3914 supra, it appears that so far as this section is concerned the proceeds of the special assessment bonds need not be used directly to pay the cost of the improvement for which the assessments are levied. The only requirement is that the bonds may be in amount sufficient to pay the estimated cost of the improvement. This, however, is not a limitation but a grant of power and its effect, in my judgment, is to enable the municipality to issue bonds before the actual cost of the improvement is ascertained and to anticipate assessments therefor before they have been actually levied. The grant of power as such relates to the amount of the issue and not to the application of the proceeds. Hence, it follows that so far as this section is concerned it would be lawful to take up an issue of notes anticipatory of the collection of a special assessment and so to use the proceeds of the bonds.

Further, in connection with this section I beg to leave to point out that it does not itself designate the means of retiring the bonds otherwise than by inference from the statement that they are to be issued in anticipation of the collection of special assessments. Other sections, which I need not quote, and the effect of which is somewhat elaborately discussed in a recent opinion to your department respecting the application of article XII, section 11 of the constitution to bonds of this character, establish the conclusion that there are four sources of revenue applicable to their payment, viz.:

1. Unexpended balances in the improvement fund. 2. Premiums and accrued interest received from the sale of bonds. 3. The special assessments themselves. 4. General taxation for the maintenance of the sinking fund.

I mention this fact because of the difference in this respect between the phraseology of the section just discussed and that of the next succeeding section.

Coming now to section 3915, I note that if there is any *requirement* in this section to the effect that the notes, the issuance of which it authorizes, be taken up only by the use of the assessments themselves and the unexpended balances of the improvement fund, such a requirement, amounting to a prohibition against taking up said notes in any other way, could result only from inference. That is to say, the statute first provides for the issuance of notes in "anticipation of the collection of special assessments." It then provides that the assessments, when collected, and

the unexpended balance of the improvement fund, produced by the issuance of the notes, shall be applied to their payment and that of the interest thereon until both are fully provided for. These provisions might be held to have the effect of prohibiting the use of any other revenues or moneys than those specifically mentioned for the purpose of providing for the notes and the interest thereon, but such an interpretation would be, as already stated, inferential. I do not think that the statute can be given this meaning. To give it such a meaning would involve the result that in the event of a deficiency in the collection of the assessments, the municipality would be without power to levy taxes for the payment of the notes or to refund them under the section next to be discussed, as valid existing indebtedness of the municipality as such. An interpretation having such a result is not to be favored on authorities cited in the opinion referred to.

I am of the opinion that the notes issued under favor of section 3915 constitute a general indebtedness of the municipality and that the requirement that certain specific moneys be applied to their retirement and payment of the interest thereon is not to be interpreted as preventing the application of moneys lawfully procured by the municipality for that purpose other than those specifically mentioned.

Therefore, I reach the conclusion that in spite of the fact that section 3916 requires the assessments and unexpended balances to be applied to the notes and interest thereon until both are "fully provided for" the section does not require that the "full provision" of which it speaks be made by the use of these moneys alone (which might prove to be impossible in a given case); and that, therefore, the section is not to be interpreted as preventing the application of other moneys to these purposes. It follows, therefore, that the language which I have been considering is not to be regarded as an implied prohibition against taking up notes issued under section 3916, either by an issue of bonds under section 3914 or by refunding bonds under section 3916. Before leaving section 3915 it may be well to inquire whether the power given to a municipality under this section is exclusive of the power given under section 3914. That is to say, if a municipality has issued notes under section 3915 may it subsequently, on account of the same improvement, issue special assessment bonds under section 3914? I find nothing in the statutes which expressly or by inference necessitates a conclusion that the two means of raising money are exclusive so that a municipality may elect which of the two it will choose, and so electing, is thereby precluded from making subsequent use of the other method with respect to a single improvement. That is to say, assuming that some ground might be found for holding that the proceeds of bonds issued under section 3914 might be used to take up notes under section 3915, there is nothing in the sections themselves to prevent such a course. It may be well to consider section 3892, General Code, in connection with the sections which have been discussed. That section provides as follows:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county

treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

It is apparent from this section that the methods of collection are the same whether bonds or notes have been issued in anticipation of the assessment. Therefore, the word "collection" as used in section 3914 must mean the same thing as the same word when used in section 3915. From this it follows that in either event, whether notes or bonds are issued, the collection anticipated is not the optional payment to the treasurer of the municipality, provided for by section 3893, not above quoted, but includes also the duplicate collection made by the county auditor.

I may state here that I have ignored in this connection the provisions of section 3905, which is as follows:

"The council may order the clerk, or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax list by the county auditor, and shall, with ten per cent. penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent. penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

In my judgment, this section is inconsistent with section 3892, General Code, in so far as the former applies to assessments. The one imposes the mandatory duty upon the clerk of council to certify an assessment, for which bonds, notes or certificates of indebtedness have been issued, to the county auditor for collection; and the other authorizes the council to order the clerk or other proper officer to certify the unpaid assessment to the auditor which, however, must be done prior to the making up of the duplicate. Markley vs. Whitmore, 61 O. S. 587.

This question seems to have been involved in Fox vs. Cincinnati, 13 C. C. n. s. 144, but was not passed upon therein. I express no positive opinion upon it here, but will continue to regard section 3892 as the controlling statute in so far as the group of sections of which it is one may be said to shed any light upon the interpretation of sections 3914 and 3915 G. C.

Another section which has come to my attention in this connection is section 3896, General Code. This section includes in the cost of the improvement for which assessments may be made "interest on bonds, where bonds have been issued in anticipation of the collection of assessments and other necessary expenditures." Similarly section 3817, General Code, provides as follows:

"When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

These sections if they have any significance go to show that a distinction is made between the interest on bonds and the interest on notes as constituting a

part of the cost of an improvement for which an assessment may be levied. That is to say, while section 3915 requires the assessments, together with the unexpended balance in the improvement fund, to be applied to the payment of the notes issued in anticipation and the interest thereon, until the same are fully provided for, yet no section specifically authorizes the inclusion of interest on notes as a part of the cost of the improvement for which assessments may be made, while the two sections which do deal with the subject-matter, do specifically mention the interest on the bonds in this category, and one of them limits the interest on deferred installments of assessments so as to correspond with the interest on the bonds issued in anticipation thereof.

I may summarize what slight evidences of legislative intent are found outside of sections 3914 and 3915 as follows:

On the one hand it appears that the phrase "in anticipation of the collection of assessments" as used in both of them must have the same meaning and not a different one in each, because the method of collection of assessments, in anticipation of the collection of which bonds have been issued, is the same as that of assessments in anticipation of which notes only have been issued. This would tend to establish the conclusion that once a collection had been "anticipated," the same collection cannot be again anticipated; so that if a municipality had once issued notes it could not thereafter issue bonds in anticipation of the same collection. On the other hand, the fact that a distinction is made between the inclusion of interest on the obligations of the municipality as an item of cost, for which assessments may be levied, as between bonds and notes, seems to me to constitute some slight evidence, at least, tending to show that it was not intended by section 3915 to authorize the issuance of notes in anticipation of the collection of special assessments, so as to preclude the subsequent issue of bonds for the same purpose. That is to say, it does not seem reasonable to suppose that the general assembly would have made the distinction which it has made between bonds and notes with respect to the inclusion of the interest in the total cost of the improvement had it not had in mind the possibility, at least, and perhaps the necessity of the issue of bonds instead of and in place of notes, before the assessment was actually made. In view of these conflicting clues to the legislative intent, and in view of the lack of explicit provision in sections 3914 and 3915, General Code, I have deemed it best to take a broad view of the question. I reach the conclusion that when notes have been issued in anticipation of the collection of special assessments such notes may be taken up, and bonds issued in anticipation of the collection of the same assessments and in place of such notes.

One slight verbal difference between the two sections seems to support this view. Section 3914, relating to bonds, provides that "such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied." Section 3915, on the other hand, provides that the "notes shall not exceed in amount the estimated cost of the improvement." While the distinction may be far-fetched, it seems to me that the legislature at least conceived of the bond issue as a single borrowing act, i. e., contemplated the likelihood, at least, that the bonds would be issued all at once; while, on the other hand, the legislature seemed to conceive of the borrowing of money by the issuance of notes as being piece-meal, i. e., as money to pay for the improvement might be needed. This is a very reasonable view to take of the language of the two sections, and I believe they should be given such interpretation. To give them such interpretation would lead to the conclusion that section 3915 was intended as a means whereby a municipality, without paying interest on the entire amount required for the improvement during the progress of the work, and before the assessments were available, might, from time to time, as the contractor's estimates were presented for

payment, issue notes under section 3915, anticipatory, to be sure, of the collection of the assessments, and to be paid for from the assessments, if the assessments happen to be paid by the property owners in time to meet the notes as they mature; but saving further power to issue bonds covering the entire cost of the improvement, if necessary, upon the completion of the improvement and before the making of the assessment.

Sections 3916 et seq., General Code, have been considered by this department many times, and I have always held that these sections are available whenever the municipality, as such, owes an unfunded debt. The power therein is very broad and is limited only by the phrase "but not to increase the indebtedness." I would not undertake to hold as a matter of law that this section could not be employed for the purpose of funding an issue of special assessment notes when the period of the collection of the assessments, as ultimately fixed, extends beyond the maturity of the notes or when there is a deficiency in the assessment. However, the fact that there is a relation established by the statutes already quoted, between the rate of interest on deferred installments of assessments and the rate of interest on bonds issued in anticipation of assessments, indicates, with some degree of strength, that the legislature never intended that a municipality should borrow money in reality in anticipation of the collection of special assessments, otherwise than under sections 3914 and 3915, General Code. And it would be a virtual anticipation of the collection of special assessments if notes were first issued and then funded under section 3916, General Code.

Furthermore, I venture to point out in this connection that section 3932, General Code, distinguishes between special assessment bonds and other bonds in a very material way, viz.:

> "Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others."

Bonds issued under section 3916, General Code, would not be technically, although they would be substantially, "bonds issued for special assessments" under section 3932, and if issued for the purpose of funding notes issued in anticipation of assessments, the sinking fund for the retirement of such particular bonds would not receive special credit for the premiums and accrued interest received by the corporation from their sale.

In another aspect of the case, bonds issued under section 3916 would be fully subject to the provisions of article XII, section 11 of the constitution. Taxes would have to be levied to pay the sinking fund and interest requirements of such bonds. Only by inference could it be held that the special assessments themselves would be directly applied to the payment of such funding bonds as is specifically provided with respect to special assessment bonds by section 3914, General Code. By perhaps less remote inference, and by such an inference only, could it be held that the sinking fund trustees would have the right to receive assessments as paid to the municipal treasurer when the bonds to be retired were not special assessment bonds but only general funding bonds. In fact there would be no explicit statutory provision for the disposition of the assessments if bonds were issued under section 3916 for the purpose of funding notes issued in anticipation of special assessments.

For the reasons above set forth, then, I have arrived at the conclusion that whether or not as a strict and technical matter of law there is power in a municipal council to borrow money under section 3916, and subject to its limitations, for the purpose of funding notes issued in anticipation of the collection of special assessments, there are strong reasons for advising against any such procedure. The same result can be practically obtained by issuing bonds under section 3914, General Code, and while the question is not free from doubt, I am of the opinion that it is the intention and spirit of the related provisions that a special assessment improvement may be financed in this way, i. e., first by the issuance of notes from time to time to pay the contractor and second by the issuance of bonds under section 3914 and the distinguishment of the notes by the use of the proceeds of such bonds. But one section seems to stand in the way of such an interpretation, and that is section 3804, which provides as follows:

> "When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and provided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

Is this section equivalent to that provision of section 3915 which requires that "all unexpended balances remaining in the fund after the cost and expenses of the improvement have been paid, shall be applied to the payment of the notes and interest thereon?"

In other words, is the difference between the improvement fund created by the issuance of bonds, and the actual expenses of the improvement the "unexpended balances" to which section 3804 refers, or may such a balance be arrived at by applying the proceeds of the bonds in part to the liquidation of notes issued in anticipation of assessments?

I see no reason why this section may not be interpreted in the second manner above outlined, and think that such an interpretation is clearly indicated by the difference between the phraseology of section 3804 and that of the corresponding provision of section 3815.

Coming now to the answer to your general question, I may say that it is my opinion that it is not proper to issue funding bonds for the purpose of providing for an indebtedness created by the issuance of notes under section 3915, General Code.

Answering the question submitted by Mr. Hamilton, I am of the opinion that the proceeds of assessment bonds may be used to take up and discharge notes issued in anticipation of the same assessment; and that such special assessment notes may be issued in small amounts and for short terms to meet monthly estimates of amounts due to the contractor.

Answering Mr. McKee's first question, I may say, generally, that numerous provisions of the General Code recognize the propriety of issuing bonds in anticipation of special assessments prior to the levy thereof. These sections above quoted which require the interest on bonds to be included in the cost of the improvement for which assessments are to be levied, clearly imply that in the ordinary course of affairs, the bonds will have been issued prior to the levying of the assessment.

Mr. McKee's first question is, accordingly, answered in the affirmative.

Answering Mr. McKee's second question, I beg to state that inasmuch as the statutes, as I interpret them, are such as to make the issuance of notes the first or preliminary step, it follows that notes as well as bonds in anticipation of the collection of special assessments, may be issued prior to a levy of such assessments under section 3915.

Mr. McKee's third question is substantially the same as Mr. Hamilton's question, and may be answered by saying that the city has authority under section 3915 to issue notes to mature at the time of the completion of the proposed improvement, then to issue bonds in anticipation of the collection of the same assessment, levy the assessment, and apply the proceeds of the bonds to the payment of the notes theretofore issued, the bonds being issued under section 3914, General Code; and that the exercise of the power to issue notes does not preclude the subsequent exercise of the power to borrow money under section 3914, General Code.

Answering Mr. McKee's fourth question, I beg to say that I have no knowledge of any statutory or other authority in a municipality to issue notes in order to provide a fund for the property owners' share of a public improvement prior to the completion of the improvement, aside from that provided in section 3915, General Code.

Mr. McKee's fifth question is substantially equivalent to your general question and is answered in the same way, viz., by the statement that it is questionable whether or not a municipal corporation may lawfully issue bonds under section 3916, General Code, to fund notes issued under section 3915, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1021.

THE THREE ARTS CLUB—PROPERTY OF SUCH CLUB EXEMPT FROM TAXATION—INSTITUTION OF PUBLIC CHARITY.

The real estate belonging to the three arts club is exempt from taxation under the provisions of section 5353, General Code, for the reason that such club is not only charitable, but also public. This club is an organization which contemplates furnishing a club house, a social center for the use of women students of music, painting and drama, the intention being to provide rooms for the use of such students at reduced cost. Fees are to be charged to persons patronizing this club for the purpose of providing for the operating expenses of the institution.

COLUMBUS, OHIO, June 29, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge receipt of a letter from your office, under date of December 17, 1913, in which my opinion is requested as to whether or not the real estate given to and used by the three arts club, a corporation not for profit, is, or would be exempt from taxation, assuming the use of the real estate to be in furtherance of the purposes of the organization.

The purposes in question, as defined by the articles of incorporation, are set forth fully in your letter. Epitomized, they contemplate the furnishing of a club house, a social center for the use of women students of music, painting and the drama. The intention is to provide rooms for the use of such students at a reduced cost. The enterprise will not be fostered with a view to profit, and is now being operated in its present quarters at a loss which is met by voluntary contributions from benevolently disposed persons.

Of course the occupants and patrons of the club are charged fees for the use of its privileges, which fees, however, are not sufficient to provide for the operating expenses of the institution.

The object of the institution and the proposed use of its property are, in my opinion, charitable within the meaning of the constitution as it existed prior to its recent amendment and the statutes as they still exist. That is to say, when an institution is not operated for profit, but with a view to meeting a need which is public, or promoting any of the branches of learning it is charitable, and when the means chosen for the dissemination of charity consists of the use of property by the objects of the charity, the mere fact that a charge by way of rent or fee is exacted for such use, does not deprive the enterprise of its charitable nature, if the rent or fee is nominal, i. e., is inadequate in a commercial sense, so that the enterprise can only be maintained by independent donation.

Cases like Cleveland Library Association vs. Pelton, 36 O. S., 253, are not controlling because they typify a condition of affairs in which property is used commercially and not in direct connection or furtherance of the charitable purpose, the profits of such use, however, being in turn devoted to the charity. But where the renting of a room, for example, is itself in furtherance of the charitable object, because the room used by the person to whom it is rented is within the purview of the charity, there is not the *protanto* subjection to taxation resulting from the rule in the Pelton case.

Gerke vs. Purcell, 25 O. S., 229-241.
Davis vs. Campmeeting Association, 57 O. S., 257.
McDonald vs. Mass. General Hospital, 120 Mass., 432.
Engleside Association vs. Nation, 109 Pac., 984.
29 L. R. A. n. s., 190.

But there is an element in the question which you ask that makes its solution very difficult. I refer to the fact that the charity is limited in its scope to students of the so-called "Three Arts." Whether or not this limitation is such as to deprive the charity of its "public" nature, is the precise doubtful question.

There are no decisions in Ohio on the point which is here raised as far as I am able to ascertain. In fact I have found no decisions anywhere upon the exact point. The general principle is that some discrimination in the selection of the objects of the charity is permitted to be made without affecting its public nature. Thus reasonable restrictions of a territorial nature; those pertaining to race; those pertaining to the particular nature of the relief to be awarded or the suffering to be ameliorated; those based upon age and sex; and, at least, broadly speaking, those based upon general occupation, as for example, the relief of needy working girls or mechanics, are of this kind.

On the other hand, there are certain discriminations and restrictions which are clearly not permissible, such as a restriction of the objects of the charity to the members of families of a particular fraternal order. Morning Star Lodge vs. Hayslip, 23 O. S., 144; Philadelphia vs. Masonic Home, 160 Pa., 572.

The general line of distinction between what are permissible and what are not permissible restrictions with respect to the objects of the charity is perhaps best stated in Philadelphia vs. Masonic Home, *supra,* as follows:

> "A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering from special disease; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which *involuntarily* affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends

on the fact of *voluntary* association with some particular society then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women and children, not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word 'purely' is prefixed by the constitution; this is to intensify the word 'public,' not 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity.

"Nor does the argument that, to the extent it benefits Masons, it necessarily relieves the public burden, affect the question; there is no public burden for the relief of aged and indigent Masons; there is the public burden of caring for and relieving aged and indigent men whether they be Masons or anti-Masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them."

I think it is apparent that so far as the authorities cited themselves go there is a class of charities, or alleged charities which are found in a twilight zone, so to speak, lying so close to the line of demarkation as to make it difficult to determine on which side of it they are located. I regard the "Three Arts Club," of which you speak, as being of this character, and accordingly, the conclusion which I reach will not be a positive one, but must be qualified by the statement that the question is an extremely doubtful one. Yet this conclusion is reached with full deference to the general principle applicable to exemptions from taxation, which is that such exemptions are not favored, and that at the outset every presumption is against them. Lee vs. Sturges, 46 O. S., 153-159. So that I do not mean, when I say that the question is doubtful, that the doubt arises in my mind before recourse is had to the last stated principle, but rather that doubt exists after that principle has been considered.

I call your attention now to the language of the first sentence quoted from Philadelphia vs. Masonic Home, *supra,* wherein it is stated that:

"A charity may restrict its admissions to a class of humanity, and still be public; it may be * * * for different callings or trades by which humanity earns its bread and * * * although only a small number may be directly benefited, it is public. * * *"

This language is, of course a mere dictum so far as the question then before the court was concerned; nor do I find, as I have already stated, any positive decisions in support of this language. I find, however, other similar statements, themselves of an obiter nature, which seem to justify the principle as an abstract one. Thus in Burbank vs. Burbank, 9 L. R. A., 348-9, 152 Mass., 254, is found the following dictum:

"A gift is a public charity when there is a benefit to be conferred upon the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specific classes, as to decayed seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity (Citing Kent vs. Dunham, 142 Mass., 216, which, however, of itself does not establish the rule stated)."

I find, then, a principle recognized as established by several dicta which, applied to the case submitted by you, would result in the conclusion that the real property used by the institution which you mention, would be exempt from taxation. For if a bequest or devise to an institution for the relief of destitute sailors is a public charity, then I should think a similar institution for the relief of destitute artists, musicians and dramatists or actors would be likewise a public charity; and if such a devise constitutes a public charity, I should think that one to an institution for the assistance of impecunious students of art, music and drama would partake of the same nature.

But while my research has disclosed nothing more positive than obiter dicta in support of the rule just stated, I find no authority whatever in opposition to it. Therefore, authorities to the extent that they may be said to be such, do support that rule.

But there is another reason which has occurred to me in support of the conclusion that the property in question is exempt. The purpose of the gift is undoubtedly to promote the study of the "Three Arts" mentioned. The institution to which the gift is made, has this general object in view, and the means by which it seeks to attain that object are appropriate to that end. The furnishing of a club house and dormitory for women students for these and kindred or allied arts on a charitable basis, all tend to promote this general object, by making it perhaps easier and safer from the standpoint of the perils which beset, or may beset a woman student without some co-operation and guidance, for such students to devote themselves to the study of these arts. In other words, the ultimate objects of the institution may be stated as being the promotion of the study of the fine arts and the protection of women engaged in such study. That the foregoing safeguards thrown around women of whatever class, meets a public need, is too obvious for discussion in the light of police legislation of the state along similar lines; that the promotion of the fine arts through the encouragement of the study, by individuals, of such arts, serves a public object, it seems to me is equally obvious. Our public schools, supported by taxation, themselves impart instruction of an elementary nature in the fine arts, and to say that no public need is subserved by promoting the advanced study thereof, would be inconsistent with the state's established policy in this respect.

In this connection I have in mind the fact that the supreme court of this state in Gerke vs. Purcell, 25 O. S., 229, has held (4th syllabus):

> "A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

Viewed from this angle, then, I have become satisfied, despite the unsatisfactory state of the authorities on the question, and despite the presumption against exemptions, that a charitable institution of the kind described by you is, notwithstanding the restriction as to the class of persons to be benefited by its activities, a *public* one.

It is only necessary to add the word "only" as used in the statute, like the word "purely" as used in the phrase "purely public charity" used in the former constitution and statutes relating to exemption from property taxation, exerts its principal modifying effect upon the noun "charity" and not upon the adjective "public."

In Burd's Orphans' Asylum vs. School District, 19 Pa., 21, and Widows' and Orphans' Home vs. Commonwealth, 16 L. R. A. n. s., 829, the case of Gerke vs. Purcell, supra, is cited as establishing the principle that, "when the charity is pub-

lic, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely' as applied to public charity."

It is believed that Gerke vs. Purcell, supra, does establish this principle. In other words a charity is either public or private; there can be no *degrees* of its public nature; the question of degree can only arise with respect to the charitable nature of the institution.

In the case which you submit I am satisfied that the objects of the institution are charitable only, or purely charitable. This conclusion having been reached, and being satisfied that the charity is public in its nature, I am of the opinion that the real property owned by the institution which you mention, in connection with its declared objects, is exempt from taxation.

Perhaps I have made it clear that were it not for the authorities which I have cited I should feel that the case described by you is one beyond the pale of exemption. In view of the decisions which I have cited, however, and in spite of my preconceived notion, I have come to the above conclusion.

Your letter inquires also as to the personal property which it is proposed to present to the club. My conclusions do not apply fully to such property. If the personal property is used by the club for its declared purpose, as for example, in the case of household furniture installed in a club house, it would unquestionably be exempt if the real estate is exempt. If the personal property consists of moneys and credits, the income of which is used to sustain the property, however, I would find myself unable to answer your question because this point is involved in a case now pending in the supreme court and is, therefore, unsettled.

I need only add to this opinion that I have assumed throughout that the "club" is open to all classes designated, upon the same terms, and does not consist of an organization, the benefits of which are limited to its own members. Were the facts otherwise then as I have assumed them, of course the cases of Morning Star Lodge vs. Hayslip and Philadelphia vs. Masonic Home, would indicate a contrary answer.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1022.

LIQUOR LICENSE—OFFICIAL CENSUS IS TO BE USED TO DETERMINE THE NUMBER OF SALOONS THAT MAY BE PERMITTED IN A PARTICULAR SUBDIVISION.

If a duly authenticated census has been taken at any time prior to the beginning of the license year for which the licenses are to be granted, and not earlier than the year preceding the first year in which the license law went into effect, then that official census will remain the official census until a new census is taken.

COLUMBUS, OHIO, June 29, 1914.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In your communication of June 4th, you desire to know whether under section 44 of the license act it will be necessary to take an official census each year to determine the number of licenses for the succeeding year in case an official census is to govern, or whether the fact that an official census is once taken shall govern until another official census is taken?

Section 44 of the license act provides in part as follows:

> "In determining the maximum number of licenses which shall be granted in any municipal corporation or township of the state, the license commissioners shall be governed in determining the population of said political subdivision by any official census which shall have been taken therein within the year next preceding that for which licenses shall be granted. If no such official census of the population has been taken, the board shall be governed by the latest estimates of the United States census bureau. * * * *"

It will be noted that the official census spoken of shall have been taken "within the year next preceding that for which licenses shall be granted" and that if no "such official census" has been taken, then the latest estimates of the United States census bureau shall govern. It must be borne in mind that the legislature in making this provision had more particularly before it the putting into effect of the law and the starting of the machinery necessary to make the license law workable. If no official census had been taken during the year previous to the putting into operation of the license law, then the board would have been relegated to the latest estimates of the United States census bureau for the population on which they would determine the maximum number of licenses, for then no such official census would have been taken. But it strikes me that when an official census is once taken it is an official census for all purposes and obtains so long as no other official census, duly authenticated, has been taken, and when such an official census so subsists it cannot be said that "no such official census" has been taken.

It would be needless expense to require that each succeeding year a census should be officially taken by the subdivision to determine the maximum number of licenses for the next succeeding year. The presumption would be that after an official census had once been taken, each succeeding year there would be a ratio of increase, and while this ratio of increase could not be taken into consideration in the fixing of the maximum number of licenses. I do not think that it would devolve upon the subdivision to take a new census unless they so desired.

As I interpret the clause in section 44, "if no such official census of the population has been taken, the board shall be governed by the latest estimates of the United States census bureau" it means that if prior to the year for which the licenses are to be granted, no official census of the population has been taken, then the latest estimates of the United States census bureau shall govern; but if a duly authenticated census has been taken at any time prior to the beginning of the license year for which the licenses are to be granted and not earlier than the year preceding the first year in which the license law went into effect, then that official census shall remain the official census until a new census is taken.

I am, therefore, of the opinion that if at the beginning of this license year, an official census has been taken prior to the beginning of the current license year, that that official census would determine the maximum number of licenses to be granted in the particular subdivision for the next ensuing year.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1023.

CITY SEALER OF WEIGHTS AND MEASURES—IN THE UNCLASSIFIED SERVICE—ASSISTANTS TO THE CITY SEALER OF WEIGHTS AND MEASURES IN THE CLASSIFIED SERVICE—COUNTY AUDITOR—COUNTY SEALER OF WEIGHTS AND MEASURES—DEPUTY COUNTY SEALER OF WEIGHTS AND MEASURES IN THE UNCLASSIFIED SERVICE.

1. *The city sealer of weights and measures is the head of a principal department, is appointed by the mayor, and, therefore, is in the unclassified service. The city sealer of weights and measures is not authorized by law to appoint assistants; such assistants are in the classified service.*

2. *The county auditor is by virtue of his office the county sealer of weights and measures, and it is simply one office with duties attached, and the deputy county sealer is by reason of the duties imposed upon him a "deputy" within the meaning of subdivision* 8 *of section* 8, *and is, therefore, in the unclassified service.*

COLUMBUS, OHIO, June 29, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Hon. S. E. Strode, the commissioner of the dairy and food division of the agricultural commission of Ohio, has submitted to this department, under date of January 7, 1914, the following inquiries:

> "First. Are city sealers of weights and measures whose appointments are made by the mayor and are confirmed by the city council under civil service?
>
> "Second. Are assistant city sealers of weights and measures whose appointments are made by the mayor and are confirmed by the city council under civil service?
>
> "Third. Are deputy county sealers of weights and measures whose appointments are made by the county auditors under civil service?"

As these questions involve a construction of the civil service law, the opinion is addressed to the state civil service commission.

The city sealer of weights and measures is appointed by virtue of section 4318, General Code, which provides:

> "The mayor may appoint a sealer of weights and measures, who shall hold office co-extensive with the term of office of the mayor who made his appointment, and until his successor is appointed and qualified, unless otherwise removed from office."

Section 4322, General Code, prescribes the duties of the city sealer of weights and measures, as follows:

> "The sealer of weights and measures shall compare all weights and measures, balances, weighing and measuring devices used in the purchase and sale of commodities with the copies in his possession. Any weights and measures, balances and weighing and measuring devices having a device for indicating or registering the price as well as the weight or quantity of commodities shall be tested by him both as to correctness of weight or

quantity and value indicated by them; such sealer shall seal such weights and measures, balances and weighing and measuring devices as shall be tested and found correct, and, after ten days' notice in writing to the owner, shall condemn or seize such as are found to be incorrect, and shall seal such weights and measures, balances, weighing and measuring devices having a device for indicating or registering the price as well as the weight or quantity of commodities only when correct both in indications of weight or quantity and value, and shall condemn or seize such in which the graduations or indications are found to be false or inaccurately placed either as to weight or quantity or value."

The city sealer of weights and measures is not under any principal department. He is not in the department of service, of safety, or of health. He is appointed by the mayor and is responsible directly to the mayor. He is, therefore, at the head of a principal department.

Branch (a) of section 8 of the civil service law, section 486-8, General Code, places ten classes of positions in the unclassified service.

Subdivision 2 thereof provides:

"All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district."

The city sealer of weights and measures is at the head of a principal department and he is appointed by the mayor. By virtue of subdivision 2, supra, he is placed in the unclassified service.

The position of assistant city sealer of weights and measures is not created by statute. By virtue of section 4214, General Code, council is authorized to determine by ordinance or resolution the number of clerks and employes in each department of the city.

Subdivision 7 (a) of section 8 of the civil service act, provides:

"Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk."

In order to come within the provisions of this subdivision, the executive officer, board or commission must be authorized by "law" to appoint such clerks, assistants or secretaries.

In State vs. Collingsworth, 82 Ohio St., 154, it is held:

"The violation of a penal ordinance of a municipality, as a result of which violation death ensues, is not an unlawful killing within the provisions of section 6811, Revised Statutes, which defines the crime of manslaughter."

This decision holds in effect that the word "law" does not apply to an ordinance. The word "law" as used in subdivision 7 (a) of section 8, supra, refers

to a statutory law and not to an ordinance. As the city sealer of weights and measures is not authorized by law to appoint assistants, such assistants are in the classified service.

The county auditor is made county sealer of weights and measures by section 2615, General Code, which reads:

> "By virtue of his office, the county auditor shall be county sealer of weights and measures and shall be responsible for the preservation of the copies of the original standards delivered to his office. It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county and to assist generally in the prosecution of all violations of such laws."

Section 2622, General Code, authorizes the appointment of a deputy sealer of weights and measures, as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

The duties of the county sealer of weights and measures are prescribed by section 2616, General Code, which as amended in 103 Ohio Laws, 332, reads in part:

> "The county sealer shall compare all weights and measures, brought to him for that purpose, with the copies of standards in his possession. When they are made to conform to the legal standards, the officer comparing them shall seal and mark such weights and measures. No weight, measure, balance or other weighing or measuring device shall be used or maintained for weighing and measuring in this state unless such weight, measure, balance or other weighing or measuring device has been sealed or marked by the agricultural commission or any employe of the commission detailed for that purpose, or by the county sealer or by the sealer of the city or village in which the same is used or maintained, by stamping upon each the letter 'O' and the last two figures of the year in which it has been compared with legal standards, adjusted and found or made to conform to said standards, with seals to be provided by said agricultural commission for that purpose. * * *"

The first question to be determined is whether section 2615, General Code, merely adds additional duties to the office of county auditor, or whether it creates a new and independent office. The auditor is made county sealer of weights and measures, by virtue of his office, that is, ex-officio.

In Bounchard vs. D'Herbert, 21 La. Ann., 139, it is held that a statute which creates the office of parish clerk and makes the clerk of the district court, ex-officio parish clerk, creates a separate office. In State vs. Somnier, 33 La. Ann., 273, it was

held that where a clerk is made ex-officio jury commissioner, the clerk does not occupy a new office, but has had additional duties placed upon him.

In People vs. Stewart, 6 Ill. App., 62, the clerk of courts was ex-officio recorder, held, that they were not distinct offices but that the duties of the recorder attached to the office of clerk. In Town of Redwood City vs. Grimmenstein, 68 Cal., 512, a marshal was made ex-officio tax collector and it was held that the act did not create a new office, but added new duties to the office of marshal.

In Lathrop vs. Brittain, 30 Cal., 680, the sheriff was made ex-officio tax collector and it was held that he had two distinct offices. While in Wood vs. Cook, 31 Ill., 271, the sheriff was ex-officio tax collector, held to be one office. In the California case last cited, the constitution required that the occupants of both positions should be elected. The court held that although the officer was elected by the name of sheriff he was also elected at the same time as tax collector.

The principle upon which these various cases are decided is not given. No attempt has been made to harmonize them. It appears that each case must stand upon its own bottom.

The act creating the county sealer of weights and measures was passed April 11, 1861, 58 Ohio Laws, 78. Section 7 of this act provided:

> "That copies of the said original standards, made in the manner aforesaid, shall be deposited by the state sealer, or some one under his direction, in the auditor's office of each county in this state, not already furnished in pursuance of the act referred to in the preceding section, *and the county auditor of each county in this state, is hereby made county sealer of weights and measures in his county,* and shall be responsible for the preservation of the copies respectively delivered to them."

Section 17 of this act authorized the appointment of a deputy county sealer of weights and measures.

Section 1054 of Bates' Revised Statutes, 1908, provided:

> "The county auditor is constituted county sealer of weights and measures in his county, and he shall be responsible for the preservation of the copies of the original standards delivered to his office."

In adopting the General Code this was made section 2615, and read:

> "By virtue of his office, the county auditor shall be county sealer of weights and measures, and shall be responsible for the preservation of the copies of the original standards delivered to his office."

This section was placed in its present form, as hereinbefore quoted, by act of 101 Ohio Laws, 234.

In section 7965, General Code, as amended in 103 Ohio Laws, 331, it is provided among other things:

> "* * * The agricultural commission shall, upon the passage of this act, and once every three years thereafter, require each county auditor and city or village sealer, in this state, to present all standards of weights and measures in their possession to him for comparison with the standards adopted by the state. * * * Each county auditor and each city and village sealer shall be required to procure copies of all the original standards adopted by the state."

It will be observed that in this section when reference is made to the county sealer of weights and measures he is designated the county auditor. The county auditor is required to get the copies and to present the same for comparison.

In 1861, when the provision in question was first enacted, the duties of a county sealer of weights and measures could not have been very great. They were small compared with the other duties of a county auditor. It could hardly be said at that time that the imposition of these duties upon the county auditor created a new office.

The fact that at the present time the duties are more exacting, and stricter regulations are being made, would not change the nature of the position or duties.

In 101 Ohio Laws, 234, this provision was added to section 2615, General Code:

> "It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county and to assist generally in the prosecution of all violations of such laws."

The adding of this provision did not change the character of the position, although it enlarged the duties of the county sealer of weights and measures.

In view of the history of the act, and the fact that the county sealer is designated as county auditor and also as county sealer of weights and measures, I am of opinion that the statute imposes new duties upon the county auditor and does not create a new office, when it makes the county auditor by virtue of his office the county sealer of weights and measures.

The civil service law is next to be considered.

In determining whether a deputy county sealer of weights and measures is in the classified service, two subdivisions of section 8 of the civil service act are to be considered.

Subdivisions 7 and 8 of said section 8, provide:

> "Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.
>
> "The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

Positions within the above classes are in the unclassified service.

Is the deputy county sealer of weights and measures a deputy within the meaning of subdivision 8, supra.

The county sealer is authorized by law to appoint a deputy sealer. The use of the word "deputy" in designating the position is not controlling. The duties must be looked to.

Is the deputy county sealer authorized to act "generally for and in place of" his principal, and does he hold a fiduciary relation to his principal?

By virtue of section 2622, General Code, the deputy county sealer acts in his own right and not in the right of the county sealer. But in section 2616, General Code, in fixing the offense the deputy county sealer is not mentioned? This section prohibits the use of weights and measures unless

> "such weight, measure, balance or other weighing or measuring device has been sealed or marked by the agricultural commission or any employe of

the commission detailed for that purpose, or by the county sealer or by the sealer of the city or village in which the same is used or maintanied, by stamping upon each the letter 'O,' and the last two figures of the year in which it has been compared with legal standards, adjusted and found or made to conform to said standards, with seals to be provided by said agricultural commission for that purpose."

In order to comply with this provision the deputy county sealer would be acting for and in place of his principal.

The county sealer of weights and measures is bound by the act of his deputy when he tests measures and weights. He must rely upon the deputy's tests and measurements. Furthermore the deputy is employed to assist the county sealer in the prosecution of all violations of laws relating to weights and measures. These duties make the relation between the county sealer and his deputy a fiduciary relation.

While the use of the word "deputy" in a statute is not controlling, as above stated, yet it is persuasive.

Therefore, the deputy county sealer of weights and measures is a "deputy" within the meaning of section 8, subdivision 8 of the civil service act.

It is my opinion, therefore, that the city sealer of weights and measures is in the unclassified service and that the deputy county sealer of weights and measures is also in the unclassified service. The assistant city sealers of weights and measures are in the classified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1024.

THE CONEY ISLAND TRANSPORTATION COMPANY—THE CONEY ISLAND AMUSEMENT COMPANY—RECEIPTS FROM THIS BUSINESS INTRASTATE IN CHARACTER.

The Coney Island Transportation Company, which operates river steamers between Cincinnati and Coney Island park, having the exclusive privilege of landing at the latter point and selling tickets, good both for transportation and admission to the park, but being a concern separate from the amusement company operating Coney Island, is a "public utility," and on the authority of a previous opinion, its receipts from this business are intrastate.

COLUMBUS, OHIO, June 29, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some months ago the commission requested my opinion as to whether or not the Coney Island Company is a public utility for the purpose of excise and property taxation. The request for opinion was in some unaccountable manner laid aside and an apology is tendered for failure to reply sooner thereto.

The facts upon which my opinion is requested are as follows:

"The Coney Island Company is incorporated under the laws of West Virginia, with corporate authority to operate an amusement park and steamboats in connection therewith or for excursion purposes. The company

does not itself operate any amusement resort but does own and operate on the Ohio river two passenger steamboats. These steamboats are run in connection with the operation of a certain pleasure resort, and during the season of such resort the company has the exclusive privilege of carrying the patrons of the latter to and from the same by water. During said season the steamboats in question sell tickets for transportation to and from the resort and for admission to the resort, the admission ticket being sold as agent for the resort company. The boats are provided with dancing cabins, refreshment stands and other amusement devices, and the tickets are sold under the reserved right to return to the holder thereof the cost price and to refuse to honor its provisions—in other words, the company does not hold itself out as a common carrier.

"At different times during the season, and generally prior to the opening of and after the closing of the season of the pleasure resort, the steamboats in question are used for occasional excursions to points of interest in Ohio and in other states.

"Except during high water in the early spring the wharfboats at which the steamer lands, both in Cincinnati and at the pleasure resort lie beyond low water mark and are, consequently, in the state of Kentucky."

Two questions are presented by the above statement of facts:

"1st. Whether the nature of the business in which the company is engaged constitutes it a 'public utility' within the meaning of the statute?

"2nd. Whether the fact that the steamers in question ply the Ohio river and customarily land outside of the low water mark, is sufficient to constitute its business 'interstate' within the meaning of the statute?"

Other opinions to the commission have discussed many of the questions which lie at the threshold of your inquiries. Thus, on principles already laid down the company is a "public utility" if it answers the description of a "water transportation company" within the meaning of section 5416, General Code. That is to say, the fact that the company does not hold itself out as being a common carrier does not effect its status as a "public utility" unless that fact bears upon its status as a "water transportation company."

The definition of a "water transportation company" found in section 5416, General Code, is as follows:

"When engaged in the transportation of passengers or property, by boat or other water craft, over any water way, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state, is a water transportation company."

Two questions are suggested by this definition and its application to the facts stated by you, viz.:

1. Is the activity of the company above described "transportation" within the meaning of the word as used by the statute?

2. Are the persons who ride on the company's boats for the purposes above stated "passengers" within the meaning of the statute?

Of course I take it that the company's boats do not carry "property" in the commercial sense, but that the company confines itself to the carrying of persons.

The first of these terms is defined by the Standard Dictionary as follows:

"The carriage of persons or commodities from one place to another."

The word "passenger" is defined by the same lexicographer as follows:

"A person who travels in a public conveyance, as a railway car or steamship; one carried for a fare by a common carrier."

While the first of these terms imports no technical or commercial usage, the second of them, especially when used in connection with the first, does to my mind indicate some such idea. Authorities are not lacking in support of the definition of the word "passenger" given by the Standard Dictionary, above quoted, which limits it to those who patronize a *common carrier.* As none of them, however, are strictly in point or decisive of the question I do not cite them.

But though the operation of the water craft in question ministers in a way chiefly to the pleasure of the persons who pay for the privilege of riding on them, yet it is in an exact sense, it seems to me, "transportation." The boats in question, during the resort season, make regular trips from one point in this state to another point in this state and carry persons whose object it is to be transported from the one point to the other point. That they may choose this vehicle of transportation because of the greater pleasure involved in such choice as compared with other vehicles of transportation, is immaterial. The case is not like that of a sailing vessel at a summer resort, for example, nor is the case purely one of an excursion boat used for pleasure rides exclusively.

It seems to me, then, that in even the strictest view of the meaning of the word "passenger" under discussion, a person taking passage on a boat for the purpose of being carried from one point to another, is such a passenger, although the operators of the craft do not hold themselves out as common carriers.

This conclusion, however, is predicated upon the facts which clearly appear from the statement furnished by you. There are suggestions in the correspondence enclosed in your letter to the effect that some peculiar relation may exist between the resort company and the transportation company, such as to constitute the latter virtually an agency of the former. The relation is not so described and, therefore, my conclusion has been reached without reference thereto. If, however, upon a complete investigation, which for the sake of accuracy should be made, it appears that the transportation company is virtually an appendage of the resort company, and is operated as such, then on the authority of Meisner vs. Detroit Belle Isle Co., 154 Mich., 545, a conclusion opposite to that above stated should be reached.

With respect to the question arising from the fact that the navigable waters of the Ohio river lie within the state of Kentucky, I beg leave to refer the commission to the opinion in the matter of the steamer "Grey Hound."

I am, therefore, of the opinion that, subject to the above qualification, the Coney Island Company is a "water transportation company" within the meaning of the taxation laws; that, therefore, it is a "public utility" and subject to valuation of its property by the tax commission; that its receipts from the transportation of passengers between points in Ohio, although over a route extending into the state of Kentucky, are receipts from intrastate business, and, therefore, it is subject to excise taxation measured by such receipts and by other receipts not of an interstate character.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1025.

RESOLUTION—THE RIGHT OF THE WIDOW OF ONE WHO HAS BEEN A BENEFICIARY TO PARTICIPATE IN A FIREMEN'S PENSION FUND.

The trustees of the firemen's pension fund may adopt a resolution which will make it possible for the widow of one who has been a beneficiary of the fund to participate as a beneficiary on the ground that under section 4612, General Code, the trustees are authorized to make rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid, and the amount thereof.

COLUMBUS, OHIO, June 29, 1914.

HON. W. S. JACKSON, *City Solicitor, Lima, Ohio.*

DEAR SIR:—Your letter of February 6th, receipt of which has already been acknowledged, requests my opinion on the following question:

> "By virtue of the regulations adopted by the trustees of the firemen's pension fund, for this city, any person who has served in the department continuously for a period of twenty-five (25) years, is entitled, upon retirement, to the sum of fifty ($50.00) dollars per month.
>
> "There are no regulations for the distribution of this fund to any person except one who has served as a regular fireman.
>
> "*Query*: May the trustees of the firemen's pension fund adopt a regulation which will make it possible for the widow of one who has been a beneficiary of this fund, to participate as a beneficiary?"

The following provisions of the General Code may be considered in connection therewith:

> "Sec. 4600. In any municipal corporation, having a fire department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a firemen's pension fund. Thereupon a board of trustees, who shall be known as 'trustees of the firemen's pension fund' shall be created, which shall consist of the director of public safety, and in villages of the fire chief, and five other persons members of such department. * * *"
>
> "Sec. 4603. * * * Such board of trustees shall administer and distribute the firemen's pension fund.
>
> "Sec. 4605. In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property, as listed for taxation in such municipality. * * *."
>
> "Sec. 4608. The trustees of the fund may take by gift, grant, devise or bequest, moneys, or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by such trustees."
>
> "Sec. 4609. The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the fire department,

a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or *his beneficiaries.*"

"Sec. 4612. Such trustees shall make all rules and regulations for the distribution of the fund, *including the qualifications of those to whom any portion of it shall be paid and the amount thereof,* but no rules or regulations shall be in force until approved by the director of public safety or the fire chief of the municipality, as the case may be."

It is clear that the legislation above abstracted contemplates the possibility of the inclusion of others than the members or former members of a fire department in the class of beneficiaries of the pension fund. It is also clear that it lies within the power of the trustees of the fund to determine the qualifications of beneficiaries, and that they must act by general rules and regulations subject to the approval of the director of public safety or fire chief as the case may be.

The only question which your query presents is as to whether or not after the rights of a member of the department as to participation in the benefits of the fund have become fixed by reason of the happening of the contingency upon which they are predicated, under the existing rules of the trustees, they may be enlarged or changed by reason of the subsequent amendment of those rules?

Your question seems to indicate that the particular contingency upon which the rights of the individual concerned in your question were predicated is retirement. Thus upon retirement, under the existing rules, the former member of the department became entitled to receive a stipulated monthly allowance. You do not state whether or not there are voluntary contributors to the pension fund as provided in section 4609; nor as to whether or not there are any specific gifts, grants, devices or bequests upon terms which might preclude the use of the proceeds thereof for any particular purpose. The facts in these respects not being before me I express no opinion as to the legal propriety of using for the purpose mentioned by you the proceeds of specific gifts, etc., or amounts voluntarily paid by deduction from monthly pay under section 4609. My opinion is to be regarded as limited to the use of the funds raised by general taxation under sections 4605 and 4606, General Code, and as to these funds I am of the opinion that it is lawful for the trustees so to amend their rule as to include widows of retired firemen within the class of beneficiaries, and by regulation to make such an amended rule of effective as to the widow of one whose status as a beneficiary has become fixed prior to the amendment. Pensions paid wholly out of public funds constitute bounties and the laws and regulations respecting them are subject to repeal or modification at any time, notwithstanding the interests of those who at the time of the change may be entitled directly or contingently to their benefits. Such interests not being contractual in their nature, and not being founded upon valuable consideration moving from the actual or prospective beneficiary cannot become "vested." (Price vs. Farley, 22 C. C., 48.)

For the reasons stated, I am of the opinion that, in so far as the proposed regulation of the trustees of the firemen's pension fund affects the disbursement of moneys raised by general taxation it would be valid; withholding my opinion, however, as to the application of moneys in the pension fund derived from other sources than taxation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1026.

MOTHERS' PENSION—RESIDENCE REQUIRED IN ORDER TO OBTAIN MOTHERS' PENSION—LEGAL RESIDENCE OF MOTHERS APPLYING FOR MOTHERS' PENSION.

Under the provisions of Section 1683-2, *General Code, a mother is not required to have resided two years in a county before applying in that county for a mothers' pension, but residence for two years on the part of the mother and children in any county in the state, whether that county be the county in which the two years' residence is established or not, entitles the mother to an allowance within a county of the state. Legal residence is not to be computed or ascertained by adding together periods of residence less than two years in different counties of the state. The mother and children must have resided legally for two years in some one county of the state.*

COLUMBUS, OHIO, June 29, 1914.

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

GENTLEMEN:—I have your letter of May 12th, requesting my opinion upon the following question arising under the so-called mothers' pension law:

> "Under section 1683-2 is a mother required to have resided two years in a county before applying *in that county* for aid, or can she have resided in 'A' county two years and then move to 'B' county, reside there for three months, and then be entitled to aid; or can she live six months in one, two months in another, and six months in another, then move into another county, reside there three months and apply for aid?"

The pertinent provision of section 1683-2 (103 O. L., 877), is as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents *in any county of the state* for two years, the juvenile court may make an allowance to each of such women, as follows. * * *"

None of the related provisions of the statutes shed any light, whatever, on the meaning of this language. The analogy between the scheme of legislation, of which this sentence is a part, and the poor laws, is so remote, in my judgment, as not to permit a strict construction to be given to a doubtful provision of this kind because of any principle embodied in the poor laws. Therefore, I am satisfied that merely because a pauper is required, by other sections of the statute, to have acquired a legal settlement in the county before being entitled to public support therein, it by no means follows that, by analogy, it should be held that a mother must have obtained a legal settlement, of which the statute speaks, in the county in which she is to have relief, before being qualified to receive relief from such county.

In fact, very cogent reasons prevent the adoption of such an analogy. The very object of the mothers' pension law is to permit those who are qualified to obtain the relief which it affords to maintain the integrity of their respective homes.

As much is apparent from section 1683-3, where it is stated, as a condition of making the allowance, that the mother must be in a situation which would require her, otherwise, to work regularly away from her home and family, and the allowance must be in such an amount as to enable her to remain at home with her family.

The poor laws, on the other hand, contemplate the removal of a pauper to the county infirmary, and if he is found in the county where he has no legal settlement, he is to be deported to the county which is legally charged with his support. Therefore, the very reasons which, in the one case underlie a strict construction of the poor laws, in the other case made for a liberal interpretation of the mothers' pension law, in this regard. Again, section 1683-2 and succeeding sections of the General Code, as enacted, are placed, by the legislature, itself, in the juvenile court law, which, by force of section 1683-3, is to be "liberally construed to the end that proper guardianship may be provided for the child in order that it may have such attention and care as best subserves its moral and physical welfare, and that, as far as practicable, the child's parents, or guardian of such child, may be compelled to perform their moral and legal duty in the interest of the child."

Having regard to these controlling considerations, I am of the opinion that the phrase "in any county of the state," as used in the first sentence of section 1683-2, is to be given its broad and primary meaning, and that, as a result thereof, legal residence on the part of the mother and child, in any county of the state, would entitle the mother to an allowance, by the juvenile court, in any county of the state, whether that county be the county in which the two years' residence has been established or not.

However, the liberal construction, which I think the section requires, cannot be extended so as to fit the second case which you present, if your statement is intended to describe a case in which the mother and children have never acquired legal residence for a period of two years in any county of the state. That is to say, two years' legal residence in any county of the state is not to be computed or ascertained by adding together periods of residence less than two years in different counties in the state. The mother and children must have resided, legally, for two years, in some one county of the state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1027.

FLOOR COVERING FOR STATE ARMORY MAY NOT BE PURCHASED FROM THE STATE ARMORY CONSTRUCTION FUNDS.

The purchasing of a canvas floor covering for a state armory, to be used on the floor for drill purposes, cannot be made from the construction fund of the state armory, since such an item is not properly a part of the construction.

COLUMBUS, OHIO, June 30, 1914.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 3rd, wherein you state:

> "The local board of control of the Sidney armory has requested the state armory board to provide a canvas floor covering for the drill hall.

This building was accepted on Saturday, February 28th., and it is necessary to use the floor for various civic purposes while the canvas covering will make it more suitable for drill purposes. In considering this request for floor covering the board found a very substantial balance in the certified construction fund for this armory, but the board was not sure if it could provide the floor covering from construction fund, as the floor covering might not be considered such part of the building as could be supplied under the law."

It is elementary that for an item to properly come under the head of "construction," it must become a permanent part of the building. A canvas floor covering would not be such part of the building as would authorize it to be paid for from the construction fund.

I am, therefore, of the opinion that you may not expend any of said fund for that purpose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1028.

CLOSING OF SALOONS ON ELECTION DAY.

The same rule of law applies to the closing of saloons on primary election day as on a general election day.

COLUMBUS, OHIO, July 2, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

MY DEAR SIR:—Hon. Herman Fellinger, of Cleveland, enquired of this department as to whether or not the primary election laws require the saloons to be closed on the day of holding that election. Having examined into the matter we find an opinion rendered by Hon. U. G. Denman, on August 31, 1909, on the subject, to be found in the annual report of the attorney general, 1909-1910, page 118, copy of said opinion being as follows:

PRIMARY ELECTION—SALOONS MUST BE CLOSED.

"I beg to acknowledge receipt of your letter of August 31st, requesting my opinion upon the following question:

" 'Does the primary election or the general election laws require the saloons to be closed on the day of holding the primary election?'

"Section 43 of the primary election law, 99 O. L., 214-224, is as follows:

" 'All provisions and requirements of the law of the state to preserve and protect the purity of elections, and all the penalties for violation of such laws shall apply and shall be enforced as to all primary elections held under this act.'

"The above section, in my judgment, refers to and adopts the following sections of the Revised Statutes:

" 'Whoever sells or gives away, any spirituous, vinous or malt liquors on any election day, or, being the keeper of a place where any such liquors

are habitually sold and drank, fails on any election day to keep the same closed, shall be fined not more than one hundred dollars and imprisoned not more than ten days.'

"Section (1536-628a) R. S., Sec. 1838:

" 'The mayor shall, three days previous to and on the day of any election issue a proclamation to the public setting forth therein the substance of the enactments to prohibit the sale of intoxicating liquors on that day; and it shall be the duty of the mayor to take proper measures for the enforcement of such enactments.'

"In my judgment, therefore, it is the duty of the mayor to publish his proclamation respecting the closing of saloons on the day of holding the primary election, and it is unlawful for any person, whether located within or outside of a municipality, to sell or to give away any intoxicating liquors on said day.

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

I concur fully in the reasoning of Mr. Denman.

Section 4967 of the General Code, provides, amongst other things, as follows:

"All statutory provisions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall, so far as applicable, apply to and govern primary elections."

This provision is substantially the same as section 43 of the primary election laws, upon which General Denman relied for authority for his conclusion.

Section 13197 of the General Code, provides:

"Whoever sells or gives away spirituous, vinous or malt liquors on an election day, or, being the keeper of a place where such liquors are habitually sold and drank, fails, on an election day, to keep it closed, shall be fined not more than one hundred dollars and imprisoned not more than ten days."

My opinion is, therefore, that the same rule of law applies to the closing of saloons on primary election day as on the general election day.

While you did not request this opinion, I am forwarding it to you inasmuch as we had already made the investigation; and as the question is an important one I am assuming the liberty of addressing it to you without request.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1029.

OFFICES COMPATIBLE—MEMBER OF BOARD OF ELECTION ARBITRATOR BETWEEN THE VILLAGE AND PUBLIC SERVICE CORPORATION.

There is no incompatibility between the position of member of board of election and an arbitrator appointed to go over matters at issue between a village and public service corporation, and, therefore, a member of the board of elections can be chosen as one of such arbitrators.

COLUMBUS, OHIO, July 7, 1914.

HON. ROBERT J. BUCHWALTER, *Member of Board of Elections, Cincinnati, Ohio.*

DEAR SIR:—Under date of June 22, 1914, you inquire:

> "Some of the political subdivisions, to wit: Villages in this county, are going to submit certain matters which are at issue between them and certain public service corporations to arbitration, and I believe each side is to pick one arbitrator and the two to select a third.
>
> "Would the fact that I am a member of the board of elections in any way interfere with my being chosen as one of such arbitrators?"

Section 5092, General Code, as amended in 103 Ohio Laws, 496, reads:

> "No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

This section does not apply to the question in hand.

The same person may hold two or more public positions if they are not incompatible.

The rule of incompatibility of office is stated by Dustin, J., in State ex rel., vs. Gebert, 12 C. C. N. S., 274, where he says:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

You do not state whether you are to be selected as arbitrator by the village and paid from public funds or otherwise. I will assume, however, for the purposes of this opinion that the position of arbitrator in question is a public position. I do not deem it necessary to decide that question.

The statutes do not prohibit deputy state supervisors of elections from being an arbitrator. The two employments are not subordinate one to the other, and they are not a check one upon the other.

If it is physically possible for the same person to discharge the duties of both positions they are not incompatible. The physical possibility of performing the duties of both positions is a question of fact to be determined by the requirements of the two positions.

It is my conclusion that a deputy state supervisor of elections may act as arbitrator of a controversy between a village and a private corporation.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1030.

DEPUTY STATE SUPERVISORS OF ELECTIONS—NOT PERMITTED TO FURNISH NOMINATION PETITIONS TO CANDIDATES AT THE EXPENSE OF THE COUNTY.

Neither section 4819 nor section 4967, General Code, justify deputy state supervisors of elections and deputy state supervisors and inspectors of elections to furnish nomination petitions to candidates at the expense of the county. Each candidate must furnish the same for himself.

COLUMBUS, OHIO, July 7, 1914.

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

GENTLEMEN:—Your letter of June 22, 1914, is received in which you inquire:

> "Do sections 4819, General Code, and 4967, as amended 103 Ohio Laws, page 481, justify deputy state supervisors of elections and deputy state supervisors and inspectors of elections to furnish nomination petitions to candidates at the expense of the counties?"

Section 4819, General Code, provides:

> "The deputy state supervisors for each county shall advertise and let the printing of ballots, cards of instruction and other required books and papers to be printed by the county; receive the ballots from the printer, and cause them to be securely sealed up in their presence in packages, one for each precinct, containing the designated number of ballots for each precinct, and make the necessary endorsements thereon as provided by law; provide for the delivery of ballots, poll books and other required books and papers at the polling places in the several precincts; cause the polling places to be suitably provided with booths, guard rails and other supplies, as provided by law, and provide for the care and custody of them during the intervals between elections; receive the returns of elections, canvass them, make abstracts thereof, and transmit such abstracts to the proper officers at the times and in the manner provided by law, and issue certificates to persons entitled to them."

Section 4821, General Code, provides in part:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. * * *"

These sections refer to expenses for elections, proper.

Section 4967, General Code, as amended in 103 Ohio Laws, 481, reads:

"County boards of deputy state supervisors of elections shall have all the powers granted and perform all the duties imposed by the laws governing general elections, including furnishing materials and supplies, printing and distributing ballots, providing voting places, protecting electors, guarding the secrecy of the ballot, and making rules and regulations not inconsistent with law, for the guidance of election officers. All statutory provisions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall so far as applicable, apply to and govern primary elections.

Section 4991, General Code, as amended in 103 Ohio Laws, 510, reads in part:

"All expenses of primary elections, including cost of supplies for election precincts and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, shall be paid in the same manner provided by law for the payment of similar expenses for general elections. * * *"

These sections provide for the payment of all proper expenses of the board of deputy state supervisors of elections in conducting primaries.

The statutes do not specifically provide that the boards of elections shall provide prospective candidates with blank nomination petitions.

Nomination petitions are to be filed with the board of deputy supervisors and then its duty as to these petitions begins. Nomination petitions are necessary to the person who seeks to be a candidate, but they are not necessary or required supplies of the board of deputy state supervisors of elections in conducting a primary election. The board is not officially concerned in the circulation of petitions or in having the petitions of any particular candidate filed. It is concerned with providing the means of permitting the electors to choose between respective candidates who have filed nomination petitions.

It is my opinion, therefore, that the board of deputy state supervisors of elections and the board of deputy state supervisors and inspectors of elections are not authorized to furnish blank nomination petitions to candidates at public expense.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1031.

AGRICULTURAL COMMISSION—POWER OF SUCH COMMISSION TO ISSUE PROCESS FOR WITNESSES APPLIES ONLY TO CERTAIN HEARINGS—INFORMAL HEARINGS—COMMISSION MAY PRESCRIBE RULES FOR INFORMAL HEARINGS.

Section 27 of the agricultural act empowering the commissioner to issue process for witnesses in its hearings applies only to such hearings and investigations as expressly authorized in other parts of the act.

The commissioner is impliedly authorized to hold an informal hearing for the purpose of investigating charges against the state veterinarian; in such case, however, testimony must be voluntary.

The commissioner, under section 20, may prescribe rules and regulations for the purpose of such informal hearing.

COLUMBUS, OHIO, July 7, 1914.

HON. BENJ. F. GAYMAN, *Secy. The Agricultural Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of June 30th, you requested my opinion as follows:

> "I desire to call your attention to sections 7, 22, 23, 24, 25, 26, 27, 28 and 32, said sections being a portion of an act entitled 'An act to create the agricultural commission of Ohio,' found on pages 304 and 341, inclusive, O. L., Vol. 103.
>
> "These sections relate to the powers of the agricultural commission of Ohio in conducting hearings and investigations. The commission desires particularly your opinion concerning the proper officer to serve the subpoenas and orders of the commission authorized in section 22 and whether or not the commission can pay from fund appropriated to it, for uses and purposes, fees of witnesses who are subpoenaed to testify before the commission.
>
> "Within a few weeks the commission will have a very important investigation to make and will be very glad if you can render us a prompt opinion covering the points upon which we are doubtful, as outlined above."

Since receiving the above, you have, personally, informed me that the investigation which your commission has in mind is in the nature of a hearing for the purpose of determining the foundation of certain complaints which have been filed with your board, charging misconduct or inefficiency in office, of the state veterinarian.

Sections 7, 22 and 32 of the agricultural commission act, above referred to, are as follows:

> "Sec. 7. Any investigation, inquiry or hearing which the agricultural commission *is empowered by law to hold* or to undertake, may be held or undertaken by or before any one member of the commission or before any member or members of the commission. All investigations, inquiries, hearings, decisions, and orders made by any one or any two members of the commission shall when approved and confirmed by the agricultural commission be deemed to be the order of the agricultural commission, and each members shall be responsible to the commission for the general work

of that one of the institutions or activities which the commission may allot to him; all matters of general policy shall be decided by the entire commission.

"Sec. 22. The agricultural commission or any member thereof, the secretary and every person appointed by the commission to conduct investigations, inquiries or hearings shall, for the purposes contemplated by this act have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

"Sec. 32. Sheriffs and constables in the several counties shall execute all lawful orders of the agricultural commission in such counties, and immediately communicate to the commission any notice given them under the provisions of law relating to live stock."

The provisions of section 7 are restricted to such investigations, inquiries or hearings as the agricultural commission is empowered by law to hold. The terms of section 22 are limited to the same restriction which is expressed in section 7. The same may be said of section 32, with respect to the duties of sheriffs and constables to execute lawful orders of the agricultural commission.

The limitation referred to is the restriction upon investigations, inquiries and hearings expressed in section 7, confining the provisions of these statutes to such investigations, inquiries or hearings as the commission is empowered by law to hold or undertake.

In brief, the commission is given power to "administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony," only in those hearings and investigations which are expressly authorized and provided for by statute, e. g., the investigation of insect pests, plant diseases, the existence of infectious and contagious disease among live stock, the inspection of nursery stock, and other matters with respect to which the commission is given express power to investigate.

Your commission is given no express power to hold hearings for the purpose of investigating charges against its officers or employes. There clearly exists an implied power, necessary and incidental to the proper administration of its offices, to look into and determine the requisite merit and fitness of its subordinates. Such a situation is covered by section 20 of the act in question. This section is as follows:

"The agricultural commission shall adopt reasonable and proper rules and regulations to govern its proceedings and to regulate the mode and manner of all investigations, inspections and hearings not otherwise specifically provided for."

This provision, which has express reference to those hearings and investigations *not otherwise specifically provided for,* would enable your board to provide reasonably for such a hearing as you have in mind. The power to provide such rules and regulations, however, must not be overstepped, and manifestly cannot be resorted to for the purpose of intruding upon the powers of the legislature. Your board, under this authority, manifestly could not impose obligations upon individuals to testify, or upon public officers to serve writs and orders in matters wherein the legislature, itself, has not seen fit to impose such duties. I am of the opinion, however, that your board may, with perfect propriety, fix a date for the purpose of looking into and examining the complaints in question. You might notify the complaining parties to have present, on this date, such witnesses and matters of evidence as they desire to present, and also the officer in question to

have present such parties and matters of evidence as he might desire to have on hand for purposes of defending himself against the charges to be considered. Such reasonable rules and regulations might be adopted for the orderly hearing of the representatives of both parties, with method and dispatch.

My conclusion in brief, therefore, is that the agricultural commission has no power of compulsory process with respect to the matter in question, but that they may readily provide a hearing, whereupon all information, voluntarily offered, may be considered.

I may further say that, in the event that it is considered more desirable to have compulsory process, that the civil service commission, under section 486-18, General Code, is empowered to make investigations for the purpose of ascertaining the manner in which officers and employes in the classified service are performing their duties, and under section 486-7 of the General Code, they may subpoena and require attendance of witnesses and all necessary evidence in the course of such investigation.

While the question asked by you is much broader than the scope of this opinion, yet, since you have stated that the investigation which your commission had in mind was of the state veterinarian, I have confined my answer solely to such question. Therefore, you will understand that this opinion in no way, undertakes to answer the question as to the power of your commission in any investigation other than the one relating to the state veterinarian.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1032.

SECTION 13 OF THE PRIVATE BANK ACT DOES NOT APPLY TO MUNICIPAL FUNDS.

Section 13 of the private bank act making it lawful to designate private banks as depositories for municipal funds, and the provision as to the deposit not being in excess of the capital stock and surplus being no longer contained in the section relating to the deposit of municipal funds, the fact that a private bank has no capital stock would not disqualify it from being designated as a depository for municipal funds. Section 4515, General Code, contains a provision that there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of said bank; the above rule does not apply to municipal funds.

COLUMBUS, OHIO, July 7, 1914.

HON. L. E. HARVEY, *Village Solicitor, Bradford, Ohio.*

DEAR SIR:—On June 8, 1914, you made the following request for my opinion:

> "Would you kindly favor me with an opinion as to whether or not a private bank which has complied with the provisions of the new banking law is eligible to bid for municipal funds although the private bank has no capital stock?"

Section 13 of an act entitled "An act to provide for the examination, regulation, supervision and dissolution of certain banking concerns" (commonly known as the private bank act) 103 O. L., 379, provides;

"Whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depository laws of the state, every corporation, person, partnership and association coming within the purview of this act shall be permitted to bid upon and be designated as depositories of such funds upon furnishing such security or securities therefor as is prescribed by the laws of the state of Ohio; provided, however, that there shall not be deposited with any such corporation, persons, partnership, or association by any such political subdivision an amount in excess of $500,000, nor in any event an amount in excess of fifty (50) per cent. of the amount of the funds of such political subdivision so at any time to be deposited."

Sections 4294, et seq., of the General Code, provide for the deposit of municipal funds.

Section 4295, as it formerly stood, contained the provision:

"But there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of such bank, and not in any event to exceed $1,000,000."

This section was amended by an act found in 103 O. L., 113, and in this amendment the above quoted restriction was eliminated. Therefore, section 13 of the private bank act, making it lawful to designate private banks as depositories for municipal funds, and the provision as to the deposit not being in excess of the capital stock and surplus being no longer contained in the section relating to the deposit of municipal funds, the fact that a private bank has no capital stock would not disqualify it from being designated as a depository for municipal funds.

This, however, does not apply to municipal sinking funds, the deposit of which is provided for by sections 4515, et seq., General Code.

Section 4515 contains a provision that there shall not be deposited in any one bank an amount in excess of the paid in stock and surplus of said bank.

In my opinion, as section 13 of the private bank act does not repeal by implication this provision of section 4515 (nor any similar provision found in any of the depository laws of the state) a private bank, without capital stock, cannot qualify as a depository for funds belonging to the sinking fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1033.

TAXES AND TAXATION—BOND ISSUE—ENLARGING AND IMPROVING A MUNICIPAL WATER WORKS PLANT—SINKING FUND AND INTEREST LEVIES—ORDINANCE—LONGWORTH ACT.

An ordinance authorizing an issue of bonds for extending, enlarging and improving a municipal water works plant, provides for the levy of a sinking fund, and interest tax sufficient to pay the bonds. The fact that the bonds were authorized by vote of the people are together not sufficient to determine whether the issue is to be considered in arriving at the debt limitations of the city under the Longworth act.

COLUMBUS, OHIO, July 7, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 28th requesting my opinion upon the following question:

> "An ordinance authorizing an issue of bonds for extending, enlarging and improving a municipal water works plant provides:
>
> " '(Section 5). That there be and hereby is levied annually until the redemption of the above described indebtedness upon the taxable property in the city of Cincinnati, a sum sufficient to pay the interest and sinking fund charges on the above described indebtedness.'
>
> "Said bonds were authorized by vote of the people.
>
> "*Question*: Is said issue to be considered in arriving at the debt limitations of said city under the Longworth act?"

Your question involves consideration of section 3949, General Code, being a part of the so-called Longworth law in its revised form.

This section provides in part that,

> "In ascertaining the limitations of one per cent., four per cent. and eight per cent. herein prescribed, the following bonds shall not be considered:
>
> * * * * * * * * * *
>
> "f. Bonds issued for the purpose of * * * improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

You do not state in your letter whether or not as a matter of fact the waterworks to be extended and enlarged produces an income sufficient to provide for all operating expenses and to pay the interest charges and sinking fund requirements of the bonds in addition to other bonds which may have been issued for the original construction of the waterworks or their previous extension and enlargement. The only suggestion which is found in your letter along this line is the fact that the bonds were authorized by a vote of the people.

Under section 3942, General Code, which I do not quote, the council of a municipal corporation desiring to issue bonds, may submit the issue to a vote of the

people, whether the debt limits require such submission or not. This section enables council to submit the policy of issuing bonds for a given purpose to a vote of the people, even though such submission is not necessary in order to avoid the operation of one of the limitations upon the bonded indebtedness of the city nor to obtain more latitude in the levying of taxes under the provisions of section 5649-2, General Code, popularly known as the "Smith law."

Therefore, the mere fact that council has secured the approval of the electors before issuing the bonds in question does not indicate anything with respect to the application of paragraph "f" of section 3949, General Code.

The fifth section of the ordinance quoted by you may also be considered as an intimation that the bonds are within paragraph "f" of section 3949.

Said paragraph "f" is not conditioned upon the actual payment of the interest charges and sinking fund requirements of the bond issue out of the operation revenues. Its conditions are satisfied if the revenues are *sufficient* to pay such interest charges and to provide for such sinking fund requirements. The theory seemingly is that if the operation revenues are sufficient for these purposes they will relieve the burden of taxation and perhaps avoid the incurring of other indebtedness even though not directly applied to these purposes. At any rate the plain language of section 3949, paragraph "f" is such as seemingly to negative the idea that it is necessary for the operation revenues actually to be applied to the objects therein referred to in order that the waterworks bonds may be exempt from computation in ascertaining any one of the debt limitations.

Section 3959, General Code, provides for applying the surplus of waterworks revenues to the payment of bonded interest and the liquidation of bonded indebtedness. The same section also requires that taxes levied and assessed for waterworks purposes shall be applied by the council to the creation of a sinking fund and for the payment of an indebtedness and for no other purpose whatever. This section then *does not require* surplus revenues to be used in the liquidation of bonded indebtedness, but on the contrary prohibits the use of tax levies to pay current expenses and authorizes the use of such levies for the liquidation of bonded indebtedness.

It follows from a joint reading of the two sections last considered that there is no requirement that waterworks revenues over and above the actual cost of operation be used for sinking fund purposes. On the contrary section 3959 expressly authorizes them to be used for extensions and betterments. Yet even if so used and accumulated into a surplus for that purpose, if they are sufficient to pay sinking fund and interest charges of a bond issue after deducting operating expenses, the bonds are not to be counted in ascertaining any of the debt limitations.

But section 5 of the ordinance, as you quote it, suggests another consideration illustrated by my opinion to your department in the matter of the application of article XII, section 11 of the constitution to special assessment bonds of municipal corporations. As stated in that opinion, to the extent that the taxing power of the subdivision may be exerted for the payment of bonds and the creation of a sinking fund, it must be exerted in the ordinance authorizing their issue. As also stated therein, the provision for an annual tax levy which the constitution requires need not be such as to provide exclusively for the retirement of the bonds and to preclude the application of other revenues, such as in this instance, the water rents in excess of operating expenses, to the same purpose. So that it would by no means follow because a municipal corporation in complying with article XII, section 11 of the constitution had provided for the annual levy and collection of a tax sufficient to pay the interest and sinking fund requirements of the bond issue, that no other revenues are to be applied thereto. In point of fact, although such

a provision as section 5 of the ordinance which you quote would have to be included in every waterworks bond issue, it might, nevertheless, so happen that no taxes would ever be levied under such a provision on account of the application of surplus water rentals to the liquidation of the bonds.

From all these considerations, then, I conclude that the necessary premise upon which to base a categorical answer to your question is not found in the facts stated in your letter. Accordingly, I am unable to state whether the issue of bonds which you describe is to be considered in arriving at the debt limitations of said city.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1034.

KENT STATE NORMAL SCHOOL—AGRICULTURAL BUILDING AND TRAINING SCHOOL—RESTRICTION CONTAINED IN 1913 APPROPRIATION BILL AS TO THE AMOUNT TO BE SPENT ON AGRICULTURAL BUILDING AND TRAINING SCHOOL NOT CARRIED IN 1914 APPROPRIATION BILL.

Although the original appropriation bill for 1913 *for the Kent state normal school for an agricultural building and training school specified that such building was to cost not to exceed* $100,000, *yet the budget bill of* 1914 *for construction and betterments for said normal school appropriated a lump sum of* $151,000 *without further specification of the amount to be expended for the agricultural building and training school. Since the appropriation for the budget bill is made without restrictions as to building or improvement for which the amount appropriated for construction and betterments must be used, the said normal school is authorized to expend to exceed* $100,000 *for the agricultural building and training school, there being no expressed intention of the legislature to continue the restriction contained in the appropriation bill of* 1913.

COLUMBUS, OHIO, July 7, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 13th, wherein you state as follows:

"Your written opinion is respectfully requested on the following matter:
"Appropriations were made for the Kent state normal school as follows:

"1913—103 O. L., p. 624:
" 'Agricultural building and training school, cost not to exceed $100,000.00 ---------- $50,000 00'

"1914—103 O. L., p. 644:
" 'Agricultural building and training school---------- $50,000 00'

"1914—Special Session:
" 'Maintenance F-10 (construction and betterments)---------- $151,000 00'

"Inasmuch as the first appropriation (1913) specified the cost should not exceed $100,000.00, would it be legal for said institution to erect a building with an estimated cost of $147,000.00, the additional amount to be paid from the budget appropriation of 1914?"

It will appear from the above statement that the eightieth general assembly appropriated in its appropriation bill for 1913, $50,000.00 for the agricultural building and training school, but specified therein that it should not cost to exceed $100,000.00, and then the 1914 appropriation, which was passed at the same session of the legislature, appropriated the balance of $50,000.00. However, the last named appropriation bill for 1914 was repealed and a new appropriation bill on an entirely different plan was enacted and known as the budget bill. Under such plan the amounts that were given the Kent state normal school for "construction and betterments" were placed under what is known as "maintenance F-10," and the amount thereof was fixed at $151,000.00.

The budget bill did not undertake to further classify the $151,000.00, and it has been the ruling of this department that there was no power to go back of the classified budget as the same was passed by the legislature. Such being the fact, there is at the disposal of the Kent state normal school for "construction and betterments" the entire sum of $151,000.00 without any restriction or limitation whatever, and while it is true that in the appropriation of the original $50,000.00 for the agricultural building and training school as found in the 1913 appropriation bill the legislature at that time restricted the entire cost of the building not to exceed $100,000.00, yet I do not believe in view of the unrestricted appropriation of $151,000.00 that the legislature can be presumed to have intended the restriction as found in the 1913 appropriation bill to continue. Had the legislature intended the restriction to continue it would in its general appropriation of $151,000.00 have again specified that only $50,000.00 of such amount was to be used for said agricultural building and training school. Not having done so it is my opinion that the restriction contained in the 1913 appropriation bill has been removed. Therefore, in answer to your question I am of the opinion that it would be legal for said institution to erect an agricultural building and training school at an estimated cost of $147,000.00, the additional amount to be paid from the budget appropriation of 1914, providing, of course, that there are still funds sufficient in the 1914 appropriation for "construction and betterments" to pay said additional amount.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

1035.

OHIO BOARD OF ADMINISTRATION—RIGHT TO RESCIND MISTAKE MADE BY THE BOARD OF MANAGERS OF THE OHIO PENITENTIARY.

The state board of administration, which is the successor of the board of managers of the Ohio penitentiary, has full powers to rescind an action taken by mistake of the board of managers.

COLUMBUS, OHIO, July 7, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of June 26, 1914, submitting papers in the matter of the petition of Frank Hironomous, No. 37886, and asking whether or not the

board has power to rescind the action of the former board of managers of the Ohio penitentiary in this case. The facts submitted are these:

On December 31, 1909, one William Davis, escaped from the Ohio penitentiary and one Frank Hironomous, a paroled prisoner working in Columbus, was accused by prison officials of assisting Davis to escape. Hironomous seeing his picture in the papers with an offer of reward for his capture, and knowing that if captured he would be returned to prison, fled to Canada. At the next meeting of the board of managers of the penitentiary, Hironomous' parole was declared violated and he was entered on the prison journal as a delinquent. This action of the board of managers caused him to lose his "good time," owing to the provisions of section 2174, General Code, which reads:

> "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

The "good time" lost by Hironomous on his ten-year sentence amounted to three years and eight months. Later Hironomous was arrested in Canada and returned to the Ohio penitentiary on the 27th day of August, 1910, and is now confined in that institution. His "short time" on his ten-year sentence expired on March 12, 1914, and he is now serving the three years and eight months' "good time" which was taken from him by reason of the board's revocation of his parole.

It is now made clear by a statement of former Deputy Warden Charles L. Resch, the present sheriff of Franklin county, Ohio, that the prison officials were in error in suspecting and accusing Hironomous of any connection with the escape of Davis, and that the man who assisted Davis was one O'Donnell, as later discovered by Deputy Warden Resch. The question now is, can the Ohio board of administration, which has succeeded to the powers and duties of the former board of managers of the penitentiary, correct the mistake made by the former board and thereby restore to Hironomous the time taken from him by reason of such mistake.

This question is one that can be easily answered. The board of managers declared Hironomous' parole revoked under a mistaken idea of the facts and the Ohio board of administration now has full power to rescind such action and restore said Hironomous to his former status. The power to make an order carries with it the power to rescind it, if it has been issued through mistake, when the rights of third parties have not intervened.

It appears from the papers submitted that the board of managers revoked Hironomous' parole because they believed he had assisted Davis to escape. If your board now is of the opinion that Hironomous was not guilty of this offense and desires for that reason to restore him the three years and eight months "good time" taken, I am of the opinion that you may do so.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1036.

ELECTRIC LIGHT PLANT—RIGHT OF A VILLAGE TO SELL ELECTRIC CURRENT TO A TOWNSHIP WITHIN THE VILLAGE FOR THE PURPOSE OF BEING RESOLD TO ANOTHER VILLAGE.

A village owning and operating an electric light plant may not legally contract with a partnership within the municipal limits, to furnish said partnership electric current for the purpose of being resold by the partnership to another village.

COLUMBUS, OHIO, July 7, 1914.

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

GENTLEMEN:—Under date of May 28, 1914, you wrote asking my opinion as follows:

> "May the board of public affairs, having the control and management of a village electric light plant, legally contract with a partnership composed of resident citizens of the municipality to furnish current, which in turn will be sold by said partnership firm to a village situated four miles distant from the municipality owning and operating the electric light plant?"

By section 3618 of the General Code, municipal corporations are given power:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

By section 3990, General Code, a municipality may not only erect electric light plants, but may purchase or, if necessary, appropriate existing plants within the municipality belonging to any person or company.

As indicated by the provisions of section 3618 of the General Code, the purpose for which a municipality is authorized to establish, maintain and operate an electric light plant, is to supply its own needs and the needs of its inhabitants. Under this power, the municipality may undoubtedly furnish electricity to any person or concern within the city limits, for domestic or commercial lighting. The provisions of this section, however, carry no implication of power in the municipalty to furnsh electricity to persons or concerns outside of its limits, nor to furnish the same to persons and concerns within the municipality, for purposes other than their own use for light, heat and power.

Pertinent to the consideration of the inquiry here presented, I note the provisions of section 6 of article XVIII of the state constitution, adopted September 3, 1912, and the provisions of section 3809 of the General Code, as amended in 103 Ohio Laws, 526. These provisions are as follows:

Sec. 6, Art. XVIII, Con.:

> "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

Section 3809 of the General Code:

> "The council of a city may authorize, and the council of a village may make, a contract * * * for the leasing of the electric light plant and equipment, * * * of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract * * *"

As I understand the question here made, its solution depends entirely upon a consideration and construction of the provisions just noted; for certainly aside from the provisions of section 6, article XVIII of the constitution, no authority exists in a municipality, on the one hand, to furnish electric current to others than its inhabitants for their own use for light, heat or power; nor, on the other hand, aside from the provisions of section 3809, does there exist any authority in a municipality to purchase electric current for the purpose of using the same to meet its own needs or for distribution to its inhabitants.

From a consideration of the provisions of section 3809, General Code, above noted, it is apparent that if it can be here determined that the partnership desiring to purchase electric current from the village owned and operating the electric light plant may lawfully do so, no obstacle is presented with respect to the right of the other village to purchase such current from said partnership; and the whole question resolves itself, then, to the consideration whether, by force of the provisions of the constitution, above noted, the municipal corporation owning and operating the electric light plant, has power to sell the same to a partnership composed of resident citizens of the municipality in which said electric light plant is located.

Aside from the provisions of the constitution, there can be no doubt but what a municipality, owning and operating an electric light plant, could furnish electric current to a partnership, located and doing business in such municipality, but such current could be sold to the partnership for only its own private or commercial use, for light, heat or power, and could not be sold to it by such municipality for the purpose of being resold by such partnership to other persons.

Taking the provisions of the section of the constitution under consideration, it will be noted that they provide that any municipality, owning and operating a public utility for the purpose of supplying the service or product thereof, to the municipality or its inhabitants, may also sell and deliver *to others,* any transportation service of such utility and the surplus product of any other utility, in an amount not exceeding, in either case, fifty per centum of the total service or product supplied by such utility, within the municipality. I have no doubt but that a partnership, located in a municipality, owning and operating an electric light plant, and composed of citizens of such municipality, is an inhabitant of such municipality, within the purview of section 3618 of the General Code, authorizing such municipality to furnish electricity to its inhabitants for light, heat or power, nor that such partnership is an inhabitant, within the meaning of section 6, article XVIII of the constitution.

The authority of the provisions of this section of the constitution only goes to the right of a municipality owning and operating an electric light plant as a public utility, to sell its product to others than its inhabitants to whom, prior to the adoption of the constitutional provisions, the municipality might furnish electric current for purposes of light, heat or power. It results from this consideration that the authority of the constitutional provisions is limited to sales of electric current by such municipality, to persons, natural or artificial, outside of and beyond its corporate limits; and that with respect to the question here made, although the village owning and operating the electric light plant, might legally sell surplus current, within the

limitations of the constitutional provisions, to the other village in question, the village owning and operating such electric light plant cannot sell the same to any person or concern within the corporate limits for purpose of resale. In conclusion I may add that I am inclined to the view that a municipality owning and operating an electric light plant is not authorized to sell electric current to persons and concerns outside of the corporate limits for any purpose other than the use of the same by such persons or concerns for light, heat or power. With respect to the question here presented, however, it is enough to know that such municipality is not authorized to sell current to persons and concerns within its limits for any purpose other than the use of such current for the purposes indicated by section 3618, General Code.

I am, therefore, of the opinion that the board of public affairs, having the control and management of a village electric light plant, may not legally contract with a partnership composed of resident citizens of the municipality, to furnish to such partnership, current for the purpose of being resold by said partnership to another village.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1037.

PROPER CUSTODIAN OF LIBRARY FUNDS—CITY TREASURER—HOW BILLS FOR MAINTENANCE OF LIBRARY MUST BE PAID—CITY AUDITOR.

The city treasurer is the proper custodian of money appropriated by the city council for the use of library trustees appointed under section 4004, General Code, since there are no statutes creating such board of trustees, and prescribing their duties which would entitle the board to control funds appropriated by council, for its purposes. All bills for the maintenance of the library must be paid under the direction of the board of trustees on a voucher signed by the auditor and drawn on the city treasurer, in accordance with section 3795, General Code.

COLUMBUS, OHIO, July 7, 1914.

HON. IRA R. WADE, *City Solicitor, Fostoria, Ohio.*

DEAR SIR:—Under date of May 22nd, you request my opinion as follows:

> "The city of Fostoria has a board of library trustees appointed under section 4004 of the General Code, and appropriates $2,000 a year for the maintenance of a free public library. This board of trustees has organized and elected one of their number treasurer, and has demanded that the city pay over this $2,000 to the treasurer of their board. The city auditor contends that the city treasurer is the proper custodian of these funds, and that all bills for maintenance of library must be paid out on vouchers signed by him and drawn on the city treasurer, and has refused to issue a voucher to pay this amount over to the treasurer of the board of library trustees.
>
> "Will you please advise me which of these two officers is entitled to this money, and whether or not the library board can pay their bills and accounts without having voucher signed by the city auditor."

Section 4297, 4298, 4300, 4301 of the General Code, are as follows:

"Sec. 4297. The treasurer shall keep an accurate account of all moneys by him received, showing the amount thereof, the time when, from whom, and on what account received, and of all disbursements by him made, showing the amount thereof, the time when, to whom, and on what account paid. He shall so arrange his books that the amount received and paid on account of separate funds, or specific appropriations, shall be exhibited in separate accounts. In addition to the ordinary duties of such officer, he shall have such powers and perform such duties as may be required by ordinance of the corporation not inconsistent with this title, and not incompatible with the nature of his office.

"Sec. 4298. The treasurer shall demand and receive from the county treasurer taxes levied and assessments made and certified to the county auditor by authority of the council, and by the auditor placed on the tax list for collection, and from persons authorized to collect or required to pay them, moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses, and costs taxed in the mayor's or police courts, and debts due the corporation, and he shall disburse them on the order of such person or persons as may be authorized by law or ordinance to issue orders therefor.

"Sec 4300. The treasurer shall receive and disburse all funds of the corporation including the school funds, and such other funds as arise in or belong to any department or part of the corporation government.

"Sec. 4301. On the first Monday of February and August in each year, the county treasurer shall pay over to the treasurer of the corporation all moneys received by him up to that date arising from taxes levied and assessments made belonging to the corporation."

Under these sections the control of all municipal funds is given to the treasurer, and he is required to maintain a detailed record and account of all receipts and disbursements of all municipal funds.

Sections 4276 and 4285 are as follows:

"Sec. 4276. The auditor shall keep the books of the city, exhibit accurate statements of all moneys received and expended, and of all property owned by the city and the income derived therefrom, and of all taxes and assessments.

"Sec. 4285. The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

Under these sections it is made the duty of the auditor to keep up accurate records and accounts of all moneys received and expended, on the part of the municipality, by or in behalf of any and all of its departments.

Section 3795, General Code, is as follows:

"The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under

the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. *Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn* from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council."

The moneys appropriated by council for the benefit of the library board, or moneys derived from the general taxes of the corporation, and such moneys must be paid into the municipal treasury and controlled and disbursed in the manner set forth in the above statutes.

Sections 4004 to 4013 of the General Code, provide for a board of library trustees, charged with the custody, control and administration of free public municipal libraries.

Section 4005 empowers such trustees to employ librarians and assistants, fix their compensation, adopt the necessary by-laws and regulation for the protection and government of the libraries, and all property belonging thereto, and exercise all of the powers and duties connected with and incident to the government and maintenance thereof.

I find nothing in these statutes creating such board of trustees and prescribing their duties, which would entitle the board to the control of funds appropriated by council for its purposes, in contravention to the statutes above set forth, providing for such control through the auditor and treasurer of the corporation.

I am of the opinion, therefore, that the city treasurer is the proper custodian of these funds, and that all bills for maintenance of libraries must be paid out under the direction of the board of trustees, on voucher signed by the auditor and drawn on the city treasurer in accordance with section 3795 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1038.

PRIMARY ELECTION NOT A GENERAL ELECTION.

The state primary election to be held this year is not a regular general election, within the meaning of section 4227-1, General Code.

COLUMBUS, OHIO, July 7, 1914.

HON. CLARE CALDWELL, *City Solicitor, Niles, Ohio.*

DEAR SIR:—Under date of June 12, 1914, you request my opinion as follows:

> "Section 4227-1 and those following (103 Laws, 211), provide for a vote at the next *regular* or *general election* upon proper referendum petitions before an ordinance becomes effective. The question in my mind is whether or not the primary election held August 11th, can properly be called a regular or general election. Referendum petitions are now being circulated upon an ordinance passed on June 6th in our council. If the primary is a general or regular election the question should be voted upon then. If not, it should wait until November.
>
> "The term 'general election,' as defined by section 4948 is confined to the November election. It would seem that if the question could be considered at the primary it would be for the reason that the primary is a *regular* election."

The term "general election," is defined in section 4948, of the General Code, as follows:

> "Unless inconsistent with the context, the words and phrases in this chapter shall be construed as follows: * * * The words 'general election' the November election in the years when state and county officers are to be elected. * * *"

Section 4826, appearing in 103 O. L., p. 23, is as follows:

> "All general elections for elective state and county offices and for the office of judge of the court of appeals shall be held on the first Tuesday after the first Monday of November in the even numbered years. All votes for any judge for an elective office except a judicial office, under the authority of this state, given by the general assembly, or by the people, shall be void."

I am of the opinion, therefore, that your interpretation of the term "general election" is correct, and that such term must be restricted to those elections which are held in November for state and county offices, which are held in the even numbered years.

In an opinion rendered to Honorable Don J. Young, prosecuting attorney, Norwalk, Ohio, under date of February 27, 1912, I said:

> "Then again, the requirement of the present primary election law only applies to voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or subdivision thereof, or municipality, at least ten per cent. of the entire vote cast (section 4949, G. C.), and as the object of the legislature in providing

for the submission of the question of the issuance of bonds must have been to obtain an expression of the whole of the entire electorate at the election whereat every voter of the county would be eligible to vote, it is readily perceived that this could not always be had at a primary election, limited as it is to partisan voters. The right of the independent voter and of the Socialist or other party voter whose party may not have received the required percentage at the next preceding election to have his vote recorded for or against the bond issue must be jealously preserved.

"I am, therefore, of the opinion that the primary election is not such an election as is included in the phrase 'regular election' contained in section 3077, General Code."

I am of the opinion that the same argument applies to referendum elections held in a municipality, and that the term "regular election" can have no application to primaries.

My conclusion is, therefore, that a primary may not be considered a "regular" or a "general" election within the meaning of the initiative and referendum act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1039.

WHEN HAMS AND BACON ARE TO BE CONSIDERED IN PACKAGE FORM.

Hams and sides of bacon, when the covering is burlap, paper, gelatin, or cloth, are to be considered in package form, within the meaning of section 13128, *General Code.*

COLUMBUS, OHIO, July 7, 1914.

HON. S. E. STRODE, *Member Agricultural Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of June 12, 1914, you request my opinion whether hams and sides of bacon when covered with burlap, paper, gelatin or cloth, are to be considered in package form within the meaning of section 13128 of the General Code.

Section 13128 is as follows:

"Whoever puts up or packs goods or articles sold by weight, into a case or package, and fails to mark thereon the gross, tare and net weights thereof in pounds and fractions thereof, or, with intent to defraud, transfers a brand, mark or stamp placed upon a case or package by a manufacturer, to another case or package, or, with like intent, repacks a case or package so marked, branded or stamped with goods or articles of a quality inferior to those of such manufacturer, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both."

The word "pack" is defined in Funk & Wagnall's Standard Dictionary as follows:

"To dispose with orderly arrangement in compact shape for convenience in carrying, keeping, or handling; to stow in any receptacle, as a box, a barrel, or package.

"To fill compactly or to overflowing; also to crowd together in close order. To compress tightly; press into a hard, dense mass."

The word "package" in the same work is defined as follows:

"An *article* or a quantity of anything wrapped up or bound together."

Question arises as to whether or not the wrapping of a single article, such as a ham or bacon, might be considered as a putting up or packing. The definition of the term "pack," as above set forth, seems to comprehend primarily the putting up or packing of either bulk substance or of articles, several of which are packed and sold together in a compact bundle or package. In other words, there is a possibility that the language used by the legislature in this section might have no application to wrapping a single article, as opposed to packing numerous articles or a bulk substance.

The definition of the term "package," as above set forth, has a clear application to a wrapped single article.

From the definition of the word "pack," as above quoted, I am of the opinion that one who wrapped a single article could not be viewed as one who packs goods or articles into a case or package within the meaning of this statute. On the other hand, it seems equally clear that one who wraps a single article may be described as one who *"puts up"* into a case or package, and I am, therefore, of the opinion that the wrapping of a ham or a bacon is to be considered a putting up of an article into a package. I, therefore, conclude that section 13128 of the General Code includes within its terms hams and sides of bacon when covered with burlap, paper, gelatin or cloth.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1040.

COUNCIL—POWER TO COMPEL THE MAYOR TO ENFORCE ORDINANCES AND RESOLUTIONS.

The council is without power of itself to compel the mayor to enforce ordinances and resolutions passed by it. Reference is made to remedies provided by the General Code for preferring charges before the council by the mayor against officers guilty of misconduct, and to those provisions of the General Code which provide for charges before the probate court against municipal officers for misconduct, and also to the remedy providing for a hearing before the governor against the mayor for misfeasance in office.

COLUMBUS, OHIO, July 7, 1914.

HON. C. E. DEWALD, *Legal Adviser, Crestline, Ohio.*

DEAR SIR:—Under date of April 14th you request my opinion as follows:

"Some time ago the council of our village passed the enclosed resolution pertaining to the police department. The mayor to date has refused to see that same is carried into effect.

"Will you kindly advise as to what rights and power a council of any village have in compelling the mayor to enforce ordinances or resolutions they may pass?"

A copy of the resolution referred to, and submitted with your letter is as follows:

"RESOLUTION

"Defining, regulating the duties of marshal and patrolman and regulation of police headquarters.

"Be it Resolved by the Council of the Village of Crestline, Ohio, a Majority of the Members Elected Thereto Concurring:

"Section One. That the night patrolmen with the exception of captain report for duty at 6 p. m. each evening and remain continuously on duty until 6 a. m. next morning.

"Section Two. That the captain of patrolmen report for duty at 7 p. m. each evening and remain continuously on duty until 7 a. m. the next morning or until relieved by the marshal.

"Section Three. That one patrolman be continuously on duty in police headquarters in town hall from 6 p. m. unto 7 a. m. each night unless called out on emergency matters pertaining to police duties.

"Section Four. That no curtain or curtains be drawn or placed over the lower half of the windows in police headquarters, except during police investigations. That a light be kept continuously burning in both rooms occupied by police.

"Section Five. That hall and rooms on first floor of the town hall, with exception of water works board room, be cared for by the police department; also the walks surrounding town hall be kept clean by police department, same to be done under supervision of marshal.

"This resolution to take effect and be in force on and after its passage."

In answering your question, I do not enter into the question of the validity of the resolution in question.

Your specific inquiry is with respect to the right and power of a council to compel a mayor to enforce ordinances and resolutions they may pass. Under section 4258 of the General Code, it is explicitly made the duty of the mayor to perform all duties prescribed by the by-laws and ordinances of the corporation, and to see that all ordinances, by-laws and resolutions are faithfully upheld and enforced.

Under section 4262 of the General Code, the mayor is required to "supervise the conduct of all officers of the corporation, and to inquire into and examine the grounds of all reasonable complaints against them, and to cause all their violations or neglect of duty to be promptly punished, or reported to the proper authority for correction."

Under section 4263 and following of the General Code, the mayor is empowered to file reports with council with respect to officers guilty of misconduct, whereupon trial of such officers is had before the council, which body may remove upon substantiation of the charges set forth. The mayor, furthermore, under section 4384 of the General Code, is empowered to remove for cause such patrolmen, night watchmen, deputy marshals, etc., as fail in their duties when the mayor cites such causes to council in writing.

Under Section 4385 of the General Code, the marshal is made the executive head, under the mayor, of the police force, and it is primarily the obligation of that

official to see that such department is properly conducted, and that its individual members perform their specific duties. The marshal in so doing, however, by the terms of section 4385, is subject to the direction of the mayor.

It is clear, therefore, that the duties of seeing that a valid resolution of the nature of that presented by you is enforced, rest upon the mayor and the marshal.

There is no express power conferred by statute, however, upon council enabling that body as such to compel these officers to comply with their duties in this respect. It is council's primary function to enact legislation; the enforcement of such legislation rests with the executive department of the city government, in this case, the mayor and the marshal.

A remedy provided for non-performance of clear official obligation on the part of municipal officers is provided by the statutes by other methods. I have mentioned above the mayor's power to prefer charges against the marshal for misconduct with the council under section 4262 and following of the General Code. Under section 4670 and following of the General Code complaint under oath may be filed with the probate judge of the county against an officer of the corporation who has been guilty of misconduct, such complaint being signed by an elector and approved by four other electors of the corporation. After a trial upon such charges the court is empowered to remove such officers upon substantiation of the same. Provision is, furthermore, made under section 4268 and following of the General Code, for a hearing before the governor against a mayor upon charges of misconduct or gross neglect of duty, etc., in office.

In 103 O. L., p. 851, twenty per cent. of the electors of a village may file a complaint with the common pleas court against an officer of the municipal corporation for gross neglect of duty, misfeasance, malfeasance or nonfeasance in office, whereupon the court of common pleas may remove or suspend such officer.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1041.

MUNICIPAL CORPORATION—AUTHORITY TO PROVIDE FOR SANITARY POLICE PENSION FUND.

Under section 4632, General Code, a municipal corporation having only one sanitary policeman, instead of a sanitary police force, is not authorized to provide a sanitary police pension fund.

COLUMBUS, OHIO, July 7, 1914.

HON. W. B. KILPATRICK, *Member House of Representatives, Warren, Ohio.*

DEAR SIR:—Under date of June 16, 1914, you state that in Warren there is one sanitary police officer, that section 4632 of the General Code provides for a sanitary police pension fund, but the law anticipates a city with more than one policeman, and you inquire if there is any way under this law that a city council could provide means of giving a pension where only one policeman is employed.

Section 4632 reads as follows:

> "In any municipal corporation having a sanitary *police force*, supported in whole or in part at public expense, the council by ordinance may declare it necessary to establish and maintain a sanitary police pension fund. Thereupon a board of trustees, who shall be known as trustees of the sanitary

police fund, shall be created which shall consist of a board or officer having charge or control of the health department in such municipality, *and five persons, members of the sanitary police force,* but upon petition of a majority of the *members of the sanitary police force,* such board or officer, as the case may be, may designate a less number than five to be elected trustees."

Section 4633 defines the manner in which trustees shall be chosen. In this section reference is had "to each person in the sanitary police force." You will observe that the word "police force" is used in the statute quoted, and the other sections referred to seem to contemplate that there shall be more than one policeman in order that a pension fund may be established. The word "force," used in the sense in which it appears in the statute, carries with it the same implication. It contemplates an organization of individuals, or, as defined in the Century Dictionary, "a union of individuals and means for a common purpose; a body of persons prepared for joint action of any kind."

These definitions would not describe a single individual, and I do not think there has been any such popular usage of the word force as would sanction its acceptance in any other sense than that expressed in the foregoing definition.

In White vs. Supervisors 105 Mich., 609, it is said:

> "A police force is an organization having the controlling mind by which its members may be made to act in concert."

With these considerations in mind, I am constrained to hold that section 4638 does not authorize the establishment of a sanitary police pension fund in a municipal corporation which has only one sanitary policeman instead of a sanitary police force.

An interesting question arises in this connection, however, upon the proposition that a municipal corporation might have the inherent right to establish a pension fund for its employes. It must be remembered that pensions for municipal services are sustained as constitutional upon the ground that legislation of this character is not a grant of a gratuity or charity but a recognition of an obligation founded upon services rendered. These payments after the expiration of a period of service are treated as in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services. It is said to be in effect pay withheld to induce long, continued and faithful service and the public is benefited by the encouraging of competent employes to remain in the public service and by retiring from such service those who become incapacitated from performing the duties as well as they might be performed by others more youthful or in greater physical or mental vigor. This doctrine is very clearly and lucidly expressed in section 430 of Mr. Dillon's work on "Municipal Corporations."

In Commonwealth vs. Walton 182, Pa., 373, it was held that a contribution to a pension fund association was for a proper municipal purpose. It was said to be a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of municipal service in which every property owner and resident of the city was most vitally interested.

Now if the constitutionality of laws of this character is sustained upon the ground that such laws are for the benefit of the municipality, the city might be said to have the inherent power of establishing such fund without regard to state legislative authority, but as this question has not been decided in this state, and so far as I know, has never been here raised, I should not like to advise any munici-

pality to proceed upon the assumption that it has any such power except as conferred by statute. The very fact that the statute itself authorizes the pensioning of certain public servants by a municipal corporation would seem to carry with it the implication that it was the intent of the general assembly that all other methods of creating pension funds were to be inhibited. In other words, the expression of the one was the exclusion of all others. This is one of the strong arguments against the theory which I have suggested with reference to the inherent power of the municipal corporation to provide for pensioning of employes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1042.

AUDITOR OF STATE—MAY NOT ISSUE WARRANT TO DISBURSING OFFICER OF STATE DEPARTMENT—HOW SUCH WARRANT MUST BE ISSUED.

The auditor of state may not issue a warrant to a disbursing officer of a state department or institution upon a claim created by such department or institution in favor of a third party; such warrant must be issued to such third party, or to his legal assigns.

COLUMBUS, OHIO, July 7, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of May 7th requesting my opinion upon the following question:

> "May the auditor of state lawfully issue a warrant to the disbursing officer of a state department or institution upon a claim created by such department or institution in favor of a third party, the purpose being to permit the department in question to issue checks instead of warrants to its creditors; the intention being that the warrants so issued by the auditor of state shall be banked by the department or institution so that such checks can be issued?"

As a condition of this question it is supposed that the warrants to be issued if payable to the disbursing officer of the institution or department shall be predicated upon detailed and itemized vouchers, sufficient in all respects for auditing purposes. It is also understood that the object of such a scheme is to reduce the number of warrants required to be issued by permitting a single warrant to be drawn covering all the vouchers chargeable to any one specific appropriation account which happen to be presented at a given time.

It is further understood that the proposed plan does not involve the consent or authority of the person to whom payment is due.

You inquire further as to what would be the liability of the auditor of state in the event such a scheme were adopted, and in the event further that the bank employed by the department or institution for the described purpose should become insolvent.

Your question requires consideration of section 243, General Code, which provides as follows:

"The auditor of state shall examine each claim presented for payment from the state treasury, and, if he finds it legally due and that there is money in the treasury duly appropriated to pay it, he shall issue to the *person entitled to receive the money thereon* a warrant on the treasurer of state for the amount found due, take a receipt on the face of the claim for the warrant so issued, and file and preserve the claim in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

In practice extending over a large number of years the phrase "person entitled to receive the money thereon" used in the section as above quoted has been interpreted to mean a person in whose favor a claim is created by the state agency having authority to incur the liability and not the department or institution or officer creating the liability. Of course this interpretation really is the primary meaning of the phrase. I mention the practice, however, because the usual form of appropriation bills which has been employed by succeeding sessions of the general assembly has been such as possibly to give color to a condition to the effect that the appropriations are for the use of the various departments as such rather than to pay liabilities incurred by the various departments. Such a contention, however, in my judgment, could not be upheld in the face of the express language of section 243, General Code, and in the light of the uniform practice as I have described it.

Such being the meaning of the section above cited, then, it follows that your question must be answered generally in the negative. It is the duty of the auditor of state to issue his warrant to the person entitled to receive the money on a claim presented for payment from the state treasury, and this implies that the auditor of state is without authority to issue his warrant on account of a given liability, to any person other than the one in whose favor the liability exists. Of course the auditor of state may lawfully recognize an assignment of a voucher or a written agreement on the part of the person in whose favor the liability exists to permit the warrant to be issued to another as his representative. Such is the practice, for example, in the matter of the pay rolls of the various departments and the propriety of such practice is sanctioned by express legislative recognition through the medium of provisions found in the last budget appropriation bill to the effect that certain requisitions or vouchers may be presented by properly designated representatives of departments, institutions, etc. But your question is conditioned upon failure to secure the authority of the person in whose favor the liability exists.

Accordingly, I am of the opinion that the auditor of state may not, under the conditions mentioned by you, lawfully issue a warrant upon a claim created in favor of the third party by an institution or department of the state government except to such third party or his assigns.

This conclusion makes it unnecessary for me to consider the liability of the auditor of state in the event of the contingency mentioned by you in your second question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1043.

RIGHT OF COUNTY COMMISSIONERS TO REPLACE PAVING ON STREET AND SIDEWALKS DESTROYED BY THE CONSTRUCTION OF APPROACHES TO A BRIDGE WITHIN A MUNICIPALITY.

Where the replacing of a bridge by the county commissioners has necessitated the raising of the street of a municipality, and the county commissioners have entered into a contract with a contractor whereby the building of sidewalks and relaying of blocks in the approaches to said bridge is to be done, the county commissioners have the authority to complete the construction of the bridge approaches and sidewalks contracted for, providing that the paving on the sidewalks and streets was destroyed by the making of the approaches to the bridge.

COLUMBUS, OHIO, July 8, 1914.

HON. CLYDE C. PORTER, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I have your letter of late date in which you inquire:

"Sometime during the fall of 1913, the county commissioners of Seneca county sold bonds for the construction of two bridges, Washington street and Perry street, within the city of Tiffin, and afterward let contracts for the construction of said bridges.

"The contract for the Washington street bridge provided for the building of the sidewalks and the relaying of the blocks on the approaches to said bridge. The contractor has practically completed this bridge and filled the approaches thereto. We have been informed that the commissioners have now taken the stand that they cannot relay the brick or construct the sidewalks on the approaches though the contract let by them and for which bonds were sold provided that the contractor should relay the brick to the approaches to the bridge and replace the sidewalks on the approaches to said bridge made necessary by the change in grade. * * *

"We might further say for your information that the contract let for the bridge provided for bridge two feet higher than the original bridge. This necessitates the raising of the grade of the streets for about 125 feet and this the city has done. We desire to know whether or not the city of Tiffin, under the circumstances detailed must pay for the paving and sidewalks necessitated by the raising of the bridge two feet by the county."

The sections of the General Code for consideration in answering your question are:

"Section 2421, G. C. The commissioners shall construct and keep in repair necessary bridges over streams and public canals on 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 cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners.

"Section 2422, G. C. Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named

in the preceding section. But when the cost of the construction or repair of the approaches or ways to any such bridge does not exceed fifty dollars, such construction or repair shall be performed by the township trustees.

"Section 7444, G. C. The county commissioners shall keep in repair the portions of such roads within their respective counties, as are included within the corporate limits of a city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no further."

A consideration of these sections places the duty of constructing bridges and approaches upon the county commissioners, and this seems to have been conceded by the county authorities up to and until after making the contract for the Washington street bridge.

You state that the new bridge is located some two feet higher than the old bridge, thus necessitating a change of street grades for about 125 feet, which the city has done; and as I understand, the commissioners have filled the approach to the level of the new grade, but deny power or duty to place the sidewalk upon the approach. Nothing is said as to whether the approach to the bridge was taken out by the flood when the bridge was destroyed, nor what was the condition of the approach and the pavement thereon, when the contract was let for the construction of the bridge.

Assuming that the flood did not destroy the approach to the bridge, and that it, with the pavement thereon, was intact when the bridge contract was let, a very different question is presented from what would exist in the event of the approaches and sidewalks thereon having been destroyed by the flood. In other language, if the bridge, the approaches thereto and sidewalks thereon were all destroyed by the flood, the replacing or rebuilding of them would fall to the lot of those whose duty it was to originally construct them, and then it would be the duty of the county to rebuild the bridge and its approaches and the city to replace the pavements on the approaches leading to the bridge.

Upon this question the case of Slusser vs. City of Sidney, 11 O. N. P., n. s., 297, is cited and relied upon, but to my mind, it is not in point and the language of Mather J., to which my attention has been called, appears to me to be purely obiter. However, I am of the opinion that the case of Saunders vs. Gun Plains township, 76 Mich., 183, is in point and to the effect that as an elementary proposition, the pavement upon the approach to a bridge is not such part of either the bridge or the approach as to make it the duty of the county commissioners, in the case under consideration, to construct it, but such duty would primarily rest with the city.

However, this does not necessarily answer your question, for the reason that this is not original construction; is not, so far as I am advised, the rebuilding and replacing pavements or sidewalks destroyed by a flood, but the reconstruction of a bridge so destroyed and the changing of a street grade upon the approach to such bridge made necessary by the acts of the commissioners in raising the level of the bridge; such being the case, it is not only exceedingly doubtful whether the matter is to be governed by the strict and literal legal rights and duties of the parties, or whether it is to be controlled by the broad principle that where one party, by his act, destroys a portion of a public way, in the lawful exercise of a power granted, the person so acting should be held liable to place such public way in the same, or substantially the same condition as before the doing of the act. Such was the view taken by the commissioners when, as you state, "the contract let by them and for which bonds were sold provided that the contractor should relay the brick to the approaches to the bridge and replace the sidewalks on the approaches made necessary by the change of grade."

Taking this view of the matter, I am of the opinion that the commissioners should complete the construction of the bridge, approaches and sidewalks, as contracted for, and should make no claim against the city for the doing of the same.

Of course, this opinion is based upon the assumption that the pavement on the approach to the bridge was not destroyed by the flood and the paving in question was not made necessary by the flood, but by the action of the commissioners in raising the level of the bridge, thus necessitating a raising of the street and pavement level on the approach, and the building of a new pavement thereon.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1044.

POWER OF COUNTY COMMISSIONERS TO LIQUIDATE AN INDEBTEDNESS OF THE COUNTY AGRICULTURAL SOCIETY WHEN SUCH INDEBTEDNESS HAS BEEN CAUSED BY PLACING IMPROVEMENTS ON FAIR GROUNDS.

The county commissioners may under authority of a vote of the people liquidate an indebtedness of the county agricultural society, when the same amounts to $15,000 *or more, and if the indebtedness amounts to less than* $15,000, *and has been caused by placing improvements on the fair grounds, the commissioners may contribute such sum as will equal half the cost of the purchase and improvement, and apply the same to the liquidation of such indebtedness, and under authority of a vote of the people may contribute more than half of such cost and so apply it, providing the same can be done by a levy of taxes at a rate not exceeding half a mill.*

COLUMBUS, OHIO, July 8, 1914.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some time ago you submitted to this department a question asked of the commission by the secretary of the Muskingum county agricultural society. Your letter of submission stated a general question relative to the power of county commissioners to levy taxes or appropriate money to pay debts incurred by agricultural societies. I find, however, that the statutes are such that it will be most convenient to take the specific case submitted by the Muskingum county agricultural society as a basis of my discussion.

That question is as follows:

The title to the Muskingum county fair grounds is vested in the agricultural society. It was purchased so long ago that the nature of the proceedings had at that time cannot now be ascertained; however, it appears from the records of the county commissioners that the latter have repeatedly entered upon their journal their consent and approval to the mortgaging of the fair grounds by the agricultural society. It also appears that on numerous occasions the commissioners have levied taxes and paid off such mortgage indebtedness.

At the present time, the fair grounds are encumbered by mortgage, given as security for money borrowed for the purpose of placing buildings and improvements on the grounds.

May the commissioners lawfully levy taxes for the purpose of paying such indebtedness?

I have considered the following sections of the General Code:

"Section 9885. County societies which have been, or may hereafter be organized, are declared bodies corporate and politic, and as such, shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased, or may hereafter purchase, as sites whereon to hold their fairs. They may mortgage the grounds of the society for the purpose of renewing or extending pre-existing debts, and for the purpose of furnishing money to purchase additional land. But if the county commissioners have paid money out of the county treasury to aid in the purchase of the site of such grounds, no mortgage shall be given without the consent of such commissioners."

From this section it appears that if, as is stated, the county commissioners have repeatedly given formal approval, and consent to the creation of incumbrances against the fair grounds, it must be that originally the county commissioners paid money out of the county treasury to aid in the purchase of the site.

"Section 9887. When a county society has purchased, or leased real estate whereon to hold fairs for a term of not less than twenty years, or the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings; if they think it for the interests of the county, and society, the county commissioners may pay out of the county treasury the same amount of money for the purchase or lease *and improvement* of such site as is paid by such society or individuals for that purpose, and may levy a tax upon all the taxable property of the county sufficient to meet such payment.

"Sec. 9863. In counties wherein there is a county agricultural society which has purchased a site whereon to hold fairs, or if the title to such grounds is vested in fee in the county, and such society is indebted fifteen thousand dollars or more, upon the presentation of a petition signed by not less than five hundred resident electors of the county praying for the submission to the electors of the county of the question whether or not county bonds shall be issued and sold to liquidate such indebtedness, such commissioners, within ten days thereafter by resolution shall fix a date which shall be within thirty days, upon which the question of issuing and selling such bonds, in amount and denomination such as are necessary for the purpose in view, shall be submitted to the electors of the county. * * *

"Sec. 9889. Such election shall be held at the regular place of voting in the county and conducted, canvassed and certified except as otherwise provided by law, as are elections for the election of county officers. * * * If a majority of the voters voting upon the question of issuing the bonds vote in favor thereof, then and not otherwise they shall be issued, and the tax hereinafter mentioned be levied.

"Sec. 9891. Such bonds shall be issued for a period of not less than ten nor more than twenty years. The county commissioners thereupon shall levy a tax upon all the taxable property on the duplicate of the county to pay such bonds as they mature and the interest thereon, at the rate and for such length of time as may be necessary for the purpose.

"Sec. 9892. From the proceeds arising from the sale of such bonds, the county commissioners shall pay off and liquidate the indebtedness for which they were so sold.

"Sec. 9894. When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such

lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy.

"Sec. 9895. If a county society and the county commissioners decide that the interests of the society and county demand an appropriation from the county treasury for the purchase and improvement of county fair grounds greater than that authorized by the preceding section, or without action of or purchase by the society, the commissioners may levy a tax upon all the taxable property of the county, the amount of which they shall fix, but shall not exceed half a mill thereon, in addition to the amount authorized in the preceding section to be paid for such purpose.

"Sec. 9896. No such tax shall be levied until the question as to the amount is submitted by the commissioners to the qualified electors of the county at some general election, a notice of which specifying the amount to be levied, has been given at least thirty days previous to such election, in one or more newspapers published and of general circulation in the county. Those voting at the election in favor of the tax shall have written or printed on their ballots 'Agricultural tax, Yes,' and those voting against it, 'Agricultural tax, No.' If a majority of the votes cast be in favor of paying such tax, it may be levied and collected as other taxes.

"Sec. 9898. When a society is dissolved or ceases to exist, in a county where payments have been made for real estate, or improvements thereon, or for the liquidation of indebtedness, for the use of such society, all such real estate and improvements shall vest in fee simple in the county by which the payments were made.

"Sec. 9899. The county commissioners of a county may keep the buildings owned by the county agricultural society or county insured, if deemed proper by them, for the benefit of such society, or the county, as the case may be.

"Sec. 9908. When the commissioners of a county have paid, or pay, money out of the county treasury for the purchase of real estate as a site for an agricultural society whereon to hold its fairs, the society shall not encumber such real estate with any debt, by mortgage or otherwise, without the consent of the commissioners duly entered upon their journal. * * *"

(This section is similar in purport to a part of section 9885, above quoted.)

Other sections in *paria materia* might be quoted showing that where the county has advanced money to aid in the purchase of the fair grounds, or their improvement, the agricultural society does not hold perfect title thereto. Thus, it is provided in such sections that such fair grounds may not be sold without the consent of the county, when the purpose of sale is to secure funds to procure another site. However, I think it is sufficiently apparent, from what has been quoted, that when the proceeds of county taxes have been used to aid in the purchase of fair grounds, the grounds, themselves, are, in a remote and qualified sense, county property.

Looking now for an answer to your question, in the provisions above quoted, I observe that sections 9888 to 9892, supra, provide very clearly for the assumption by the county of an indebtedness of an agricultural society, amounting to $15,000.00

or more, by the issuance of bonds, upon the approval of the electors of the county. If the facts in a given case show that the indebtedness to be liquidated amounts to $15,000.00 or more, then it would appear that the only manner in which the county commissioners could lawfully liquidate such indebtedness, at least by issuing bonds therefor, would be under authority of the vote of the electors; but it would likewise appear that the commissioners clearly have authority to proceed in this manner when the facts are as above stated.

It would seem unreasonable to hold that the county commissioners, even under sanction of the vote of the electors, would have authority to levy taxes for the assumption of an indebtedness of $15,000.00 or more, but would not have authority to levy taxes for the liquidation of a similar indebtedness amounting to less than $15,000.00. Of course, such a result might conceivably follow from the plain terms, or lack of them, used in the statutes themselves. But if other statutes than those above specifically referred to by fair inference, afford power to the commissioners to liquidate indebtedness of a county agricultural society, less in amount than $15,000 00, it would seem that some presumption, at least, that such is the legislative intention is afforded by consideration of the fact that explicit authority is given to the commissioners to assume an indebtedness exceeding $15,000.00 in amount, and to issue bonds therefor, upon the vote of the electors.

It seems to me that provisions of this nature are found in sections 9887, 9895 and 9896 of the General Code. These sections, as they now appear, seem somewhat at variance. One of them authorizes the county commissioners to pay, out of the county treasury, for the improvement of a fair ground site owned by the agricultural society, an amount equal to that advanced by the society for such purpose. The other group of sections, however, provides that, in addition to the current levy in aid of the society, the commissioners may make an additional levy for the purpose of purchase and improvement of grounds, provided the electors of the county approve the proposition.

It appears, however, that the two sections or groups of sections were not intended, at least, to be at variance with one another, because they were originally all a part of the same act of the legislature. I find that reference to the original act serves to clear up the difficulties encountered; and I further find that there is such an ambiguity in the statutes, as they now stand, as to justify reference to the original act, for the purpose of determining the meaning of the present law on well understood principles of statutory construction.

The original act is found in 68 O. L., 50, and is in form amendatory of section 3 of an act supplementary to an act for the encouragement of agriculture, passed February 15, 1853, as amended, April 8, 1868. Without quoting all of its provisions it suffices to say that the first sentence is substantially the equivalent of the present section 9887, General Code, and the remaining provisions are substantially the equivalent of section 9895, et seq., General Code (although what is now section 9887 has been subsequently amended; 84 O. L., 230).

When the statutes were codified in 1880, the first part of this act became section 3702, R. S., and the latter part became section 3703, et seq., when it was that the phrase "the preceding section" was first used in what is now section 9895, General Code. (See. R. S. of 1880, sec. 3703.)

Subsequently, the intervening sections, now designated by sections 9888-9894, inclusive, were independently enacted, receiving publishers' section numbers 3702-1-3702-4, inclusive, and 3702b.

Despite the insertion of these sections out of their appropriate place, I am of the opinion that the words "the preceding section" continue to mean what they originally meant, and as they are found in section 9895, they refer not to section 9894 but to section 9887.

The joint effect of section 9887 and 9895, et seq., General Code, may be described as follows:

The county commissioners may, if they think it for the interest of the county and their society, pay out of the county treasury, without a vote of the people, an amount equal to the amount expended by the agricultural society, for the purchase and improvement of the fair ground site. This may be done at any time, regardless of when the expenditure, on the part of the society, was made. Of course, the law does not contemplate that the society shall be reimbursed for expenditures already made by it; but where the grounds have been purchased or the improvement made and the society has paid one-half the cost and expense thereof, the remainder being unpaid, the commissioners may act.

Then sections 9815, et seq., have the effect of authorizing commissioners, on agreement of the society, to pay a greater portion of the total cost and expense of purchasing and improving county fair grounds than one-half thereof, if such payment can be provided for by a levy of not to exceed one-half a mill on the taxable property of the county, and if, further, such tax is authorized by the affirmative vote of the electors.

While, therefore, the county commissioners are not authorized by any provision of law other than those of sections 9888, et seq., General Code, to levy taxes or borrow money directly for the purpose of liquidating the indebtedness of an agricultural society, yet, if it appears that the county has not paid one-half the cost of the purchase and improvement of the site used as a fair ground, and primarily owned by the society, and the grounds or improvement are not paid for, the commissioners may lawfully levy taxes and appropriate money for the purpose of having the county pay such part; and if it appears that the county has already paid one-half the cost of such improvement of the fair ground property, the commissioners may submit to the vote of the electors the proposition of levying taxes at a rate of not exceeding one-half mill on the county duplicate for the purpose of assisting, further, in the purchase and improvement of such site. The proceeds of such levies, if made, should be, of course, applied, directly or indirectly, to such purchase and improvement; but, in my judgment, the liquidation of indebtedness, incurred in the improvement of the grounds, would constitute the proper application of such funds.

As I have intimated, the interpretation which I have placed upon the statutes is a very liberal one and is justified, principally, by consideration of the fact that the liquidation of an indebtedness, amounting to $15,000.00 or more, is specifically authorized by statute so that it would appear that the sections which I have been discussing should receive such an interpretation as to permit the liquidation of an indebtedness of less than that amount.

Aside from the statutes which I have mentioned, I find no authority of law enabling the county commissioners, either directly or indirectly, to levy taxes for the liquidation of an indebtedness by an agricultural society, for placing improvements upon a fair ground.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1045.

BONDS ISSUED CONTRARY TO LAW IN EXCESS OF THE ONE PER CENT. LIMIT—BONA FIDE HOLDER—DUTY TO PAY SUCH BONDS—ILLEGAL TO LEVY TAX TO PAY SUCH BONDS WHERE NO OBLIGATION HAS BEEN CREATED.

Bonds issued in excess of the one per cent. limit, provided in the Longworth act, may nevertheless, be valid obligations of a municipality in the hands of bona fide holders, if the amount of the single issue exceeds the limit, and if the ordinance, or the bonds contain recitals to the effect that all provisions of law have been complied with.

The same rule applies in the federal and state courts, and such a bona fide holder can compel the levy of a tax to pay bonds so issued.

It would be legal to levy taxes for the payment of such bonds so illegally issued, under the circumstances stated; but where no obligation has been created, it would be illegal to levy taxes to pay the bonds, and under the circumstances, as stated, the budget commissioner and the county auditor might lawfully refuse to extend a levy certified by the council for the purpose of paying bonds, which do not constitute a lawful obligation of the municipality even though it is no part of the statutory duty of the budget commission to pass upon the regularity of the bonds.

COLUMBUS, OHIO, July 8, 1914.

Bureau of Inspection & Supervision of Public Office, Department of Auditor of State Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of May 7th, asking an opinion upon the following questions:

> "If a municipality issued bonds without a vote of the people in excess of the one per cent. limit provided in the Longworth act, may council or the budget commission permit a levy to be made upon the taxable property of the municipality to meet all or a portion of the said indebtedness thus illegally issued and floated?
>
> "Said bonds were issued for the construction of a municipal waterworks plant, and the revenues resulting from the operation of said plant are not sufficient to meet the interest charges. In the event that the council or budget commission refuses to levy a tax to meet said interest charges, would mandamus action in the common pleas court lie to compel said council or budget commission to provide for such indebtedness?
>
> "If said bonds were held by non-residents of the state, would payment be enforced by the federal courts?"

Your first question may be answered generally by saying that it is at least the right of the proper taxing authorities of the municipal corporation, and other officers having power respecting municipal levies, to cause taxes to be levied for the payment of any bonded indebtedness which constitutes a binding obligation of the municipality. (Section 5506, General Code.)

This being true, it follows that, unless the fact that the Longworth act limitations have been violated, together with the other facts surrounding the transaction, is sufficient under the given circumstances to absolve the municipality from total or partial liability on account of the bonds which have been issued, it would be lawful, notwithstanding such violation of the law governing the issuance of the bonds, for the taxing officers to levy taxes for their payment.

The answer to your first question, then, becomes dependent upon considerations suggested by the form of your second question. The sections of the Longworth act to which you refer impose certain limitations upon the bonded indebtedness of municipal corporations. Unquestionably, from the point of view of the municipality and its taxpayers, the issuance of bonds in violation of these limitations is unlawful, and unless paramount rights intervene it is the right of the public to refuse to be bound by the obligation thus attempted to be incurred.

This being the public right it would seem also to follow that it is the duty of the public officer charged with the raising of revenues to refuse to levy taxes for the purpose of providing for the payment of such unlawfully issued bonds, on the theory that the bonds are simply void. Such is, indeed, the inference from section 3953, a part of the Longworth act, which requires an annual sinking fund and interest levy "for the payment of all bonds *herein authorized.*"

But municipal bonds are negotiable instruments; and the power to issue them as such carries with it the liability on the part of the municipality to be governed by the rules of law peculiarly applicable to such instruments, qualified only by such considerations as may arise out of the fact that the municipal government is a public agency with limited powers.

The rules to which the municipality, as a maker of a negotiable security, is subject, may be summarized by the familiar statement that despite an infirmity in the original issuance of such securities, they may constitute valid, binding obligations of the corporation in the hands of one who, for value, has purchased them before maturity without notice of the infirmities which they originally possessed. This rule is opposed in a sense by the rule above referred to, viz.: that those who deal directly or indirectly with municipal agents are charged with notice of the law governing their action and with the limited extent of the authority which they possess, and to bind their principal, the public. Really, then, the opposite force of these two rules makes the ultimate question in each case depend upon the question of notice. Of what is the purchaser or holder of negotiable bonds charged with notice?

In Dillon on municipal corporations, volume 2, section 924, will be found an admirable summary of the application of the rules surrounding this question to the case of bonds issued under the restraint of debt limitation.

It will be found by consulting this author that, regardless of the form of the security, there are certain things, the knowledge of which, all takers of such securities are charged and put upon their inquiry. These are the public records specified in the law under which the bonds are issued. Consulting the chapter of the General Code authorizing the issuance of bonds, we find the following reference to specific public records:

> "Section 3918. Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, *and under what ordinance.*
>
> "Section 3940. Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation under the authority conferred in the preceding section, *shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation.*"

Two public records are here specified, viz., the ordinance under which the bonds are issued, and the tax duplicate of the municipality. The one would notify the holder of the bonds as to whether or not two-thirds of all the members elected to council had concurred in its passage as required by section 3939, and as to whether or not a vote of the electors had been taken as required in certain contingencies by section 3940.

It would also charge the holder of the bond with notice as to the total amount of the whole issue of bonds of which his particular securities are a part. The other would charge the purchaser with notice as to the amount of bonds which the municipality might issue at one time and, therefore, within any one year, without a vote of the people.

By putting together the facts of which he would thus have constructive knowledge, the puchaser of the bonds would know whether or not the single issue itself exceeded in amount one per cent. of the tax duplicate of the municipality; and he would likewise know whether or not a vote of the people had been taken. So that if the amount of the single issue itself exceeded the one per cent. without counting other bonds issued in the same year, the purchaser would be bound to know that the bonds were invalid and could not claim to be a bona fide holder of them.

Buchanan vs. Litchfield, 102 U. S., 278.
Dickson County, vs. Field, 111 U. S., 83.
Lake County vs. Graham, 130 U. S., 674.
Sutliff vs. Lake County, 147 U. S., 230.
Nesbitt vs. Riverside, Ind. District, 144 U. S., 610.

As against such notice as this, the purchaser of the bonds cannot claim reliance upon recitals upon the face of the bonds, which, under circumstances hereinafter to be discussed, might work an estoppel against the municipality.

Therefore, it follows that under the circumstances already discussed, viz., where the single issue exceeds the limitation without counting other bonds issued in the same year, the bonds would be absolutely void, and no one could acquire as against the municipality any rights whatever under them as such; so that they would neither form the basis of a valid tax within the meaning of your first question, nor the foundation for an action in mandamus or otherwise as inquired in your second question

Before leaving the question, permit me to say, that in my judgment, waterworks, bonds issued for the *construction* of a plant (which carries with it the idea that there has been no plant in existence theretofor) are always to be counted at the time of their issue in ascertaining the one-per cent. limitation of the Longworth act. The section which exempts them under certain circumstances from consideration in ascertaining the limitations of that law describes the exempted bonds as follows:

Section 3949, General Code, paragraph f.:

> "f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks *is* sufficient to cover the cost of all operating expenses, interest charges, and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

It is perfectly apparent that the bonds do not acquire the attribute of exemption from consideration until it is established as a fact that the income from the waterworks is sufficient for the purpose mentioned. The anticipated sufficiency of waterworks revenues will not serve to accomplish this result, nor is this conclusion shaken by consideration of the fact that the sufficiency of such revenues for the purpose stated could hardly be ascertained in a single year following the issuance of the bonds; because purchase and construction are not the only kinds of waterworks bonds mentioned in the paragraph. Improvement and extension bonds are likewise mentioned, and as such bonds would naturally be issued while the waterworks was a going concern, it would follow as to them that the one-per-cent. limit could have perfect application, and, hence, the exemption of such bonds from consideration in ascertaining the one-per-cent. limit is not a vain thing.

As to the purchase and construction bonds issued when there is no waterworks in existence, however, I am persuaded that the one-per-cent. limitation is concerned. That limitation differs from the other two limitations prescribed by the Longworth act in certain essential particulars, which I need not dwell upon. Suffice it to say that the limitation is upon the gross indebtedness created in a year. If the waterworks is not being operated so that it can be ascertained what the income is, or whether or not it is sufficient to satisfy the requirements of paragraph "f" of section 3949, it is obvious that all purchase and construction bonds issued for waterworks purposes under the circumstances supposed, must, at the out-set, be counted in ascertaining the one-per-cent. limitation and are themselves subject thereto.

Consideration of the language of the one-per-cent. limitation as compared with the other two which relate to the outstanding net indebtedness, net indebtedness being computed by ascertaining the difference between the par value of the bonds and the amount held in the sinking fund for their redemption, it at once appears that the fact that premiums, accrued interest and the balance in the improvement fund may reduce the net indebtedness created by an issue of bonds, is not material in so far as the one-per-cent. limitation is concerned; that limitation, as already stated, being upon the gross indebtedness created in a given year without deduction for credits to the sinking fund on account of the bond issue.

From all these considerations it follows that in the case of waterworks construction bonds where no plant has been in operation, and where it cannot be determined at the time of the issuance whether or not the waterworks is satisfying paragraph "f" of section 3949, General Code, all the facts required to put the purchaser of such bonds upon his notice as to their infirmity would appear from the tax duplicate and a recital on the face of the bonds showing the total amount of the issue. I mention these facts because were the situation otherwise, and if the illegality of the bond issue was dependent upon the application of paragraph "f" of section 3949, i e., upon whether or not the waterworks was producing sufficient income for the purpose therein stated; and if the one-per-cent. limitation applied to the net indebtedness instead of to the gross indebtedness, then it would not be true that a purchaser of bonds could tell by looking at the face of the bonds and taking cognizance of the amount of the tax duplicate that the limitations of the law had been violated even where, as in the case thus far supposed, the amount of the bond issue itself is in excess of one per cent. of the duplicate. Instead, the legality of the bonds would depend upon facts of an entirely different nature within the rule subsequently to be discussed in this opinion, and under such circumstances, appropriate recitals upon the face of the bonds might estop a municipality from contesting their validity in the hands of subsequent purchasers for value before maturity.

But no statute requires any specified public record to be kept by the municipality showing the amount of bonds issued in a given year within the meaning of the rule as stated by Judge Dillon. Therefore, if the municipality's violation of the 1% limit of the Longworth act occurs by reason of successive issues in the same year, and not by reason of the single issue involved, an innocent purchaser would not be advised by any such public record, or by anything which would come to his notice as mere possessor of the bonds, that there was a defect underlying their issuance. He might, of course, satisfy himself as to the existence of such defects by examining the other ordinances of the municipality. This he is required to do at his own peril, unless there is something on the face of the bonds imputing compliance with the necessary requirements of law. That is to say, if the face of the bonds or the ordinance to which they are required to refer on their face by section 3918, General Code, does not advise the purchaser that they have been lawfully issued, he is put upon his inquiry; but if sufficient recitals are there found he is excused from making any such inquiry, and becomes a bona fide holder without notice of such infirmities as might be disclosed by such an inquiry.

This is what is known as the estoppel of the municipality by recitals made by its

officers from asserting as against such a bona fide holder the defense which it might otherwise have. As stated by Judge Dillon, such a recital must be in terms sufficient to satisfy the statutes themselves, and to lead the purchaser to believe, in the face of facts, with notice of which he is charged, that the bonds are valid.

Whatever may be the rule as to the exact form of such a recital, which will be sufficient for this purpose, it is clear that if there is an explicit declaration to the effect that all the requirements of law have been complied with in the issuance of the bonds, the same will amount to an insurance that the bonds are within the statutory limit.

Judge Dillon also lays down the rule that, the fact, against which as a defense an estoppel is claimed by reason of a recital in the bond, or in the ordinance, must be one, which, either expressly or by necessary or reasonable implication, the issuing officers have authority to adjudicate and determine.

Underlying the doctrine of estoppel is the familiar rule that the adjudications of judicial and administrative officers are not open to collateral attack. (State ex rel. vs. Board of Education, 27 O. S., 96, 97.)

If the recital itself amounts to a finding and determination relative to a fact which the issuers are expressly or by necessary implication authorized to find and determine on behalf of a municipality, it is the recital of the municipality; otherwise it is a mere unauthorized statement and cannot bind the public.

The statutes, as I have stated, do not confer upon council express authority to make recitals either in the ordinance or on the face of the bonds. However, by conferring the power upon council, subject to the limitations, they necessarily repose in council, the duty of determining as a condition of each separate exercise thereof, whether the statute has been complied with thereby.

It has been held in State ex rel. vs. Board of Education 27 O. S. 96, that when a municipal authority having power to issue bonds, proceeds to exercise such power and send into the market bonds upon which the affirmation appears that they are under and in pursuance of a given law, that affirmation cannot afterwards be denied as against a bona fide holder. Similarly in State vs. Commissioners, 37 O. S., 526, it is held that where a municipal authority (in this case the board of county commissioners) is given power to issue bonds only under certain conditions, there is implied the power to pass upon the question as to whether or not the conditions exist and to incorporate a finding to the effect that they do exist, as one of the recitals on the face of the bonds.

Again, in Commissioners vs. Nichols, 14 O. S. 260, at page 271, Peck, C. J., used the following language:

> "No person or tribunal is *expressly* invested by the statute with power to determine this question, and we are, therefore, of the opinion that the statute, in imposing the duty upon the commissioners, of issuing the bonds if a sufficient sum is provided, and prohibiting them from doing so if the sum is insufficient, *necessarily* invests them with the power to determine as to the sufficiency of the means provided for the completion of the road."

These decisions support the conclusion that under a statute like sections 3939 et seq., General Code, and under circumstances like those which we are now discussing (that is where the question whether or not the limitation is exceeded, depends upon the counting of other bonds issued during the year without a vote of the people, and is not foreclosed by the amount of the issue itself) the council has necessarily the implied authority to determine whether or not the jurisdictional facts underlying its action exist; and if a recital with respect to those facts is incorporated in the bonds, such recital is binding upon the municipality and estops it from asserting the contrary as a defense against the bonds in the hands of bona fide purchasers who have or may have relied upon such recitals.

Before passing from this subject, I beg leave to state that I have considered in this question the effect of article XII, section 11 of the constitution taken in connection with the general provisions of the Smith law imposing limitations upon the taxing power. If my opinion is desired with reference to whether or not recitals on the face of the bonds that all provisions of the constitution and laws have been complied with etc., will estop a municipality from contesting the validity of the bonds in the hands of bona fide purchasers, where the tax limitations are such that the provision for levying and collecting sufficient taxes to pay bonds cannot be made, I shall be pleased to consider this question further.

From all that has been said it follows, of course, that where the total amount of the particular issue, does not of itself exceed 1% of the tax duplicate, the municipality may be estopped by a recital to the effect that all provisions of law have been complied with in the issuance of the bonds, found upon the face of each bond, to assert against the claim of a bona fide holder thereof the defense that the 1% limitation of the Longworth act has been exceeded.

In such event, and to the extent at least that the bonds may have passed into the hands of bona fide holders, it would be not only lawful for, but obligatory upon the council and the budget commission to permit a levy to be made upon the taxable property of the municipality to meet the indebtedness, though the same had been illegally created.

In this connection it may be stated that actual notice on the part of a subsequent taker is not sufficient to deprive him of the rights of a bona fide holder where he has purchased from one who might assert such title.

The question as to whether such action on the part of the council or the budget commission could be enforced by mandamus in the state courts may be answered as follows:

The federal courts have not always distinguished between fundamental lack of power, as in the case of the issuance of bonds without any authority whatsoever, and mere defective issuance as where the power exists, but may be exercised only under certain circumstances. The courts of this state have made this distinction quite clearly, I think, with respect to bonds issued without any authority whatever, the Ohio courts have applied the logical rule, that the bonds are totally void even in the hands of so-called bona fide holders; for the reason that all persons are charged with notice of the purposes for which bonds may be issued by a municipal corporation and of the constitution and laws of the state. But with respect to more defective execution of authority which is clearly granted, the courts of Ohio have followed the federal rule, as is evident from the authorities already cited.

The question then is as to nature of the violation of a debt limit. Does it constitute a fundamental lack of power or a case of defective execution of power? The supreme court of the United States has treated it as the latter. There are no decisions in Ohio under the Longworth act, but those already cited seem to establish the conclusion that the trend of judicial thought in this state is that the observance of a debt limit is a mere condition precedent, or rather, an incident to a power granted rather than the excessive issuance of bonds being an instance of a total lack of power. Thus, in State vs. Commissioners, supra, a statute authorized certain road improvement proceedings to be instituted only upon the petition of a majority of the land owners resident along and adjacent to the line of the road. A case was presented in which proof was offered to the effect that a majority of the land owners had not subscribed the petition; nevertheless, the county was held to be estopped as against the bona fide holder from asserting its defense.

The general rule is that in the case of bonds not issued under a law providing for a specific tax levy, mandamus to compel a general tax levy will not lie until the municipality has defaulted and the bond holder has put his claim in judgment. In other words, such general rule is to the effect that the remedy by mandamus is virtually

a proceeding in aid of execution. However, it appears that in some of the cases above cited mandamus was entertained at the suit of a bona fide holder to compel a tax levy without a preceding judgment. (State vs. Commissioners, supra; State vs. Board of Education, supra.) Under these authorities it appears that the rule in Ohio differs from the general rule, and that the right to the issuance of a writ of mandamus is not dependent upon the securing of a previous judgment.

However this may be, it is sufficient for the purpose of your question to say that whether before or after judgment, a bona fide holder of the bonds would be entitled to the issuance of a writ of mandamus to compel an appropriate tax levy for their payment in the courts of the state, as the state courts have applied the same rule as that followed by the federal courts in such cases. From the decisions already cited it follows, too, that if bonds were held by non-residents of the state, so that the federal courts might have jurisdiction, and if such bond holders were bona fide purchasers relying upon appropriate recitals on the face of the bonds to such an effect as to estop the municipality from asserting its defense against them, payment of the bonds could be enforced by the federal courts.

If you have in mind the power of the budget commission to question the legality of a given tax levy sought to be made by council when the limitations of the Smith law are not in danger of being exceeded so that the budget commission really has no official duties in the premises, but the levy is, nevertheless, clearly illegal, I beg to state that in my judgment if a given levy is separable from the remaining levies of the municipality and does not merely enter into a general levy for a given purpose by way of increasing the amount thereof—in other words, if the levy can be separated from the other levies of the municipality and identified—and if the levy is clearly illegal, the county auditor or the budget commission (in short any of the officers whose action follows that of the council), can assuredly refuse to extend such an illegal levy, for the only remedy of council to compel such an extension would be by action in mandamus; and inasmuch as the writ of mandamus would only issue where the relator's right is clear, it follows of course, that such an action could not be maintained.

I think it follows from this too, that if the budget commission or the county auditor knowing the illegality of a given levy, cannot be compelled to extend it, they can likewise be enjoined from extending it, for under sections 12075, et seq., General Code, special provision is made for enjoining illegal levies. Such an action is to be instituted primarily against the county auditor. So that if the budget commission and the county auditor cannot be *compelled* to put on an illegal levy; and if the county auditor can be *enjoined* from extending such a levy; from these considerations it seems to follow that notwithstanding the silence of the Smith law in the premises, and notwithstanding that the primary and real or only function of the budget commission is to enforce the rate limitations without paying any attention to the *legality* of levies certified to them, nevertheless, it is the duty of that body, in the broad sense, to give heed to such considerations, and to refuse to approve and cause to be extended a levy which is known to be illegal, regardless of the necessity of so doing for any of the purposes of the Smith law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1046.

SAVINGS BANKS—RIGHT TO INVEST THREE-TENTHS OF THEIR TEN PER CENT. RESERVE ON TIME DEPOSITS, IN SECURITIES.

Under amended section 9764, savings banks may invest three-tenths of their total of ten per cent. reserve on time deposits in securities named in said section.

COLUMBUS, OHIO, July 9, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 2, 1914, you made the following request for my opinion:

> "Please render to this office an opinion as to whether or not amended section 9764 provides that savings banks may invest three-tenths of their *total* of 10 per cent. reserve on time deposits in certain municipal bonds."

Section 9764, General Code, as amended by an act passed February 6, 1914, 104 O. L., 186, is as follows:

> "Savings banks shall keep as reserve at least ten per cent. of their time deposits, and at least fifteen per cent. of their demand deposits; at least six per cent. of that part of such deposits which is payable on demand, and at least two per cent. of that part of such deposits which are time deposits shall be kept in the vaults of the bank in lawful money, national bank notes, and gold or silver certificates issued by the United States; not more than three-tenths of such reserve for time deposits may be invested in the securities named in paragraphs 'b' and 'c' of section 9758 of the General Code or the bonds of any city or county within this state; that part of such reserve not so kept or invested shall be kept subject to demand in other banks or trust companies, as designated by resolution of the board of directors for that purpose, a copy of which, upon its adoption, shall be forthwith certified to the superintendent of banks and the depositary thus designated shall be subject to the approval of the superintendent of banks. If the superintendent of banks withholds his approval, appeal may be made in the manner provided in section 9759 of the General Code."

Under this section as it stands savings banks must keep a reserve of at least ten per cent. of their time deposits. This ten per cent, for the purpose of determining the meaning of the rest of the section, may be treated as an entity, that is as a total reserve. Of this total reserve three-tenths may be invested in the securities named in this section, that is, suppose the total reserve of a savings bank, on its time deposits, amounted to $100,000, three-tenths of this, or $30,000, could be invested in the securities specified in this section.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1047.

BOND OF NOTARY APPLICANT—FEE FOR CLERKS OF COURT FOR CERTIFYING UNDER SEAL TO THE GENUINENESS OF THE SIGNATURE OF SUCH BOND.

The clerks of courts may charge for certifying, under seal, to the sufficiency of a bond of a notary applicant, and also to the genuineness of the signature by reason of the provisions of section 2901, General Code.

COLUMBUS, OHIO, July 14, 1914.

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

GENTLEMEN:—Under date of March 21st, you asked my opinion upon the following question:

> "Should clerks charge for certifying to the sufficiency of a bond of a notary applicant and also to the genuineness of the signature?"

The certificate referred to appears on the application for appointment as notary public and is prepared and issued under the direction of the governor. It reads as follows: "(The following certificate must be made by a judge, clerk of the court or justice of the peace.) I certify that the security of the above bond is in my opinion sufficient for the amount specified, and that the signatures thereto are genuine....."

The provision under which the clerk can charge for making the certificate is Code section 2901, which provides that the clerk shall receive thirty-five cents "for certificates of fact under seal of the court, to be paid by the party demanding same."

The certificate required by the governor is clearly a certificate of fact and being made by the clerk, a public official, requires seal thereto; consequently, I hold that the clerk should charge for making such certificate.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1048.

ARTICLES OF INCORPORATION OF THE NATIONAL MUTUAL AUTOMOBILE INSURANCE ASSOCIATION NOT APPROVED.

The articles of incorporation of The National Mutual Automobile Insurance Association not approved for the reason that they fail to comply with sections 9593 and 9594, General Code.

COLUMBUS, OHIO, July 10, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 9th enclosing proposed articles of incorporation of The National Mutual Automobile Insurance Association. The articles of incorporation of this association have already been presented to this department and rejected for failure to comply with sections 9593 and 9594, General Code.

I regret to be obliged to state that in their present form the articles still fail to comply with these provisions in the following particulars:

1. They do not limit the property to be insured, consisting of automobiles, to that in the state of Ohio, as the statute requires.

2. They attempt to authorize insurance against theft, etc., which cannot be undertaken by an association of this kind. This criticism affects the entire second sentence of the purpose clause.

3. The articles do not specifically state that the members agree to be assessed for the payment of incidental expenses, losses, etc., as required by section 9594, General Code.

The articles in question are accordingly returned to you with the advice that they be not filed or recorded until corrected as above stated.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1049.

BOARDS OF EDUCATION REQUIRED TO PROVIDE SCHOOLS AND SUFFICIENT EDUCATIONAL FACILITIES FOR INMATES OF COUNTY CHILDREN'S HOMES—PUBLIC SCHOOLS OF THE STATE ARE FREE TO INMATES OF PUBLIC OR PRIVATE ORPHAN ASYLUMS.

Under the provisions of section 7676, General Code, the board of education of the respective school districts of the state wherein are located county or children's homes, are required to provide schools and sufficient educational facilities for the inmates of such county or children's homes, either by the establishment of special schools located at such county or district children's homes or in the regular schools of the respective districts.

Under section 7681, General Code, the public schools of the state are free to the inmates of orphan asylums located in such respective school districts, regardless of whether or not such orphan asylums are private or public institutions.

COLUMBUS, OHIO, July 14, 1914.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Under date of January 22, 1914, you wrote to this department as follows:

> "A number of children's homes, public and private, have raised a question relative to public school attendance of the inmates of their institutions. In section 7681 of the juvenile code we find a statement: 'The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including the children of proper age who are inmates of a county or district children's home or orphan asylum located in such a school district * * *.'
>
> "Sections 7676 to 7678 refer to a method of public school control over school work of a children's home or orphan's asylum which is established by law, but is not sufficiently near to a public school to make attendance thereat practical."

In relation thereto you submitted the following request:

> "1. Do all of these sections permit a board of education in any school district in which a county or district children's home is located to refuse to admit the children to a public school when the trustees of such institution

desire that the children attend such school, even though the number of children in such home of school age is greater than the capacity of the school house in that school district?

"2. Are the school authorities under obligation to make adequate provision by enlargement of their school buildings to accommodate children from a children's home?

"3. Does section 7681 include an institution which cares for orphan and other dependent children, but which is under private management?

"4. Does the term 'children's home or orphan asylum established by law' in section 7677 include privately managed institutions?

"5. A certain private institution in the city of Cincinnati has established a branch outside of that municipality. Are the residents inmates of the branch entitled to attend the public schools of the district in which the branch is located?"

Sections 7676 to 7678, inclusive, of the General Code, which provide for schools at children's homes, orphan asylums and infirmaries, and provide for the management and regulation thereof, were amended April 28, 1913, by the legislature and approved by the governor on May 9, 1913, and appears in the 103rd volume of Ohio Laws, at page 896 thereof.

Section 7681 of the General Code to which you refer in your inquiry, was also amended at the same time and appears at page 897 of the 103rd volume of Ohio Laws. Said section 7681 of the General Code was formerly 3013 of the Revised Statutes, and prior to the last amendment thereof this section read as follows:

"The school of each district shall be free to all youth between six and twenty-one years of age, who are children, wards, or apprentices of actual residents of the district, including children of proper age, who are inmates of a county or district children's home, located in such a school district, at the discretion of its board of education, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

In construing this last mentioned section, in an opinion rendered to Hon. J. W. Zeller, commissioner of common schools, Columbus, Ohio, under date of October 14, 1909, this department held in substance, so far as the operation of said section concerns inmates of county children's homes, that such inmates are entitled to free tuition in the public schools. Said opinion is as follows:

"Your communication of September 24th, in which you ask my opinion on the following question, is received:

"Children from the Morgan county children's home, situated in Malta, Ohio, some eight or ten in number, have attended the Malta school. The Malta board of education have presented a bill to the board of trustees of said home for the tuition of these pupils, and demand payment. The board of trustees of said home are of the opinion that these children are entitled, under section 4013 R. S., to free tuition.

"Query: Are these children, in your opinion, so entitled to free tuition under said section 4013 R. S.?"

"In reply thereto I beg leave to submit the following opinion. Section 4013 R. S., reads in part as follows:

" 'The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, *including children of proper age who are or may be inmates of a county or district children's home located in any such school district, at the discretion of the board of education of said school district*; * * *'

"The only question in interpreting this section of the statute is as to what meaning shall be put upon the phrase 'at the discretion of the board of education of said school district' and I am of the opinion that the discretion here given to such board of education is not intended to give them the right to charge tuition to pupils coming within the meaning of this section. The section evinces the intention that the schools of each district shall be free to all school children of proper age, who are or may be inmates of a county or district children's home located in any such school district, and the discretion given to the board in this section is such as it may exercise in the case of any school child of proper age coming within the scope of this section, and pertains to the educational, moral and other qualifications of such children. This discretion is by this section given to the board of education in all cases, and if the board were empowered under this section to charge tuition for inmates of county or district children's homes, it would also be possible for them to charge tuition for children of school age, 'who are children, wards or apprentices of actual residents of the district,' for the phrase 'at the discretion of the board of education' is a limitation upon all of the section that precedes it.

"I am further strengthened in this opinion by the provisions of section 4010 of the Revised Statutes, which makes it mandatory upon the board of education of a school district, upon request by the board of trustees of a county or district children's home located in said school district to 'establish in such home * * * separate school, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education; * * * such schools * * * shall be continued in operation each year * * * at such homes * * * not less than forty-four weeks. If the distributive share of the school funds to which such school at any such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools hereby required, the deficiency shall be paid out of the funds of the institution; * * *.

"This section shows that it was the intention of the legislature to furnish free schooling in one of two ways to the children who are or may be inmates of a county or district children's home.

"I am therefore, of the opinion that the children of the Morgan county children's home are entitled, under section 4013 R. S., to free tuition in the schools of the Malta school district, if otherwise qualified."

Subsequent to the date of the rendering of the opinion above quoted, this department followed the reasoning used in that opinion in an official opinion to Hon. T. E. McElhiney, prosecuting attorney, McConnellsville, Ohio, under date of December 22, 1911, and said opinion holds in effect as follows:

"Inmates of a children's home are classed equally with other youth under the meaning of section 7681, General Code, and such inmates may attend a village school not within their own district, if there is no school within their own district within one and one-half miles of the home or at closer proximity than

the village school. The board of education of said village cannot charge tuition for said inmates until they have notified the board of education of the district in which the pupils reside.

"The duty of providing for the education of such inmates devolves upon the board of education of the township in which they reside and not upon the trustees of the home."

Attached hereto I am enclosing a copy of the last mentioned opinion.

Section 7676 as last amended, and as the same now appears in the 103rd volume of Ohio Laws, page 896, supra, provides as follows:

"The board of education in any district in which a children's home or orphans' asylum is established by law, when requested by the board of trustees of such children's home or orphans' asylum when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. Such schools must be continued in operation for such period as is provided by law for public schools. If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners."

Section 7681 of the General Code as last amended, as the same appears at page 897 of the 103rd volume of Ohio Laws, provides as follows:

"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home or orphan's asylum located in such a school district but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

It will be noted that in section 7681 as last amended, the clause "or orphans' asylum" has been added and the clause "at the discretion of its board of education" has been left out of said section. The amendment relating to said section 7676, it will be noted, has dropped out the reference formerly contained therein prior to its last amendment, to schools established at county infirmaries, and has added the clause that schools shall be established by the board of any district at children's homes or orphans' asylums "when no public school is situated reasonably near such home or asylum." From the phraseology now employed in said sections, it seems reasonably clear that it was the intent of the legislature to furnish free schools in one of the two ways to children who are or may be inmates of county or district children's homes or orphans' asylums; that is to say, either by establishing a separate school at such homes on the part of the board of any district in which such homes or asylums are located, or by furnishing sufficient educational facilities at the schools of the district wherein such homes or asylums are located, on the part of the board of education of such respective districts.

Therefore, in answer to your first question, it is my opinion that the sections referred to in your inquiry do not permit boards of education in school districts, where county or children's homes are located, to refuse to admit the children to such public schools, unless such board provides schools and sufficient educational facilities by the establishment of separate schools located at such county or district children's homes, in accordance with section 7676, General Code, supra.

In answer to your second question, it is my opinion that such boards are legally obligated to make adequate provision for the accommodation of the children from such children's homes, unless they provide a separate school located at the county or district children's home, as provided by said section 7676, supra.

Your remaining three questions relate entirely to the education of children who reside at orphans' asylums. Section 7677, as amended, 103 O. L., 896, provides that the control and management of schools established under section 7676, supra, shall be under the respective boards of education of the school district in which such homes and institutions are located, as follows:

> "All schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located, and courses of study, length of school term, and all other school matters shall be uniform in the respective school districts. Teachers employed in such homes or institutions must have a teacher's elementary school certificate as provided by section seven thousand eight hundred and twenty-nine of the General Code."

Section 7678 of the General Code, as amended, 103 O. L., 896, provides that the county commissioners shall provide the necessary school room or rooms, furniture, fuel, etc., as follows:

> "In the establishment of such schools the commissioners of the county in which such children's home or orphans' asylum is established shall provide the necessary school room or rooms, furniture, fuel, apparatus and books, the cost of which for such schools must be paid out of the funds provided for such institution. The board of education shall incur no expense in supporting such schools."

In the case of State ex rel. The German Protestant Orphan Asylum of Cincinnati vs. The Directors of School District No. 14, Millcreek township, Hamilton county, 10 O. S., 448, the court held as follows:

> "BY THE COURT. Held, that the children, inmates of the German Protestant Orphan Asylum of Cincinnati, are not 'children, wards, or apprentices of actual residents' in the school district within which said asylum is located, and therefore, under the 10th section of the act of February 21, 1849, 'for the better regulation of the public schools in cities, towns,' etc. (Swan, Revised Statutes 860), not entitled to gratuitous admission to the privileges of the public schools of said district."

The wording of the 10th section of the act of February 21, 1849, under which this decision was rendered, to all intents and purposes is the same as section 4013, Revised Statutes, now section 7681 of the General Code, and reads in part as follows:

> "Admission to said schools shall be gratuitous to the children, wards and apprentices of all actual residents in said district, who may be entitled to the privileges of the public schools, under the general laws of this state."

In an opinion rendered by this department October 19, 1909, to Hon. Jno. W. Zeller, state commissioner of common schools, Columbus, Ohio, this department held in substance as follows:

> "Inmates of Baptist missionary home, who are children of parents who are in foreign countries, and their maintenance is provided for by their parents who are not residents of Granville school district, must pay tuition to Granville public school."

As before stated, it is to be noted that section 7681 of the General Code, prior to its last amendment, did not contain the clause "orphans' asylum." It is well to further note that said section 7676 of the General Code includes the phrase "orphans' asylum" established by law, and it is further to be noted that section 7677 contains the language that all schools so established in any such home or asylum shall be under the control and maintenance of the respective board of education of the school district in which such homes and institutions are located, etc., and the schools so established means schools established in any district in which a children's home is established by law, as the same is provided in section 7676, General Code, supra. It would seem, therefore, to be the intent of the legislature, by virtue of the last amendment of said section, to obviate the holding of the court in the case of State ex rel. Asylum vs. Directors of School District, etc., supra, to avail the children of orphans' asylums of the advantages provided in said sections 7676, 7677, 7678 and 7681 of the General Code, supra. This would seem to follow, as above stated, by reason of the fact that the legislature has specifically included in said sections, as last amended, the term "orphans' asylum," and has specifically made the provision of said sections applicable to such institutions, when the same are established in accordance with law.

Section 7681 of the General Code, supra, refers to and includes orphans' asylums generally without any limitation thereon.

Section 7676 of the General Code refers to, and seems to apply to children's homes or orphans' asylums established by law.

Therefore, answering your third question, I am of the opinion that section 7681 of the General Code applies to and includes institutions which care for orphans and other dependent children, even though the same may be under private management.

Answering your question number four, I am of the opinion that section 7677 and section 7676 of the General Code do not include privately managed institutions, because said sections seem only to refer to children's homes or orphans' asylums which are established by law.

Answering your fifth question, it is my view that if the private institution referred to is an orphans' asylum, and they have established a branch thereof in another part of the municipality, then such children or orphans would be entitled to attend the public schools of the district in which the branch is located, as coming within the provisions of section 7681 of the General Code, supra, being children or inmates of an orphans' asylum; but that such institution could not avail itself of the provisions of sections 7676 and 7677, unless it comes within the expression of said sections as being a children's home or orphans' asylum established by law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1050.

OFFICES COMPATIBLE—PROSECUTING ATTORNEY MAY BE TRUSTEE OF SINKING FUND OF CITY.

The prosecuting attorney may legally be appointed to serve as trustee of the sinking fund of a city, there being no incompatibility.

COLUMBUS, OHIO, July 14, 1914.

HON. HARRY T. NOLAN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of April 18, 1914, as follows:

"Will you kindly advise me whether, in your opinion, a person holding the office of prosecuting attorney of a county may legally be appointed and serve as a trustee of the sinking fund of a city. Inasmuch as I am the person affected by the question submitted, I prefer the opinion of someone else as to the legality of such procedure."

Throop on public officers, section 33, lays down the following rule:

"Officers are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty."

In Dillon on municipal corporations, in a note to section 419, it is said that:

"Incompatibility in offices exist, where the nature and duty of the two offices are such as to render it *improper from considerations of public policy,* for one incumbent to retain both."

I can see nothing in the rules above stated, nor find anything in the statutory law of the state that makes the office of sinking fund trustee incompatible with that of prosecuting attorney, and it is therefore my opinion that these two offices may be held by one and the same person.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1051.

POWERS OF STATE BOARD OF HEALTH DO NOT EXTEND BEYOND THE TERRITORIAL LIMITS OF THE STATE—POWER OF STATE TO REGULATE MUNICIPALITY IN OTHER STATE.

The state board of health is but a state agency for the purposes indicated by the statutes providing for its organization and defining its duties. As such agency, its jurisdiction does not extend for any purpose beyond the territorial limits of the state, and it has no power to take effective official action with respect to a nuisance created by a city in an adjoining state in permitting sewage to flow into streams in an adjoining state, by which such sewage is carried into a river which may be the source of the water supply of a city in this state.

This state in its quasi-sovereign capacity to meet the situation, has power to enjoin and abate such nuisance by action in a court of competent jurisdiction against the offending municipality in the adjoining state.

COLUMBUS, OHIO, July 15, 1914.

HON. JOHN W. HILL, *President, The State Board of Health, Cincinnati, Ohio.*

DEAR SIR:—Under date of April 14, 1914, you wrote asking my opinion as follows:

> "A city in this state desires to use a certain stream for a public water supply, and a city in an adjoining state is or was a few years ago permitting considerable sewage from its outskirts to be carried either directly or through small rills, which were water courses in time of flood, into the main stream. The collection and proper disposal of this sewage of the city in the other state would be of no benefit to that city, but would be a benefit to a city in this state.
>
> "Will you kindly let me know what, if any, jurisdiction we would have with respect to the sewage pollution of a stream by a city in another state where that stream is liable to be drawn on for public water supply by a city in this state."

The state board of health is a state agency for the purposes indicated by the statutes providing for its organization and defining its duties. As such state agency its jurisdiction does not extend, for any purpose, beyond the territorial limits of the state, and if the river, the pollution of which is complained of in your communication, is the Ohio, the territorial limits of this state, with respect to the river in question, does not, probably, extend further than the low water mark of the same.

Booth vs. Shepard, 8 O. S., 243.
Handly's Lessee vs. Anthony, 5 Wheat., 374.
Board of Health vs. Greenville, 86 O. S., 1, 37.

It does not follow, however, that by reason of the lack of jurisdiction on the part of the state board of health to act in the premises, there is no remedy for the condition complained of. The state of Ohio, in its quasi-sovereign capacity has undoubted power to institute, in a court of competent jurisdiction, an action to enjoin and abate the nuisance complained of.

Dillon, in his work on municipal corporations, states the interest and legal rights of the several states in questions of this kind, as follows:

"* * * The pollution of the streams with the consequent annoyance and injury to the health, not only of the residents and citizens of the state where the pollution originates, but also to the residents and citizens of adjoining states with the consequent injury to property therein, has raised questions affecting the right of a state to use or authorize the use of the waters of rivers and streams for such purposes within its own limits, when the effect thereof is to cause loss and injury to the citizens of, and property within, a sister state. These questions have newly arisen, and the law on the subject is in an undeveloped condition requiring discussion and consideration fully to define the rights of the respective states and their citizens. It may, however, be said that the power of a state within which a river or stream rises is not absolute, and that it can neither unduly appropriate the waters of such river or stream to the loss and detriment of an adjoining state and the citizens thereof, nor can it pollute the same by the discharge of sewage in such a manner as to cause loss and damage to a sister state and its citizens unreasonably and unnecessarily. The state is sovereign within its own boundaries, and as to the public uses to which the waters of its rivers and streams may be applied therein by its citizens and residents, but in its relation to sister states, it is only municipal in its functions and powers, and it is bound to respect the rights of the sister state and its citizens. Hence a state has, under the provisions of the federal constitution extending the judicial power of the federal courts over controversies between two or more states and between a state and citizens of another state, a standing in those courts to protect its lawful interests in rivers and streams flowing from an adjoining state from injury or damage to its detriment. And where a navigable stream rises in one state and flows thence into another, it has been held that the lower state is entitled to maintain a suit in equity against the upper or higher state (of which the supreme court of the United States has original jurisdiction), to prevent an undue and improper appropriation of the waters of the stream, which otherwise would flow through and across her territory, and the consequent destruction of her property and of the property of her citizens, and injury to their health and comfort.

"Similarly, it is within the power of a state to invoke the original jurisdiction of the supreme court of the United States to restrain an adjoining state and a municipality therein from contaminating the waters of a stream flowing along, past, or through the plaintiff's territory by discharging therein sewage in great quantities to the serious detriment and annoyance of the citizens and property owners of the plaintiff state. * * *"

In the case of Georgia vs. Tennessee Copper Company, 206 U. S., 230, which was one instituted by the state of Georgia against the Copper Company to enjoin it from discharging noxious gas from its works in Tennessee, in and over the territory of the plaintiff state, the court held:

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They retained the right to make reasonable demands on the grounds of their still remaining quasi-sovereign interests, and the alternative to force a suit in this court.

"This court has jurisdiction to, and at the suit of a state will, enjoin a corporation, citizen of another state, from discharging over its territory noxious fumes from works in another state where it appears that those fumes cause and threaten damage on a considerable scale to the forests and vegetable life, if not to health, within the plaintiff's state."

The court, in its opinion in this case, says:

"This is a suit by a state for an injury to it, in its capacity of quasi-sovereign. In that capacity, the state has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

In the case of Missouri vs. Illinois and the sanitary district of Chicago, 180 U. S., 208, suit was brought by the plaintiff state against the defendants named for an injunction restraining the defendants from receiving or permitting any sewage to be received or discharged into an artificial channel or drain, constructed by the sanitary district under authority of the state of Illinois, in order to carry off and eventually discharge into the Mississippi river, through the Des Plaines and Illinois rivers, sewage of the city of Chicago, which had previously been discharged into Lake Michigan. The bill did not assail the drainage channel as an unlawful structure, nor aim to prevent its use as a water way, but it sought relief against the pouring of sewage and filth through it into the above named rivers in the state of Illinois, into the Mississippi river, to the detriment of the state of Missouri and its inhabitants. Upon demurrer of the defendants to this bill for an injunction, it was held that the action could be maintained.

In addition to the right of the state of Ohio to abate and enjoin the nuisance here complained of, by action against the municipality of another state responsible for the nuisance, I am inclined to the opinion that a municipality of this state, if legally injured in the exercise of its corporate functions, such as the maintenance of a water supply for its citizens, would likewise have proper standing to institute an action in a court of competent jurisdiction, for the purpose of redressing the wrong.

You do not state, in your communication, sufficient facts to warrant me in expressing my opinion as to the merits of an action which might be brought with respect to the matter complained of, and I do not, therefore, express any opinion on this question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1052.

RIGHT OF PRIVATE BANK TO OWN STOCK IN A STATE BANK.

A private bank may own stock in a state bank.

COLUMBUS, OHIO, July 14, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On December 15, 1913, you made the following request for my opinion:

"Under section 9 of the private banking act, and section 9765, paragraph "b" of the savings banking law, has a private bank the right to own stock in a state bank?"

Section 9 of what is commonly called the "private banking act" (section 744-9, General Code, 103 O. L., 379) is as follows:

"Sections 720, 724, 725, 729, 734, 735, 737, 738, 740, 741, 742, 742-1, 742-2, 742-3, 742-4, 742-5, 742-6, 742-7, 742-8, 742-9, 742-10, 742-11,

742-12, 742-13, 742-14, 742-16 and 743 of the General Code of Ohio, shall refer to and include every and all corporations not organized under the laws of this state or of the United States, persons, partnerships and associations using the word 'bank,' 'banker' or 'banking' or 'trust' or 'trust company' or words of similar meaning in any foreign language as a designation or name under which business is or may be conducted in this state, and every such corporation, person, partnership or association shall be governed by and shall conduct all their business and transactions as provided in said sections in the same manner as if such corporations, persons, partnerships or associations were specifically mentioned in each of said sections; and every such corporation, person, partnership or association shall do and perform all things required by each and all said sections, and the superintendent of banks shall have the power and authority over such corporations, persons, partnerships and associations, as is given to him over banking corporations in Ohio by said sections; and each and every other section of the General Code providing for the inspection, examination and regulation of banking corporations, except the provisions as to capital stock and the amount of loans and investments computed on the basis of capital stock, and except the provisions for the publication of reports, shall be held to apply to each and every such corporation, person, partnership or association so far as said sections and parts of sections may be applicable."

Section 720 and the other sections to which explicit reference is made by this section are the sections of the General Code governing the examination, supervision and liquidation of banking corporations by the superintendent of banks. All of these sections are, by reference, made applicable to private banks, and by this section all other sections of the General Code providing for the inspection, examination and regulation of banking corporations (except those specifically referred to) are made to apply to private banks in so far as such sections may be applicable.

Section 9765 of the General Code is as follows:

"A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits, in, and buy and sell the following:

"a. The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal security shall be made upon notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate not exceeding thirty per cent. of the capital surplus and deposits of a savings bank shall be so invested.

"b. Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"c. Promissory notes of individuals, firms, or corporations, when se-

cured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

This section applies solely and only to savings banks, that is, banking corporations organized under the laws of Ohio as savings banks; and could only be made applicable to a private bank, or to any banking corporation other than a savings bank, by a direct statutory provision. None of the statutory provisions relative to the amount and character of investments by banking corporations are applicable to private banks; and there is nothing in our laws to prevent a private bank from investing in stock of another bank, or in fact to prevent a private bank from making any investment of its funds which an individual can make.

This is one of the defects of our banking laws at the present time, and is one reason why so many private banks have failed. It can only be remedied by careful legislation on the subject, and this legislation must start by prescribing that private banks must have a fixed capital stock. Without a provision of this character there can be no basis upon which to regulate the amount of investments, and unless the amount of investments by a bank is fixed and subject to regulation, regulations as to the character of investments would be practically worthless.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1053.

POWER OF THE OHIO BOARD OF ADMINISTRATION TO REGULATE THE NUMBER AND SALARIES OF OFFICERS REFERRED TO IN SECTION 2180, GENERAL CODE.

Section 41 of the Ohio board of administration act, passed May 11, 1911, did not become effective until August 15, 1911; on that date it expressly repealed section 2180 of the General Code, as amended by house bill 621, 102 O. L., 474, passed May 31, 1911. The Ohio board of administration can, therefore, regulate the number and salaries of officers referred to in section 2180, General Code.

COLUMBUS, OHIO, July 15, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 26, 1914, as follows:

"May the board of administration, under the provisions of section 1842, regulate the number and salaries of the employes mentioned in section 2180, General Code?"

Section 1842, General Code, was originally section 11 of the Ohio board of administration act, and read:

"Section 11. Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act * * *. The chief officer shall have entire executive charge of the institution for which he is appointed, except as otherwise provided therein. He shall select and appoint the necessary em-

ployes, but not more than ten per cent. of the total number of officers and employes of any institution shall be appointed from the same county * * *.

"The board after conference with the managing officer of each institution shall determine the number of officers and employes to be appointed therein. It shall from time to time fix the salaries and wages to be paid at the various institutions which shall be uniform, as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor."

This act was passed on May 11, 1911. Section 39 of the act and section 41 read as follows:

"Section 39. To give the board adequate time to prepare the necessary details no part of this act relating to said board shall take effect until August 15, 1911, except section two, three, four, five, six and seven, but this act shall be in full force and effect from and after said date, when the board shall assume all of its duties * * *.

"Section 41. That sections 1824, 1825 * * * 2180 * * * of the General Code be, and the same are hereby repealed, and that all parts of sections inconsistent with the provisions of this act be, and the same are hereby repealed in so far as said inconsistencies exist."

On May 31st the legislature passed house bill 621, 102 O. L., p. 474, which reads:

"Be It Enacted by the General Assembly of the State of Ohio:

"Section 1. That section 2180 of the General Code be amended to read as follows:

"Section 2180. There shall be appointed an assistant clerk at an annual salary not to exceed one thousand and eighty dollars, a chaplain, who shall act as librarian, at a salary not to exceed fifteen hundred dollars a year, a physician, a superintendent of schools who shall be accredited as a guard, a superintendent of construction at a salary not to exceed thirteen hundred and twenty dollars a year, a superintendent of gas and electric light at a salary not to exceed thirteen hundred and twenty dollars a year, a captain of night watch at a salary not to exceed twelve hundred dollars a year, a superintendent of subsistence at a salary not to exceed eleven hundred and twenty dollars a year, and a stenographer at a salary not to exceed sixty dollars per month.

"Section 2. That said original section 2180 of the General Code be, and the same is hereby repealed."

The question now is, did section 41 of the Ohio board of administration act, which expressly repealed section 2180 of the General Code, affect such repeal on May 11, 1911, the date of its passage, or upon August 15, 1911, the date upon which, according to section 39 of the act, it became effective. If section 41 of the Ohio board of administration act worked a repeal of section 2180 on the date of its passage, viz., May 11, 1911, then house bill 621 in amending section 2180 on May 31, 1911, reenacted that section, and it (section 2180) should be held to control. If, however, section 41 of the Ohio board of administration act did not affect a repeal of section 2180 until August 15, 1911, when according to section 39 of the act it became effective, then it repealed on that date section 2180, as that section stood amended by house bill 621 passed on May 31, 1911.

Section 280 of Lewis Sutherland's work on statutory construction, reads in part:

"Statutes speak from the time they take effect, and from that time they

have posteriority. If passed to take effect at a future date, they are to be construed, as a general rule, as if passed on that date, and ordered to take immediate effect."

Citing:

State vs. Edwards, 136 Mo., 360.
Rice vs. Reddiman, 10 Mich., 125.
Harrington vs. Harrington's Estate, 53 Vt., 649.
Metrop. Board of Health vs. Schmades, 10 Abb. Pr. (n. s.), 205.

This doctrine would support the conclusion that section 41 of the Ohio board of administration act, which was the repealing section, did not work a repeal of section 2180 of the General Code until August 15, 1911, when it repealed said section as it stood amended by house bill 621, passed May 31, 1911; and this, it seems to me, is exactly what the legislature intended.

The sections of the General Code repealed by section 41 of the Ohio board of administration act, related to the powers and duties of the trustees and officers of the different institutions of the state, and it was necessary for all of these sections to continue in full force and effect until August 15, 1911, when the Ohio board of administration act became effective. To my mind it seems very clear that the legislature in amending section 2180 of the General Code, meant such amendment to continue in full force only until August 15th, when the Ohio board of administration act should become effective, repealing all such sections as 2180, relating to positions and salaries of officers and employes in the various institutions of the state, and granting to the board the power to establish a uniform system with respect to such matters operating upon all of the institutions of the state.

I am, therefore, of the opinion that section 41, the repealing section of the Ohio board of administration act (102 O. L., p. 223), did not work a repeal of section 2180 of the General Code until August 15, 1911, and it then repealed such section as amended, in house bill 621, passed May 31, 1911; and in direct answer to your question, that the Ohio board of administration may, by virtue of section 1842 of the General Code, regulate the number and salaries of the employes of the Ohio penitentiary mentioned in section 2180 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1054.

SCHOOL DISTRICTS—RIGHT OF A DISTRICT BOARD EMPLOYING A SUPERINTENDENT TO JOIN WITH A RURAL SCHOOL DISTRICT WHICH NEVER EMPLOYED A SUPERINTENDENT—POWER OF SCHOOL DISTRICTS TO JOIN, BY MUTUAL CONSENT WITH THE BOARDS OF EDUCATION.

Under section 4740, General Code, as amended, a village district already employing a superintendent, cannot join with a rural school district which never employed a superintendent and which said districts were never heretofore joined together for supervisory purposes by employing a superintendent in common upon application to the county board of education to be joined and continue as separate districts as authorized by said section.

Under the recently enacted school code, appearing in 104 O. L., 133, school districts formerly designated as "special school districts" now constitute rural school districts, which said rural school districts are a part of the respective county school districts of the state. Part of any county school districts may be transferred to an adjoining school district or city or village school district by the mutual consent of the boards of education having control of such districts.

COLUMBUS, OHIO, July 18, 1914.

HON. THOMAS S. MADDOX, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Under date of July 14, 1914, you requested an official opinion upon the following questions:

> "*First.* Our county board of education in Fayette county, Ohio, desires your construction of section 4740, Ohio Laws, 104, page 141, in this:
>
> "Can a village district already employing a superintendent, join with a rural school district which never employed one, resolving that it will employ a superintendent, etc., and upon application to the county board be continued as a separate district, etc.?
>
> "*Second.* Can a special school district under any of the sections of the school code, Ohio Laws, page 135, after May 19, 1914, join with a village district in another county, for school purposes?"

Section 4740 of the General Code, 104 O. L., 141, provides as follows:

> "Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

Section 7705 of the General Code, prior to its repeal and amendment by House Bill No. 13, enacted February 5, 1914, 104 O. L., 144, provided as follows:

"The board of education of each village, township and special school district may appoint a suitable person to act as superintendent, and to employ the teachers of the public schools of the district for a term not longer than three school years, to begin within four months of the date of appointment. But nothing herein shall prevent two or more districts uniting and appointing the same person as superintendent."

It would seem to follow, therefore, that the phrase employed in section 4740, "union of school districts for supervision purposes which already employ a superintendent," means to refer to schools which under said section 7705, prior to its said repeal and amendment, united for supervision purposes. It is to be noted that said section 7705, General Code, prior to its amendment specifically provided that nothing therein should prevent two or more districts uniting and appointing some person as superintendent.

Again, reverting to section 4740, General Code, as amended 104 O. L., 141, it is to be noted that any village or rural district or union of school districts for supervision purposes which already employed a superintendent at the time of the amendment thereof, shall, upon application to the county board of education be continued as a separate supervision district, etc.

Under the terms of your first question it appears that the village district inquired about has for some time past been employing a superintendent. It further appears that the rural school district inquired about does not now and never has employed a superintendent. I take it from the form of your question also that these two districts never joined together for supervisory purposes under section 7705 of the General Code, supra.

Therefore, the two districts cannot be said to be a village or rural district which have heretofore employed a superintendent, and they are not districts which have heretofore entered into a union for the purpose of supervision by employing one common superintendent. The provisions of section 4740, as amended, apply only to such districts as have heretofore employed a superintendent and which were so employing such superintendent at the date of such amendment, either as a village or rural district or a union of school districts for supervision purposes.

Therefore, in direct answer to your first question, it is my opinion that a village district already employing a superintendent cannot join with a rural school district which never employed a superintendent, and which said districts were never heretofore joined together for supervisory purposes by employing a superintendent in common, upon application to the county board of education to be joined and continued as separate districts in accordance with said section 4740, supra.

Answering your second question, section 4692 as it appears in 104 O. L., 135, provides as follows:

"Part of any county school district may be transferred to an adjoining county school district or city or village school district by the mutual consent

of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such a resolution shall require a majority vote of the full membership of each board by yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board, together with a copy of such map are filed with the auditors of the counties in which such transferred territory is situated."

Under the above section only territory of a county school district may be transferred to an adjoining county school district or a city or village school district by the mutual consent of the boards of education having control of such districts.

Special school districts were formerly provided for by section 4728 of the General Code. Said section provided as follows:

"A special school district may be formed of any contiguous territory, not included within the limits of a city or village, which has a total tax valuation of not less than one hundred thousand dollars."

Said section 4728 was repealed by said House Bill No. 13, passed on February 5, 1914, so that under the statutes as now amended, we no longer have the term or phrase "special school districts." The new act heretofore referred to in section 4679, 104 O. L., 133, divides the school districts of the state into city, village, rural and county school districts as follows:

"The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts."

Section 4680, General Code, defines a city school district as follows:

"Each city, 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 city school district."

Section 4681 as amended 103 O. L., 545, defines a village school district as follows:

"Each village, 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 five hundred thousand dollars, shall constitute a village school district."

The last two sections were not in any wise changed by the recently enacted school code.

Section 4684 of the General Code, prior to its amendment, provided that any school district, other than a city, village or township school district, etc., shall constitute a special school district as follows:

"Any school district, other than a city, village or township school district and any school district organized under the provisions of chapter five of this title, shall constitute a special school district."

The above section as amended in 104 O. L., 133, provides for and defines county school districts as follows:

"Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and the territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural school district is situated in more than one county such district shall become a part of the county school district in which the greatest part of the territory of such village or rural district is situated."

Section 4735 as amended, 104 O. L., 138, provides that existing special school districts shall constitute rural districts as follows:

"The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Under the new school code there is no provision whereby a special school district may be joined to a village school district in another county for school purposes. Such districts so formerly designated as special school districts now constitute rural school districts until changed by the county board of education. Under section 4684 (104 O. L., 133) supra, rural school districts are constituted and go to make up either the whole or a part of the respective county school districts of the state.

Section 4728, as amended, 104 O. L., page 136, provides that each county school district shall be under the supervision and control of the county board of education, as follows:

"Each county school district shall be under the supervision and control of a county board of education composed of five members who shall be elected by the presidents of the various village and rural boards of education in such county school district. Each district shall have one vote in the election of members of the county board of education except as is provided in section 4728-1. At least one member of the county board of education shall be a resident of a village school district if such district is located in the county school district and at least three members of such board shall be residents of rural school districts, but not more than one member of the county board of education shall reside in any one village or rural school district within the county school district."

Section 4692 supra, provides that part of any county school district may be transferred to an adjoining county, city or village school district by mutual consent of the boards of education having control of such districts.

Inasmuch as school districts formerly designated "special school districts" now constitute rural school districts and form a part of the county school districts, which

latter districts are under the control of the county board of education, I am of the opinion, therefore, that school districts formerly designated "special school districts" may be joined with a village district in another county, provided such village district is an adjoining district, by transferring the same in accordance with section 4692, which transfer can be made by the mutual consent thereto by the boards of education of the respective districts.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1055.

RIGHT OF COUNTY COMMISSIONERS TO BORROW MONEY TO PROVIDE FOR THE MAINTENANCE OF COUNTY TUBERCULOSIS HOSPITAL, UNTIL MARCH 1, 1915.

Under section 2434, General Code, which grants authority to commissioners to borrow money and issue bonds for the relief and support of the poor, bonds may be issued to provide for the maintenance of a county tuberculosis hospital between the present and March 1, 1915, when the proceeds of the special levy authorized for that purpose will first become available. This question is somewhat obscure, and the conclusion is based upon the fact that it is clearly the legislative intention that tubercular paupers shall be kept in this hospital and not elsewhere during the time mentioned.

COLUMBUS, OHIO, July 18, 1914.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—In your letter of July 5th, receipt whereof has already been acknowledged, you enclosed a copy of an opinion given by Hon. H. C. Sherman, assistant prosecuting attorney, to the county commissioners of Franklin county, and a letter addressed by Messrs. Squire, Sanders and Dempsey to Messrs. Hayden, Miller and company of Cleveland, Ohio, both referring to a certain issue of bonds authorized, or attempted to be authorized by the commissioners of Franklin county, for the purpose of providing temporarily for the maintenance of the Franklin County Tuberculosis Hospital. I note that there is a difference of opinion between your office and Messrs. Squire, Sanders & Dempsey, respecting the legality of this issue of bonds, and that my opinion in the premises is requested.

I have not before me the exact phraseology of the resolution authorizing issuance of the bonds, therefore, I do not know what is the declared purpose of the commissioners in issuing them. I note, however, that it is agreed that the authority to issue such bonds, if it exists at all, is referable to section 2434, General Code, which empowers the county commissioners, inter alia to borrow money and issue bonds "for the relief or support of the poor."

I may pause here to say, that in my opinion, this assumption is correct, there being no other provision of law under which authority to borrow money for the maintenance of a county tuberculosis hospital or of any class of persons therein, could be claimed.

The question, then, is, as to whether or not, the maintenance of a county tuberculosis hospital, constitutes the "support of the poor." At the outset, I may say that I quite agree with Messrs. Squire, Sanders and Dempsey in their views that the word "poor," as used in section 2434, General Code, has a limited meaning, and refers to the destitute, or such persons as are dependent on the county for support.

But this premise does not lead in my judgment to the conclusion at which Messrs. Squire, Sanders and Dempsey have arrived. The present statutes relative to the county tuberculosis hospital are found in 103 O. L., 492, and consist of sections 3139, et seq., General Code, as amended. The prior legislative history of these sections is of interest in this connection, but in the view I take of this question, it need not be considered.

Of these sections, the first, section 3139, provides as follows:

> "On and after January 1st, nineteen hundred and fourteen, no person suffering from pulmonary tuberculosis, commonly known as consumption, shall be kept in any county infirmary."

The related sections contain the following provisions:

> "Section 3141. In any county where a county hospital for tuberculosis has been erected such county hospital for tuberculosis may be maintained by the county commissioners, and for the purpose of maintaining such hospital the county commissioners shall annually levy a tax and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose.
>
> "Section 3142. An accurate account shall be kept of all moneys received from patients or from other sources, which shall be applied towards the payment of maintaining a tuberculosis hospital. * * *
>
> "Section 3145. The medical superintendent shall investigate applicants for admission to the hospital for tuberculosis who are not inmates of the county infirmary and may require satisfactory proofs that they are in need of proper care and have pulmonary tuberculosis. The board of trustees may require from any such applicant admitted from the county or counties maintaining the hospital a payment not exceeding the actual cost incurred in their care and treatment, including necessaries and cost of transportation, or such less sum as they may deem advisable, owing to the financial condition of the applicant."

It is clear from these provisions that the county tuberculosis hospital is a place for the care and support of a certain class of indigent persons who would otherwise be kept in the infirmary, viz.: the tubercular poor. The keeping of such persons in the county tuberculosis hospital, or in some district tuberculosis hospital, is not only authorized as a means of supporting the poor, but is required by the positive provision of section 3139, General Code, supra.

True, persons who are not inmates of the county infirmary, may also be admitted to the county tuberculosis hospital, but such admission is conditioned upon the right of the "trustees" (which word as used in section 3145, General Code, is evidently intended to apply to the county commissioners, as directors of the infirmary, as well as to the trustees of the district hospital), to require the payment of the actual cost incurred in their care and treatment. The intention is that to the extent of their ability to pay, tubercular persons, other than those who are inmates of the county infirmary, are to provide for their own maintenance in the county tuberculosis hospital.

It is true that the provisions of section 3145, General Code, constitute a grant of power, and not the imposition of a duty; it is true also that the commissioners as "trustees" may require from those other than the inmates of the infirmary, the payment of a sum less than that which corresponds to the actual cost incurred in their care and treatment, etc., if they deem such action advisable "owing to the financial condition of the applicant."

As to this last feature of the statute, it may be said that furnishing medical treatment to persons who, if in good health, would be able to support themselves, but who are not able to provide for themselves in sickness, or to procure the services of a physician, has always been regarded as a proper function of the relief of the poor, and is so recognized in our statutes: see section 3490, General Code. It is true that the furnishing of medical relief has been heretofore a function of the township trustees and municipal authorities, instead of the infirmary directors, or county commissioners; but as to the tubercular poor, it is clearly the intention of the law that medical relief to them shall be provided for through the agency of the county tuberculosis hospital.

Therefore, I am of the opinion that the mere fact that the county commissioners as trustees are authorized to exact from applicants, other than inmates of the infirmary, the payment of a less sum than that corresponding to the actual cost of maintenance and treatment, does not deprive the care and relief of such persons of the nature of poor relief.

The only question, then, which seems at all doubtful to me, arises out of the fact that the commissioners are authorized by inference to maintain in the county tuberculosis hospital, if they so desire, persons other than the inmates of the infirmary, without exacting from such persons the payment of a sum sufficient to meet the cost and expense of their care and treatment, etc., and without reference, also, to the ability of such persons to pay. To the extent that the commissioners might by such action cast upon the public the burden of providing for the care and treatment of tubercular patients, who are able to pay for their own maintenance and treatment, to that extent at least, the maintenance of the county tuberculosis hospital would not constitute the relief and support of the poor.

But I am unable to see that such a consideration is material to the present question. I assume that the commissioners have authority to borrow money for the relief of the poor, without the declared intention of applying it to the maintenance of a tuberculosis hospital as constituting such poor relief; there would be no question in my mind (nor I take it in the mind of any other person) as to the legality of the bond issue, had the commissioners not disclosed their exact purpose by recitals made in their resolution. In fact, then the bonds would have sold without question, and when sold, the manner of the application of their proceeds could in no event have affected their validity; this proposition is elementary.

Now the mere fact that the commissioners stated the exact manner in which they intended to apply the money derived from the sale of these bonds, to the relief and support of the poor, does not in my opinion materially alter the case. Had the commissioners stated in their resolution that the money derived from the sale of the bonds was to be applied to the maintenance and treatment in the tuberculosis hospital of all those persons, who, but for the provisions of section 3139, General Code, would be kept in the county infirmary, and such other persons, afflicted with pulmonary tuberculosis as might not be able to provide the necessary care and medical treatment for themselves, then it would clearly appear that the money in question would be used for the relief and support of the poor.

Not having been quite so explicit as this, however, but having (apparently), stated merely their purpose to apply the proceeds of the bond issue, generally to the maintenance of the county tuberculosis hospital, the commissioners have nevertheless, in my opinion, stated a purpose for which it is lawful to issue bonds. For, having the power to provide for the maintenance of the county tuberculosis hospital, as a function of poor relief, it will be presumed that they harbor no intention to violate the law and exceed their authority. It follows that the authority to issue the bonds exists, in spite of the possibility of the wrongful application of their proceeds. Should the commissioners in point of fact apply the proceeds of the bonds to the maintenance of the hospital generally, and then fail to exact from those who are able, such charges

as would compensate the county for their maintenance, thereby the validity of the bonds would not be affected, and such misapplication of public moneys as might be involved would be a matter to be restrained or corrected by proper action of the prosecuting attorney, the county auditor, or some tax payer.

In arriving at this conclusion, I have not been unmindful of certain considerations which make the question doubtful. It is true, that the permanent maintenance of the county tuberculosis hospital is to be provided for by a special levy, authorized by section 3141, as amended, General Code, (which said levy will not produce funds until March, 1915, whence the necessity for procuring them otherwise); so that the general assembly has evidently not considered the general levies for the county poor fund and the revenues otherwise accruing to that fund as available for the maintenance of the county tuberculosis hospital. This point is not without its weight, but to my mind, it is not conclusive. In fact consideration of section 3141, General Code, has led me to take the very view, which I have adopted. It is true that when this section becomes practically available, it might be considered as affording the exclusive means of providing for the maintenance of a county hospital for tuberculosis, it is equally true that until that time there rests upon the commissioners the positive duty to keep the tubercular poor in some hospital, and not in the county infirmary. The discharge of this duty requires the use of some public moneys. Obviously, no funds other than the poor funds could properly be used for this purpose. Therefore, it follows of necessity, it seems to me, that until the moneys derived from the levies made under authority of section 3141, General Code, as amended, become available, it must be the legislative intention that the poor fund shall be used for the maintenance and treatment of the indigent patients, who must be provided for outside of the county infirmary, and in a tuberculosis hospital. To hold otherwise would render impossble compliance with section 3139; and this section to my mind, is the keynote of the legislative intention embodied in the act of which it is a part. If then, the poor fund, if sufficient, is the only fund available until March, 1915, for the purpose of carrying out the explicit command of the legislature with reference to the care and treatment of the tubercular poor, then it follows, I think, that in the event such fund is insufficient at the present time, it may be augmented by borrowing money, under section 2434, General Code, just as it might be in the event that it proved insufficient to provide for the maintenance of the infirmary itself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1057.

POWERS OF THE FORT MEIGS MEMORIAL COMMISSION TO MAKE REASONABLE RULES PROHIBITING TRESPASSING ON THE GROUNDS UNDER ITS CONTROL.

Under section 12500, General Code, the Fort Meigs memorial commission may make a reasonable ruling prohibiting trespassing on grounds under its control, and any person violating such rule may be subjected to the penalty prescribed by this statute. The word "person" as used in this statute may be read "persons" by authorization of section 12368, General Code. Under the provisions of section 12522, General Code, the commission may be considered the occupant of the lands in question and persons may be arrested for trespassing upon such lands after notice is given to "keep off" by the commission.

COLUMBUS, OHIO, July 20, 1914.

HON. WILLIAM CORLETT, *Secretary The Fort Meigs Memorial Commission, Waterville, O.*

DEAR SIR:—Under date of June 15th you request my opinion as to whether or not your commission may enact rules prohibiting trespassing upon the grounds, under their control, after nightfall, and whether arrests may be made for violation of such rules.

The Fort Meigs memorial commission is authorized by sections 15292-15295 of the General Code. Section 15294, General Code, is as follows:

> "Such commission shall have the entire management and control of said memorial and grounds, and of all improvements thereon, including the location and erection of all memorials upon such property; the maintenance, improvement and protection thereof, and the expenditure of all moneys hereafter appropriated therefor.
>
> "And for the purpose of carrying these powers into effect said commission may adopt such rules and regulations governing the use, protection, improvement and management of said property as may be necessary."

Section 12500 of the General Code is as follows:

> "Whoever wilfully violates a reasonable rule governing the access to prehistoric parks or historic grounds made by a person, association or company, owning or having custody of such parks or grounds, or injures or marks structures, trees or plants therein, shall be fined not more than fifty dollars or imprisoned not more than sixty days, or both, and be liable to such owners or custodians for damages."

Section 12368 of the General Code provides as follows:

> "In the interpretation of part fourth, the words "person" and "another," when used to designate the owner of property, the subject of an offense, include not only natural persons, but every other owner of property * * * words in * * * the singular number include the plural number * * *."

Under authorization of this latter statute, therefore, the word "person," as used in section 12500 of the General Code, may be read "persons," and this section, therefore, has a clear application to a board or a commission such as the Fort Meigs memorial commission having custody of the grounds in question. The board may, therefore,

make a reasonable rule prohibiting access to the grounds after nightfall, and any person refusing to comply with said rule may be arrested by any police officer and be subjected to the penalty prescribed by this statute.

Section 12522 of the General Code is the only remaining authority having possible bearing upon your situation. This statute is as follows:

> "Whoever, being about to enter unlawfully upon the lands or premises of another, is forbidden so to do by the owner or occupant, his agent or servant, or, being unlawfully upon the lands or premises of another, is notified to depart therefrom by the owner or occupant, his agent or servant, and refuses to depart therefrom, shall be fined not less than one dollar nor more than five dollars."

I am of the opinion that the commission may be deemed the occupant of the premises in question, within the meaning of this statute, and when, by virtue of the commission's authority under section 15294, above quoted, to enact rules for the management of the grounds, it has prescribed a rule against trespassing upon the premises after nightfall, I am of the opinion that such a rule operates as a prohibition, by the occupant against unlawfully entering his lands within the meaning of section 12522 of the General Code, above quoted.

When such prohibition was brought to the notice of an individual, and he, nevertheless, enters upon such grounds in contravention thereto, he is guilty of a violation of this statute and may be arrested by any police officer therefor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1058.

POWER OF MUNICIPALITY TO SELL BONDS FOR THE PURPOSE OF ERECTING POLES, WIRES AND OTHER FIXTURES FOR TRANSMITTING AND DISTRIBUTING ELECTRIC CURRENT PURCHASED BY SUCH MUNICIPALITY FROM OTHERS.

Of the two acts passed May 15, 1911, amending section 3939, General Code, to the extent that said acts are in conflict or substantially different, effect is to be given to the act later approved by the governor. The provisions of subdivision 12 of this section as amended authorizing municipal corporations to issue and sell their bonds for erecting or purchasing works for the generation and transmission of electricity, are to be construed as authorizing a municipality to issue and sell its bonds for the purpose of erecting poles, wires and other fixtures for transmitting and distributing for lighting purposes electric current purchased by such municipality from others.

COLUMBUS, OHIO, July 20, 1914.

HON. MICHAEL MINGES, *Village Solicitor of Cleves, First National Bank Building, Cincinnati, Ohio.*

DEAR SIR:—I have your favor of July 7, 1914, in which you ask opinion of me as follows:

> "As solicitor of the village of Cleves, I am writing you asking your opinion, if consistent with your duties, upon the construction of two acts of the legislature, the first being senate bill No. 281, found in 102 O. L., page 153, and the second being senate bill No. 131, found in 102 O. L., page 262.

"The particular part to which I desire to call your attention is the twelfth specific purpose under section 1, relative to the right and power of municipal corporations to issue bonds for the erecting of electric light works.

"The question which I have before me is as to whether or not a village has the right to issue bonds for the purpose of erecting works for the transmission only of electricity, it being the desire of counsel with their limited means not to erect works for the generation of electricity, but they desire only to erect the necessary poles, wires and fixtures to transmit current throughout the village and after having the system erected they desire to purchase the necessary current for furnishing light to the village and the inhabitants thereof.

"As senate bill No. 131 provides for the issuance of bonds for erecting works for the generation *and* transmission of electricity, I am undecided as to whether or not we would have authority under this act to issue bonds for the transmission only of electricity.

"Will you therefore, kindly give me your ideas of construction of these two acts, and whether or not, in your opinion, the village of Cleves has the right to issue bonds for the transmission only of the necessary current."

As pertinent to the questions presented it is provided by section 3618, General Code, that municipal corporations shall have power to establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat.

By section 3990, General Code, a municipal corporation may not only erect electric works, but in villages where electric works have already been erected by any person or company, which works are being operated under existing franchise, the municipality is authorized to purchase the same, if an agreement can be had with the owner of such works; if not, the municipality is authorized to appropriate such electric works by action.

Section 3809, General Code, as amended, 103 O. L., 526, provides:

"The council of a city may authorize, and the council of a village may make a contract * * * for the leasing of the electric light plant and equipment * * * of any person, firm, company or municipality, or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years."

It thus appears, that with respect to the right of a municipal corporation to furnish electric light to meet its own needs and those of its inhabitants, that it may do so by the construction or acquirement and maintenance of an electric light plant for generating the necessary electric current, or it may purchase such current from others.

The question presented, however, is one with respect to the right and power of this village to issue bonds for the purpose of procuring the money necessary for the erection of poles, wires and fixtures in the municipality for the transmission of current which it expects to purchase.

Section 3912, General Code, provides:

"Municipal corporations shall have special power to borrow money and maintain and protect a sinking fund. The power to borrow money shall be exercised in the manner provided in this chapter."

Section 2835 of the Revised Statutes of Ohio, authorizing municipal corporations to issue and sell their bonds for certain specific purposes, was amended in 1893 (90 O. L., 229), so as to authorize for the first time the issuance and sale of bonds for the

purpose, among others, of electric light works. This section of the Revised Statutes was amended from time to time prior to 1910, when the General Code went into effect; at which time said section 2835, Revised Statutes, was carried into the General Code as section 3939. On May 15, 1911, said section 3939 was amended, but in such amendment the subdivision of the section relating to electric light works was not changed and reads as follows:

> "12. For erecting or purchasing gas works or electric light works and for supplying light to the corporation and the inhabitants thereof."

This act was approved by the governor on May 22, 1911. On the same date, to wit: May 15, 1911, the legislature again amended section 3939, and in such amendment the subdivision of the section relating to electric light works reads as follows:

> "12. For erecting or purchasing gas works or works for the generation and transmission of electricity for the supply of gas or electricity to the corporation and the inhabitants thereof."

This act was approved by the governor May 26, 1911.

With respect to the question at hand, there may be room for doubt whether there is any practical and substantial difference in the intent and purpose evinced by the legislature in the enactment of the language found in section 12 of these respective acts. To the extent, however, that there is or may be any conflict or substantial difference in the enactments, the effect is to be given to the later act, to wit: the one approved by the governor May 26, 1911. In acting on the approval or disapproval of bills enacted by the house and senate, the governor acts as a branch of the legislative power, and his approval is the last legislative act which imparts life and effect to the statute.

Lukens vs. Nye, 156 Calif., 498.
Stuart vs. Chapman, 104 Me., 17.
Drum vs. Cleveland, 13 N. P., n. s., 281, 290.
State ex rel. Halladay, 63 O. S., 165.

By section 3939 of the General Code, as amended by the latter act above noted, a municipal corporation may in the manner therein provided issue and sell bonds "for erecting or purchasing gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the corporation and the inhabitants thereof."

Undoubtedly under the authority of this section a municipal corporation has authority to issue and sell bonds for erecting or purchasing works having for its purpose both the generation and transmission of electricity for supplying the same to the corporation and its inhabitants. The question is whether under the authority of this section a municipal corporation may issue and sell its bonds for the erection of works for the purpose only of transmitting electricity for supplying the same to the corporation and its inhabitants. I am of the opinion that it may do so. I am inclined to the view that the word "and," as used between the words generation and transmission in subdivision 12 of this section, is to be given a distributive, as well as a conjunctive effect, and authorizing the issuance and sale of bonds for the purpose of erecting works for the purpose of both generating and transmitting electricity, or for the purpose of transmitting electricity which may be otherwise acquired. In a consideration of this question, it is, of course, to be noted that the statutory power of municipal corporations to erect and construct municipal improvements and utilities and their power to borrow money by the issuance and sale of bonds for such purposes,

are in a measure separate and distinct powers, yet a consideration of the statutes relating to municipal corporations indicates an aim on the part of the legislature to make the power of such corporation to borrow money by the issuance and sale of bonds, as broad with respect to the erection and construction of improvements and utilities calling for large sums of money, as its power to erect and construct such improvements or utilities.

> "It is a well established rule that the provisions of a statute are to be construed in connection with all laws *in pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious in its several parts. And where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy.
>
> "Cincinnati vs. Conner, 55 O. S., 82, 89."

The general subject under consideration is the power of a municipality to furnish electric light to meet its own needs and those of its inhabitants. As before noted, such municipality is given express power to furnish electric light for these purposes by purchasing the necessary electric current from others. To transmit and distribute the current so purchased for the purpose of furnishing light to the corporation and its inhabitants, it is necessary to erect poles, wires and other fixtures for the purpose of effecting the sole purpose for which the current is purchased. To do these things it may be necessary for the corporation to borrow money by the issuance and sale of bonds, and consonant to the rule of statutory construction before noted, I am of the opinion that the language of subdivision 12 of section 3939 is to be construed as authorizing a municipality to issue and sell its bonds for such purposes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1059.

DUTY OF DIRECTOR OF PUBLIC SERVICE TO LAY PIPES AND FURNISH OTHER INCIDENTAL CONNECTIONS FOR THE PURPOSE OF FURNISHING WATER TO FIRE HYDRANTS—CONNECTIONS TO BE FURNISHED—COST OF REPAVING STREET TORN UP BY WATERWORKS DEPARTMENT PRIMARILY CHARGEABLE TO THE WATERWORKS FUND, COUNCIL MAY DIRECT, HOWEVER, THAT IT BE CHARGED AGAINST THE STREET REPAIR FUND; SUCH EXPENSE IS NOT CHARGEABLE AGAINST THE SAFETY FUND.

1. Under the provisions of section 3963, General Code, it is the duty of the director of public service, by the use of the waterworks fund, and without charge against the safety department, to lay pipes and furnish other incidental connections for the purpose of furnishing water to fire hydrants.

2. The connections to be furnished are such connections as will carry the water to the fire hydrant, as furnished by the department of public safety.

3. The expense of restoring a paved street, torn up by the waterworks department, in process of making such connection, is primarily chargeable to the waterworks fund; but council, by appropriate legislation, may direct the director of public service to charge it against the street repair fund, but it may not be charged against the safety fund.

COLUMBUS, OHIO, July 20, 1914.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 28th requesting my opinion upon the following questions:

> "What interpretation should be placed upon that part of section 3963, which reads as follows 'no charge shall be made by the director of service in cities * * * for furnishing and supplying connections with fire hydrants?'
>
> "What connections are to be furnished with fire hydrants and must said connections be installed by the municipal waterworks plant?
>
> "Must a municipal waterworks plant bear the expense of restoring a paved street torn up in order to repair the pipe connections leading from the mains to the fire hydrants?
>
> "We would refer you to your former opinion construing said section 3963 in connection with 4371, rendered July 28, 1913."

In the previous opinion referred to I held that sections 3961 and 4371, General Code, were inconsistent, and that as a matter of law the one last enacted, viz., section 4371 must control; so that the furnishing of fire hydrants or plugs is a matter within the department of public safety, to be paid for out of funds raised by taxation and appropriated for the use of that department.

My examination of the question submitted, and particularly of the language of section 3963, General Code, wherein the same words, viz., "furnishing and supplying with connections * * * fire hydrants," are used save that the word "with" follows instead of precedes the word "connection," leads me to the conclusion that while my previous opinion was right, there is no inconsistency between section 3961 and 4371, General Code, but that section 3961 is to be so interpreted as to limit the power of the director of public service to "furnishing and supplying" *connections* with fire hydrants, and is not to be extended to furnishing fire hydrants themselves.

It is at least possible to read section 3961 in this way, and I mention this view as at least an additional reason justifying the conclusion reached by me in the former opinion. It will be assumed at any rate that sections 3961 and 3963, General Code, are limited to supplying connections with fire hydrants.

Under section 4371 and related sections of the General Code, it is the power and duty of the director of public safety, in my opinion, to designate the *location* of any fire hydrant or plug and it is also his duty to purchase such plug or hydrant ready for connection with the water distribution system of the city. It is then the duty of the director of public service, under section 3963, to lay down such pipes and to furnish such incidental connections as are necessary to carry the water from the distribution mains of the city waterworks department to the fire plugs as located by the director of public safety. It is also his duty to keep such connections so furnished by him in repair.

All this must be done by the director of public service as the chief administrative authority of the waterworks department and with the use of waterworks funds. Section 3963 prohibits him from making any charge against the safety department for such services. If it were not for this section, however, it would be quite proper for such a charge to be made as the expense is one which really ought to be met by the taxpayers and not the users of water. This statement, however, involves a general criticism of the policy of section 3963, General Code; there can be no question as to the meaning of the section.

I believe the general statements which I have made constitute as much of an answer to your first two questions as I could furnish in the absence of a more specific request.

Your third question is more difficult. In principle it might be extended to cover any case of restoring a paved street, torn up for the purpose of repairing waterworks mains and plug connections. Of course work of this sort is to be done by the department of public service which has charge of the streets as well as the waterworks, but the question as to whether or not it should be paid for out of waterworks funds or out of street repair funds, derived from general taxation, is one which is difficult of solution.

Section 3963 does not furnish any answer to this question. It prohibits the director from charging the department of public safety for the expense of keeping waterworks connections with fire hydrants in repair, and to this extent I think its express language may be interpreted so as to prohibit charging the cost of the restoration of the pavement to that department; but it does not specify as to what fund under the supervision of the department of public service may be drawn upon for the purpose of meeting such expense. I quote, however, section 3964, General Code, which provides as follows:

> "Attachments of whatever nature made to the water pipes or other fixtures belonging to the waterworks and intended for public use shall be subject to the same supervision, rules and regulations as are made for the protection of waterworks against abuse, destruction and unnecessary use or waste of water or the director of public service may make general or special rules and regulations for such purpose."

I do not believe that under this section the director of public service has authority to make a rule charging the cost of restoring the paved street against any proprietor, either public or private. Service connections have to be repaired, at least, in the absence of abuse or destruction on the part of the proprietor; and I do not believe that the director of public service may, under a joint interpretation of this and preceding sections, hold the department of public safety for alleged "abuse or destruction" of any kind. Under section 3714, General Code, council has the special power to exercise

care, supervision and control of the streets within a corporation and to cause them to be kept open, in repair and free from nuisances. Council must act, of course, through the agency of the director of public service but this power is evidently paramount.

I find no express authority for the use of waterworks money to restore paved streets under any circumstances. In a sense the restoration of a street to its original condition might be regarded as a part of an extension or laying down of pipe which is an enterprise, the expense of which is payable out of the waterworks fund. In another sense the re-surfacing of the street is an independent undertaking necessitated by the original excavation, of course, but not being a part of it.

In the absence of any more explicit statutory provisions than those which I have found, I am of the opinion that the director of public service, who has general management of the waterworks, even to the extent that his disposition of waterworks money cannot be in detail controlled by the council, may, in the exercise of his administrative discretion, expend such moneys for the reimbursement of the city on account of the expense of restoring paved streets torn up by any repairing and fire hydrant connection. The council, through the department of public service and the sub-department of street repairs may, of course, provide otherwise for the doing of such work, as it has general power over the repair of streets.

In the case of service connections other than those with fire hydrants it is, I believe, customary for the waterworks department to charge the consumer with the cost of replacing the pavement as well as with making the excavation, laying the pipe and refilling the trench. This is, of course, on the theory that the restoration of the pavement is an expenditure on the part of the city for the benefit of the consumer, and the result is that no municipal funds are drawn upon for this purpose, at least ultimately.

The sections already considered, however, preclude the possibility of charging the department of public safety for any expense connected with making connections with fire plugs. The burden must fall upon some public fund and primarily, at least, it must fall upon the waterworks fund, because the restoration of the pavement, as already stated, is in a sense, at least, a part of the process of making the connection.

Now the statute is negatively phrased. It is a prohibition against charging any part of the expense to the safety department; and it is directed against the director of public service in his peculiar capacity as manager of the waterworks and administrator of the waterworks fund. It is controlling upon the council only in so far as expenditures from the safety fund are concerned. It does not amount inferentially to a prohibition against the expenditure of any other fund than the waterworks fund for any part of the expense of such an enterprise which might lawfully or appropriately become a charge upon any such other fund. The digging of the trench, the laying of the pipe and the refilling of the trench are not expenses which might lawfully be charged to any fund other than the waterworks or safety fund, and the sections under consideration prevent them from being charged against the latter, therefore, they must be charged against the former. But the restoration of the pavement being a matter which if not provided for out of the waterworks fund may appropriately become the subject of legislation by council in the exercise of its duty to keep the streets open and free from nuisances, is one that when authorized and directed by council may, in my opinion, be charged against the street repair division of the service fund.

My conclusion is that in the absence of legislation by council authorizing and directing the director of public service to restore pavements torn up for the purpose of making connection with fire hydrants by the use of the street repair fund and making appropriations from that fund for that purpose, an expense of this kind falls upon the waterworks fund as a part of the expense of making the connection; but that council may legislate as suggested, and in so doing may relieve the waterworks fund of the burden of making such expenditure. Such action on the part of council ought to be looked upon with favor in my opinion, because of the fact that in the absence of stat-

utes, a governmental expense, or rather an expenditure made necessary for governmental purposes, is one which ought to be borne by the taxpayers rather than by the users of water; and statutes preventing such a result ought in my judgment, to receive a very strict interpretation.

So that your third question, while it is to be answered in the negative, in the sense that the expense of restoring streets is one that *must* be charged to the waterworks fund under all the circumstances mentioned, is not fully answered by such a statement; because it is only in the absence of the taking of proper steps that such expense is to be so charged.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1060.

RIGHT OF FOREIGN INSURANCE COMPANIES TO WRITE OHIO POLICIES INDEMNIFYING PHYSICIANS AGAINST MALPRACTICE.

A foreign insurance company may not write in Ohio policies indemnifying physicians against malpractice.

COLUMBUS, OHIO, July 20, 1914.

HON. ROBERT M. SMALL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On March 18, 1914, you made the following request for my opinion:

> "Enclosed you will find 'Physicians' Liability Policy' No. 1427235, issued to Dr. John Larkin of Hillsboro, Ohio, by the Fidelity and Casualty Company of New York as of date January 5, 1912.
>
> "This policy was renewed on January 5, 1913, for a period of one year on the payment of $15.00 premium by the insured as is evidenced by the enclosed renewal certificate No. 21337.
>
> "The above insurance policy covers the insured and provides indemnity as follows:
>
> " 'To INDEMNIFY the person named in statement number 1 of the schedule of warranties and herein called the assured, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death, suffered by any person or persons in consequence of any malpractice, error, or mistake—(a) of the assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term.
>
> " 'TO DEFEND in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons in consequence of any malpractice, error or mistake —(a) of the assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term.' "
>
> "Its limit of indemnity is set out in paragraph one of that part thereof designated 'subject to following conditions,' and is as follows:

" '1. The company's liability for loss from any malpractice, error or mistake resulting in bodily injuries to or in the death of one person is limited to five thousand dollars, and subject to the same limit for each person, the company's total liability under this policy is limited to fifteen thousand dollars. The expenses incurred by the company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the assured, will be paid by the company irrespective of the limit expressed above.'

"The said Fidelity and Casualty Company was licensed by this department for the years 1911, 1912 and 1913 dated as March 1st, each year and authorized accordingly to transact business in this state.

" 'Its appropriate business of making insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; making insurance against loss or damage resulting from accident to property, from cause other than fire or lightning, guaranteeing the fidelity of persons holding places of public or private trust, who may be required to, or do, in their trust capacity, receive, hold, control, disburse public or private moneys or property; guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; making insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes, and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations, as prescribed in section 9510, paragraph second, General Code, in accordance with law, during the current year.'

"You will find also enclosed a certified copy of declaration and charter of the Fidelity and Casualty Company of New York, also a letter from the Hon. Charles C. Nadal, its general counsel, bearing upon the subject of 'Physicians' Liability Insurance.'

"A study of these enclosures prompts two queries and I respectfully request your opinion relative thereto.

"*First.* Do the laws of Ohio permit the issuance of insurance therein as of a character as provided in the above paragraphs one and two by insurance companies organized under the laws of Ohio, or by insurance companies organized under the laws of any other state in the United States and admitted thereto?

"*Second.* If you should conclude affirmatively as to query number one, does section 9510 provide for such insurance?"

The agreement entered into by the Fidelity and Casualty Company under the policy submitted by you is two-fold. First, it is an agreement to indemnify and second to defend. As this agreement is fully set forth in your letter, I do not again copy it from the policy.

In the first place I desire to call your attention to the case of State ex rel. The Physicians' Defense Co. vs. Laylin, Secretary of State, 73 O. S., 90, where it was held that a contract or agreement to defend a physician against a suit for malpractice (such contract or agreement not including a judgment should one be recovered against the physician) is not a contract of insurance, as there is no agreement to indemnify, and that such an agreement or contract on the part of the corporation constitutes professional business, and is expressly prohibited to corporations by section 3235 R. S. O., now section 8623, General Code. The syllabus of this case is as follows:

"1. A foreign corporation, the sole business of which as authorized by its charter, is that of defending physicians and surgeons against civil prosecution for malpractice, which, in the prosecution and conduct of said business, issues and sells to members of the medical profession a contract whereby it undertakes and agrees to defend the holder of said contract against any suit for malpractice that may be brought against him during the term therein specified, but does not assume, or agree to assume or pay, any judgment that shall be rendered against him in such suit, is not engaged in the business of insurance, nor is the contract so issued and sold an insurance contract.

"2. But a foreign corporation created for the purpose of engaging in and carrying on such business, is not entitled to have or receive from the secretary of the state of Ohio, a certificate authorizing it to transact such business in this state for the reason that the business proposed is professional business, and as such is expressly prohibited to corporations by section 3235 of the revised statutes of Ohio."

As the second portion of the contract contained in the policy submitted by you expressly provides that the company is "to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons in consequence of any malpractice, error or mistake (a) of the assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term;" in other words, is to defend the assured against any or all civil suits for damages for malpractice on the part of himself or his assistants brought during the term of the policy, this portion of the policy would seem to come fairly within the decision to which I have above referred, and would be prohibited to a corporation either foreign or domestic.

Under this decision of the court, and its construction of section 8623, General Code, an insurance company cannot enter into contracts of this character unless expressly authorized so to do. That is, in the absence of a special and specific provision authorizing contracts of this character by an insurance corporation, the general statute would control. There is no such special or specific statute giving such authority to insurance corporations and, therefore, it must be considered that they come within, and are bound by, the rule announced in said case of State ex rel. Physicians' Defense Co. vs. Laylin.

Answering your questions specifically:

First. Do the laws of Ohio permit the issuance of insurance therein as of a character as provided in the above paragraphs one and two by insurance companies organized under the laws of Ohio, or by insurance companies organized under the laws of any other state in the United States and admitted thereto?

Section 9510, General Code, specifies the kinds of insurance which companies may be organized in this state to transact, or which companies organized in other states may be allowed to transact in this state. This section is as follows:

"A company may be organized or admitted under this chapter to—

"1. Insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes, and make all kinds of insurance on goods, merchandise and other property in the course of transportation on land, water or on a vessel, boat or wherever it may be.

"2. Make insurance on the health of individuals and against personal injury, disablement or death resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident

to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trusts, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policyholders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value. The securities so deposited may be exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state it shall be permitted by the superintendent to collect the interest on such deposits.

"3. Make insurance on the lives of horses, cattle or other live stock against loss by death caused by accident, disease, fire or lightning, and against loss by theft and damage by accident. But such companies shall have a capital of one hundred thousand dollars, with at least twenty-five per cent. of the capital stock paid up.

"Receive on deposit and insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property; lend money on bottomry or respondentia and cause itself to be insured against any loss or risk it has incurred in the course of its business, and upon the interest which it has in any property by means of any loan which it has made on mortgage or bottomry or respondentia, and generally to do all other things proper to promote these objects."

Section 665 of the General Code provides that the only insurance business which can be transacted in this state, either by domestic or foreign insurance companies, is that expressly authorized by the laws of this state. This section is as follows:

"No company, corporation or association, whether organized in this state or elsewhere shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

It is, therefore, necessary to determine whether the insurance of physicians against claims for malpractice is authorized by the laws of this state, that is by section 9510 of the General Code which I have quoted above. A careful examination of this section fails to disclose authority for insurance of this character. The only language which could possibly be claimed to apply in any way to insurance of this kind is that authorizing companies to "indemnify persons and corporations other than employers, against loss or damage for personal injury or death resulting from accidents to other persons or corporations."

The contingency insured against in the policy submitted to me cannot be classed as an accident. The policy specifically states that it is to indemnify "against loss from or liability * * * in consequence of any malpractice, error or mistake." It may perhaps be claimed that the paragraph of section 9510 dealing with liability insurance can reasonably be held to include and authorize liability insurance of every character, and thus include the insurance of physicians against the results of malpractice.

A consideration of the statute itself is perhaps the strongest argument against this intention. It will be found that the statute specifies with great care the different kinds of liability or casualty insurance which may be written, and if it were intended to authorize generally all kinds of liability and casualty insurance there is no reason nor excuse for the careful detail with which the different kinds of insurance are specified; again, by examination of the legislation of the state, it is found that this statute has from time to time been amended so as to authorize additional classes of insurance to those contained in it at the time of its enactment. (See 102 O. L., 359; 90 O. L 157; 93 O. L., 17; 97 O. L., 408.)

The last amendment was made in order to authorize casualty companies to indemnify employers against loss or damage for personal injury or death resulting from accident to employes, and further to indemnify persons other than employers against such loss or damage.

Had the statute authorized all kinds of liability and casualty insurance these amendments would be entirely unnecessary. The civil action for recovery of damages on account of malpractice by a physician is not of recent origin. I have not taken the trouble to trace the history of this action, but I am quite positive it is older than the state of Ohio, and the liability of physicians to actions of this character must have been known to the first legislature which passed a statute on the subject of insurance, as well as to every legislature that has experimented in the dangerous but attractive field of making and amending laws, and, therefore, so far as I can see, there is no reason whatever upon which to base the contention that insurance of this character was intended by the legislature to be embraced by the terms of section 9510.

It is unnecessary to determine whether this particular company is authorized by the laws of the state, under which it is organized, to write policies of insurance indemnifying physicians against loss from liability on account of malpractice, and agreeing to defend physicians from actions for damages for malpractice for the reason, as above stated, that under section 665 of the General Code, no insurance company can, in this state, transact insurance business not authorized by the laws of this state, no matter whether such company is organized in this state or elsewhere; and I fail to find in the statutes of Ohio any authority express or implied for the issuance of policies to idemnify physicians against or defend them from claims for damages on account of malpractice.

My position, I think, is sustained by the case of State ex rel. Sheets Attorney General vs. Aetna Life Insurance Co., 69 O. S., 317. This case has been cited to sustain the contention that an insurance company may write any class of insurance in this state if such business is within the charter powers of such company, and is not obnoxious to the policy of the laws of this state, unless such business is expressly prohibited by the laws of this state, upon the assumption that under the rule of comity that prevails between the states of the union, this state will permit a corporation, organized in another state, to do any act authorized by its charter or the law under which it is created, unless said act be expressly prohibited by the laws of this state, or be obnoxious to the public policy of this state. This rule may be generally true, but it does not apply to the question now under consideration and is not sustained by the case referred to. The syllabus of said case is as follows:

"1. A life insurance company incorporated and organized under the laws of another state, and authorized by its charter to engage in the business of 'indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes,' may, upon complying with the statutory requirements regulating deposits by foreign corporations, be licensed and permitted, under favor of section 3596, Revised Statutes, to engage in and transact such employers' liability insurance in this state.

"2. In the absence of any statute in Ohio prohibiting life insurance companies from doing an employers' liability insurance in this state, and the business itself being by statute expressly authorized; a life insurance company, incorporated and organized under the laws of a sister state, and empowered by its charter to engage in the business of employers' liability insurance, may, by the comity that prevails between the states, be licensed and permitted to transact such business in this state, although our statute has not in express terms conferred upon domestic life insurance companies authority to engage in or transact that particular kind of insurance."

It is seen from this that the court bases its holding upon the fact that the kind of insurance under consideration in said case was expressly authorized by our statutes; and the presumption necessarily arises, from a careful consideration of this syllabus (which is the law of the case), that the court would have no hesitancy in holding that insurance business of a kind not authorized by the laws of this state cannot be transacted in this state by either a domestic or foreign insurance company.

For a more complete discussion of this matter I refer you to my opinion to your predecessor, Hon. Edmond H. Moore, dated July 12, 1912, in which I held that the superintendent of insurance was not warranted under the laws of Ohio in issuing a license to the Aetna Accident and Liability Company, a foreign corporation, organized to do a casualty business other than fire, to issue a policy insuring against the loss of use of an automobile caused by fire.

My answer to your first question, therefore, is that the laws of Ohio do not authorize insurance companies to issue policies agreeing to indemnify physicians from and defend them against claims arising from malpractice.

My answer to your first question also answers your second question.

I herewith return to you the enclosures referred to in your letter.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1061.

BONDS OF THE ST. FRANCIS LEVEE DISTRICT OF ARKANSAS AND THE BONDS OF THE HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT OF HARRIS COUNTY, TEXAS, NOT COUNTY BONDS.

The bonds of the St. Francis levee district of Arkansas are not county bonds, and under the provisions of section 9778, General Code, do not, therefore, come within the classes specified in said section. The same is true of the bonds of the Harris County Houston Ship Channel Navigation District of Harris county, Texas.

COLUMBUS, OHIO, July 20, 1914.

HON. JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On May 20, 1914, you made the following request for my opinion:

"I herewith submit for your consideration papers describing an issue of bonds by the St. Francis levee district of Arkansas, and would request an opinion as to whether or not said bonds may be deposited with the treasurer of state as security for the faithful performance of trusts as provided for by section 9778, General Code, of Ohio.

"I would also request an opinion as to whether or not bonds issued by the Harris County Houston Ship Channel Navigation District of Harris county, Texas, are acceptable for the purpose referred to above. The following certificate appears on the back of said bonds:

" 'Office of the Comptroller of the State of Texas.'

" 'I, W. P. Lane, comptroller of public accounts, certify that there is on file and of record in my office a certificate of the attorney general of the state of Texas to the effect that this bond has been examined by him, as required by section 17, chap. 15, acts 31st legislature, and that he finds that it has been issued in conformity with the constitution and the laws of the state of Texas, and that it is valid and binding obligation upon said Harris county, state of Texas, and said bond has this day been registered by me.

" 'Witness my hand and the seal of my office, this the 4th day of January, A. D., 1912.' "

[Signed] A. P. Lane,
Comptroller of the State of Texas.

Section 9778 of the General Code is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

Under this section the only bonds which may be received by you are bonds issued

by the United States, or by this state or by a county or municipality therein, or by a county or municipality in any other state, or the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock. The naming of certain bonds which may be accepted for deposit under this section necessarily excludes all classes of bonds which are not named, and, therefore, this being a provision to secure the faithful performance of trusts by trust companies should be strictly construed, and no bonds should be accepted which do not come squarely within one of the specified classes.

In regard to the bonds of the Harris County Houston Ship Channel Navigation District of Harris county, Texas, I, of course, give full faith and credit to the certificate of the comptroller of the state of Texas that such bonds are valid and binding obligations upon Harris county, Texas, but it appears that these bonds are issued by a certain district of Harris county, Texas, and, therefore, cannot be properly classed as "county bonds." They are, primarily, the bonds of the district by which they are issued, and, therefore, cannot be classed as county bonds for the purpose of deposit under section 9778.

As to the bonds of the St. Francis Levee District of Arizona, it appears that the St. Francis Levee District embraces all or parts of seven counties in the northeastern part of Arkansas. This particular district was organized in 1893 and has the power to issue bonds. These bonds, however, are not the bonds of any county, nor of a municipality, but are bonds of the St. Francis Levee District, and as such do not come under any classification of bonds which are made acceptable for deposit under section 9778, as stated in a former opinion to you upon a question analogous to this, I do not wish to be considered as in any way passing upon the validity or worth of these bonds. My holding is merely upon a strict construction of the terms of the statute under consideration.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1062.

SECTION 7748, GENERAL CODE, PROVIDING FOR TRANSPORTATION OF PUPILS WHO ARE REQUIRED TO GO TO A SCHOOL MORE THAN FOUR MILES DISTANT, DOES NOT APPLY TO VILLAGE AND CITY BOARDS OF EDUCATION.

Section 7748, General Code, providing for the transportation, by the board of education, of pupils who are required to go to school more than four miles distant from the pupil's residence, in lieu of the payment of tuition at a nearer school in another district, by said board, does not have any application to village and city boards of education, but only to boards of education of rural districts.

COLUMBUS, OHIO, July 20, 1914.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of February 3, 1914, this department received a communication from you, wherein you say:

> "Enclosed find a letter. Please give me your opinion on the question contained therein."

The communication referred to reads as follows:

> State Superintendent of Schools, Columbus, Ohio.
>
> Dear Sir:—"Having been interested in board of education matters for a good many years past, I am taking the liberty of writing you direct for a legal opinion regarding whether or not the board of education of the city of Cleveland are not compelled to pay the transportation of high school pupils in the junior and senior years, who are obliged to go more than four miles from their homes to a school. Going into detail, I might add that a little over a year ago at the regular election, Nottingham was voted into the city of Cleveland.
>
> "Prior to annexation, Nottingham village school maintained a full four year course of high school, but after being taken in by Cleveland (our schools coming under the board of education of said city), the pupils of the junior and senior years of old Nottingham (now Cleveland) were instructed to report at the Glenville high school of Cleveland, Ohio, at the September opening.
>
> "The first and second years of high school are still maintained in old Nottingham, and a similar high school for the same years maintained in Collinwood, which is midway between Glenville high and old Nottingham, the distance between old Nottingham and Glenville being five miles.
>
> "The question is, are not these juniors and seniors from old Nottingham (now Cleveland) entitled to their transportation from the board of education of the city of Cleveland?"

Sections 7747 and 7748, General Code, as the same now appear on pages 125 and 126 of 104 O. L., are as follows:

> "The tuition of pupils who are eligible for admission to high school *and who reside in rural districts*, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance

any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificate shall be furnished by the superintendent of public instruction.

Section 7748. "A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; *except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid.* A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

Under section 7747, above quoted, it will be noted that it is only the tuition of pupils eligible to high school admission who reside in rural districts in which no *high school is maintained,* which must be paid by the board of education of the district in which they have legal school residence. The italicized portion of section 7748 allows an alternative to boards of education, maintaining high schools of their own, with reference to pupils who live more than four miles from such high school, permitting such boards, instead of paying the tuition, to a nearer outside school, of all successful *applicants,* to transport the successful *applicants* to their own school. The term "applicant" has a well recognized reference, in these statutes, throughout, to Boxwell-Patterson graduates. The italicized portion of section 7748, when standing alone, has a possible general application to rural, as well as city and village school districts, only, if we disregard the habitual application, in the statutes, of the word "applicant," to Boxwell-Patterson graduates. The use of the term "applicant," however, will, at least, be conceded to make the provision, even when read alone, ambiguous in its nature.

When we regard the following last portion of section 7748, which is as follows:

"A pupil living in a village or *city district*, who has completed the elementary school course, and whose legal residence has been transferred to a *rural district* in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a *resident pupil of such district.*"

It is clear to me that if the italicized portion, above referred to, applied to residents of a village or city district, as well as those of a rural district, the language of the above quoted latter portion of section 7748 would have been unnecessary or, at least, the legislature would have taken the pains to reserve the same rights to a graduate in a rural district, who removed to a city or village district, after having completed his elementary course and received a Boxwell degree.

It would seem that these provisions, of themselves, would be sufficient to justify, clearly, the conclusion that section 7748, General Code, has no application to residents of village and city districts. This conclusion is fortified when we read these statutes as a whole, in view, particularly, of the consideration that 7747, General Code, imposes the obligation of paying tuition only for residents of rural districts. A history of these statutes, however, would seem to remove the question of all doubt. Sections 7747, 7748, 7749, 7750 and 7751, as originally enacted in 95 O. L., page 72, were all comprised within one enactment of the legislature, and they appeared in the statutes, in the form of one enactment, as 4029-3, Revised Statutes, until the codifying commission, in 1910, separated them and gave them the designated numbers they now bear.

Section 4029-3, Revised Statutes, as it first appeared on page 72, 95 O. L., is as follows:

"The tuition of pupils holding diplomas and residing in *township, special or joint sub-districts,* in which no high school is maintained, shall be paid by the board of education *of the district in which they have legal school residence,* such tuition to be computed by the month and an attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall charge no more tuition than it charges for other nonresident pupils, and no board of education shall be required to pay the tuition of any pupil for more than four school years; provided the board of education shall be required to pay the tuition of all successful *applicants,* who have complied with the provisions of this act, residing more than three miles from the high school provided by said board, when said applicants attend a nearer high school. The tuition of pupils residing in joint sub-districts shall be paid by the boards of education, having control of such districts, from the contingent funds of said districts. A board of education not maintaining a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils and when such agreement is entered into *the board making the same shall be exempt from the payment of tuition at other high schools;* provided the school or schools selected are located in the same civil township, or some adjoining township, as that of the board making the agreement. Where no such agreement is entered into the school to be attended can be selected by the pupil holding a diploma; provided, due notice in writing, is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, said notice to be filed not less than five days previous to said beginning of attendance. Said tuition can be paid from either the tuition or contingent funds, and in case the board of education deems it necessary it may levy a tax of not to exceed two mills on each dollar

of taxable property *in the district or joint subdistrict* in excess of that allowed by section 3959 of the Revised Statutes of Ohio; the proceeds of said levy shall be kept in a separate fund and applied only to the payment of such tuition."

Under the application of the rule *noscitur a sociis*, having in view the use of the term "applicants," as therein used, considering the fact that provision for payment of tuition, in this statute, provides only for a levy upon the taxable property *in the district or joint subdistrict*, it is clear that the original statute had not application to village or city districts. The act was next amended in 100 O. L., page 74. The statute then appeared as follows:

"The tuition of pupils holding diplomas and residing in *township, special or joint subdistricts*, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month and an attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall charge no more tuition than it charges for other non-resident pupils. A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from said school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. A board of education providing a second grade high school as defined by law shall be required to pay the tuition of graduates residing in the district at any first grade high school for one year; provided, however, *any such board of education maintaining a second or third grade high school shall not be required to pay any such tuition after the rate of taxation permitted by law for such district* shall have been reached and all the funds so raised are required for the support of the schools of said district. No board of education shall be required to pay the tuition of any *pupil* for more than four school years; provided the board of education shall be required to pay the tuition of all successful applicants, who have complied with the provisions of this act, residing more than three miles from the high school provided by said board, when said applicants attend a nearer high school. When the elementary schools of any township school district in which a high school is maintained are centralized and transportation of pupils is provided, all pupils resident of the township school district holding diplomas shall be entitled to transportation to the high school of said township school district, and the board of education of said school district shall be exempt from the payment of the tuition of said pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education may include. The tuition of *pupils residing in joint subdistricts shall be paid* by the boards of education, having control of *such districts*, from the *contingent* funds of said districts. A board of education not maintaining a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils and when such agreement is entered into the board making the same shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement; provided the school or schools selected by the board are located in the same civil township, or some adjoining township, as that of the board making the agreement. Where no such agreement is entered into the school to be attended can be selected by the pupil holding a diploma; provided, due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, said notice to

be filed not less than five days previous to said beginning of attendance. Said tuition can be paid from either the tuition or contingent funds and in case the board of education deems it necessary it may levy a tax of not to exceed two mills on each dollar of taxable property in the *district or joint subdistrict* in excess of that allowed by section 3959 of the Revised Statutes of Ohio; the proceeds of said levy shall be kept in a separate fund *and applied only to the payment of such tuition.*"

It is apparent that there was no change in this statute at this time which could possibly be construed to extend its application beyond township, special or joint subdistricts. The codifying commission then separated the statutes, after which section 7748 of the General Code was amended, on page 296 of 101 O. L., to read as follows:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all *successful* applicants who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. *A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate.*"

If we disregard the separation of the sections by the codifying commission, we find nothing in this last quoted amendment to justify an extension of these sections to village and city school districts. Through all these changes of the statutes it must be remembered that the provision for the method of paying such tuition by levying upon the *district*, when the tuition or contingent funds were insufficient for the purpose, ever remain the same, and this provision still appears in the General Code as section 7751. This provision is as follows:

"Such tuition shall be paid from either the *tuition or contingent funds* and when the board of education deems it necessary it may levy a tax of not to exceed two mills on each dollar of taxable property in the *district* in excess of that allowed by law for school purposes. The proceeds of such levy shall be kept in a separate fund and applied only to the payment of such tuition."

In 104 Ohio Laws the legislature changed the application of these statutes to rural

districts instead of to township or special districts, in conformance with the newly enacted statutes providing for reformed school jurisdiction over rural districts.

It is my conclusion, therefore, that section 7748 of the General Code has no application to the case presented by you, for the reason that city districts are not within the comprehension of these statutes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1063.

COSTS INCURRED IN PROCEEDINGS UNDER MOTHERS' PENSION ACT—PAYMENT OF SUCH COSTS.

The only costs chargeable under the mothers' pension act are those incident to the hearing motion provided for under section 1683-8, General Code.

The fees in such proceedings as are provided by law for services in the court, the judge of which is exercising the juvenile jurisdiction at the time, may be taxed as costs in such proceedings. Such costs cannot be paid out of the county treasury in the event that they are not paid by the contestor, as provided in section 1683-8, they must go unpaid.

COLUMBUS, OHIO, July 20, 1914.

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

GENTLEMEN:—In your letter of February 12th, you request my opinion as to the following questions arising under the so-called mothers' pension act, sections 1683-2 to 1683-9, inclusive, 103 O. L., 877:

(1). Does the use of the term "costs" in section 1683-8 imply that the judge of the juvenile court may tax fees for himself, for officers serving writs and for witnesses? If so, in what proceedings may such costs be taxed; for the implication that the judge may tax fees for issuing orders, filing reports, making a record and indexing, the same in all proceedings under the act, or is the authority of the judge to tax fees limited to proceedings on a motion filed under section 1683-8 by a citizen to set aside, vacate or modify a judgment of allowance?

(2). Under what circumstances are the fees taxable, if any, to be paid out of the county treasury, and under what circumstances are they to be taxed against a contestor, under section 1683-8?

(3). Are the taxable fees, in case a probate judge is acting as juvenile judge, those fixed by sections 2900 and 2901 General Code, and when collected are the same to be paid into the fee fund of the probate judge?

(4). In case a common pleas judge has been designated to act as juvenile judge, what fees are to be taxed? In such event, would the fees, when collected, be paid into the fee fund of the clerk of the common pleas court?

I have paraphrased your statement of the questions that you desire to submit to me, and I shall be pleased if you will call my attention to any misunderstanding which I may have of the exact scope of your inquiry.

All of these questions involve consideration of the following provisions of law:

> "Section 1683-2 as enacted, 103 O. L., 877. For the partial support of women whose husbands are dead, or become permanently disabled for work by reasons of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a

period of three years when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows: Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may from time to time extend such allowance for a period of six months, or less. * * *.

"Section 1683-3. Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the allowance is made, must be living with the mother of such child or children: Second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent from work for such time as the court deems advisable: Third, the mother must, in the judgment of the juvenile court, be a proper person, morally, physically and mentally, for the bringing up of her children: Fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman: Fifth, it must appear to be for the benefit of the child to remain with such mother: Sixth, a careful preliminary examination of the home of such mother must first have been made by the probation officer, an associated charities organization, humane society, or such other competent person or agency as the court may direct, and a written report of such examination filed.

"Section 1683-4. * * * The juvenile court may, in its discretion, at any time before such child reaches such age, discontinue or modify the allowance to any mother and for any child.

"Section 1683-8. In each case where an allowance is made to any woman under the provisions of this act, a record shall be kept of the proceedings, and any citizen of the county may, at any time, file a motion to set aside, or vacate or modify such judgment and on such motion said juvenile court shall hear evidence, and may make a new order sustaining the former allowance, modify or vacate the same, and from such order, error may be prosecuted, or an appeal may be taken as in civil actions. If the judgment be not appealed from, or error prosecuted, or if appealed or error prosecuted, and the judgment of the juvenile court be sustained or affirmed, the person filing such motion shall pay all the costs incident to the hearing of such motion."

Certain general principles underlie the consideration of the specific statutes above quoted, with a view to answering your questions. The statutes, prescribing fees for public officers, will be found, on examination, to contemplate two kinds of fees, viz.: those to be paid by the person for whom the services are to be rendered, and those to be paid out of the public treasury. As a general rule, all fees that may be taxed as costs are of the first class. Therefore, it becomes, to my mind, material to inquire what services, under the statutes cited, are to be regarded as rendered for the public and what for the individual requesting them.

Section 1683-8 speaks of a record of proceedings, but the remaining provisions of the act fail to require or to define any such proceedings. For example, the allow-

ance which the statutes contemplate is not predicated on any application, as in the case of the allowance of a blind pension, or an order for soldier's relief, or other similar matters. There is no provision for a hearing, as in the case of blind pensions or lunacy inquests, or other *ex parte* proceedings of a similar character. There is no express authority to subpoena witnesses, with relation to an original allowance; on the contrary, one of the precedent conditions of an allowance is that a careful preliminary examination of the home in question shall be made and a written report of the examination filed.

Of course, in order to render the statute workable, some sort of an informal application must be entertained by the juvenile judge in order to start proceedings. But it is clear to my mind that, in the legal sense, the original allowance is not a proceeding of a private character. That is to say, for this purpose the appropriate analogy is found in the "poor laws" which provide for complaint to the proper officers, visitation and investigation by them, or by some public charities organization, and the granting of relief. The discharge of the official function partakes more of the nature of a general public duty than of the nature of a proceeding for the establishment of a private right or privilege.

So that, while section 1683-8 speaks of a record of the previous proceedings, I am, nevertheless, of the opinion that no proceedings of a judicial nature are required or authorized until the filing of a motion, of which that section speaks. Of course, by proceedings of a judicial nature I mean that idea of judicial power expressed in State ex rel. vs. Guilbert, 56 O. S., 575, quoting Cooley's Constitutional Limitations, 109:

> "To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws is the peculiar province of the judicial department."

But whatever be the character of the proceedings for the original allowance of the pension, it is clear to me that the duties devolving upon the Judge of the juvenile court, in connection therewith, are, in the philosophical sense, owing to the public and not to the recipient of the benefits contemplated by the act.

As to services of this character, the courts have laid down the principle that no compensation, by way of fees, is payable from the public treasury, in the absence of specific provisions of law.

> Commissioners vs. Miller, 4 N. P. 53; 13 C. C. 518.
> Miller vs. Conradi, 5 C. C. n. s. 145.

To anticipate slightly, because the same is pertinent in this case, the services of the juvenile judge, in connection with mothers' pensions, other than those following the filing of a motion to set aside, etc., are of a character similar to his services in hearing juvenile delinquency cases, under the juvenile court act proper. He conducts no trial in the ordinary juvenile case, and he acts, not as a judicial officer meting out judgment, but as the representative of the state, as *parens-patriae,* exercising benevolent guardianship over persons of abnormal status; and if this jurisdiction is being exercised by the probate judge, the fees chargeable in his favor are those enumerated in section 1602, viz.: "when acting as a judge of the juvenile court, for each case filed against a delinquent, dependent or neglected child, two dollars and fifty cents;" these fees are to be paid out of the county treasury, upon the warrant of the county auditor and the certificate of the probate judge, and are not to be taxed against any individual or regarded as costs in any "case."

I take it, therefore, that if it were the intention of the general assembly that the judge, exercising the juvenile jurisdiction, or any officer of his court, should be entitled

to fees, as such, payable from the county treasury, in matters of this kind, it would be specifically provided for as a payment out of the county treasury.

I am able to find but one provision of this nature, viz.: that of section 2903, as follows:

> "The clerk (of courts) shall receive out of the county treasury upon the allowance of the county commissioners the following fees: * * * for each entry on journal required by law to be made, and not otherwise provided for, per one hundred words or fraction thereof, ten cents. * * *"

By section 1603 the probate judge is to be allowed the same fees as are allowed the clerk of the court of common pleas for similar services. By section 1682, General Code, it is provided that "fees and costs in all such cases * * * (cases under the juvenile act) shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court," so that if the above quoted provision of section 2903 is applicable to the record required to be kept of the "proceedings" in mothers' pension matters, by section 1683-8, it would seem to provide a fee payable out of the county treasury for performing such services.

But, I am of the opinion that the record of which section 1683-8 speaks is not a "journal" within the meaning of section 2903. In Miller vs. Conradi, supra, it was held that what is now section 1603, General Code, then section 547, R. S., was not intended to apply to the class of fees which I have designated by the term "fees payable from the public treasury," The language of Parker J., at page 151, is that the court was "of the opinion that section 547, which allows compensation such as is allowed the clerk of the court of common pleas, has no relation to services of this character (inquests of lunacy) performed by the probate judge, which are to be paid for by the public; that it has relation to causes and proceedings between private parties, and that that is what is provided for by section 546 and section 547, is intended to cover the cases that may have been omitted from section 546."

Continuing in the immediate context, and speaking of the statute relating to inquests of lunacy, the court points out that that statute does not provide compensation for making up a record.

For the reason, then, that the circuit court of this state has held that what is now section 1603, General Code, is not applicable to fees payable out of the county treasury, and for the further reason that, in my judgment, there is no statute which could be stretched so as to cover the case of the record of proceedings provided for by section 1683-8, I am of the opinion that neither the judge of the juvenile court nor any of the officers of his court are entitled to any specific compensation for making up such record.

It is even clearer that no compensation, by way of fees, is to be charged or collected from any source by the probation officer, associated charities organization, humane society or other competent person or agency, directed by the court to prepare and file a written report of preliminary examination, as provided in section 1683-3.

In short, then, for the foregoing reasons, and also, because of the fact that section 1683-3 specifically provides for costs incidental to the hearing of the motion and makes no specific provision for any other costs, I am of the opinion that no fees or costs of any character, whatever, are to be charged or collected from any source on account of "proceedings" under the mothers' pension act prior to the filing of a motion to set aside or vacate or modify the judgment of allowance.

Coming now to the question as to what costs are taxable, as incident to the hearing of the motion, I observe that the juvenile court, upon the filing of such motion, is authorized to hear evidence and to make a new order sustaining, modifying or vacating the former allowance. This implies, of course, that the juvenile judge may be called upon to issue subpoenas and to swear witnesses, etc., and that persons may be called upon, under process, to testify. I think this implication is not unwarranted, for while

the previous course of the "proceedings" has been non-judicial, this particular feature of them is clearly judicial, and, being conducted by a tribunal which is designated as a court, subject to review by appeal or error, in the same manner as civil action, it would seem reasonable, at least, to hold that the implied power to issue subpoenas and to enforce the attendance of witnesses, etc., must exist.

Your question, however, raises the point as to whether the mere provision for the payment of "costs" incident to the hearing of such motion by the person filing same, is, of itself, sufficient to imply authority to tax fees as costs. In my opinion, this provision is sufficient authority to tax, as costs, such fees as are lawfully chargeable. Of course, one must look elsewhere than in this act to find what fees are chargeable. In my opinion, the schedule of taxable fees is to be found in the statutes prescribing the fees chargeable in probate courts and in courts of common pleas. Your question being general, however, I feel that it is not necessary for me to go into detail and to point out precisely what fees are chargeable for each specific service, and precisely how they are to be handled. It is sufficient for your purposes, I believe, to say that, in my opinion, the identity of the court, the judge of which happens to be exercising the juvenile jurisdiction, governs the matter of fees. Thus, if the judge of the common pleas court is exercising jurisdiction, then the schedule of fees of witnesses, officers serving processes, clerk of court, etc., for services in the common pleas court, governs; if the probate judge is exercising jurisdiction, then the fees which may be charged are those provided by law for services in the probate court.

In my opinion, fees are chargeable for filing the motion provided for in section 1683-8, for issuing and serving processes, for compelling the attendance of witnesses, to witnesses for attending under subpoena and for making the "new order" of which section 1683-8 speaks; and as already indicated, the precise fees chargeable in the given instance are to be determined by reference to the statutes regulating fee bills, in the court which happens, at the time, to be exercising juvenile jurisdiction.

My conclusions here are based upon section 1639, which, as amended in 103 O. L., 836, provides 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 conferred in this chapter. The judges of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.
>
> "The words, *juvenile court when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction,* and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction.
>
> "The foregoing provisions shall not apply to Hamilton county, in which county the powers and jurisdiction conferred in this chapter shall be exercised by the court of common pleas. * * *"

From this it is clear that the juvenile court is not a separate court, but merely the common pleas, probate, insolvency or superior court, as the case may be, the judge of which happens, at the time, to be exercising the juvenile jurisdiction.

In my opinion, all fees received by any of the officers subject to the provisions of the county officers' salary law, (including probate judge, clerk of court and sheriff), under the provisions of section 1683-8, are to be paid into their respective fee funds. The principles underlying this conclusion have been outlined in other opinions to your department.

You ask, also, as to payment of fees out of the county treasury. I have already stated my opinion to the effect that no fees of any kind are to be charged and collected from any source, on account of services other than those incident to the hearing of the motion referred to in section 1683-8. A careful reading of this section will disclose that the person filing the motion must pay the costs, whether his motion is sustained or not, unless the second judgement of the court is appealed from or error prosecuted, in which event he must also pay the costs if the judgment of the juvenile court is sustained or affirmed, regardless of the effect of such an affirmance, upon the end sought to be attained by his motion. Thus, the contestor may move to vacate an allowance; the motion may be granted by the court. If error is to be prosecuted or appeal taken "as in civil actions," the implication would seem to follow that the pensioner might be the plaintiff in error, or the appellant. Should she appeal and the judgment be affirmed or sustained, then, though such affirmance would establish the object of the original motion, nevertheless, the contestor must pay the costs.

On the other hand, under the circumstances just imagined, should the appellate court reverse the juvenile court, thus ultimately denying the object of the contestor's motion, and putting him in the light, so to speak, of a wrongful inter-meddler, yet he would not be charged with the costs, under the section.

It will thus be seen that section 1683-8 is a very strange provision. The ridiculous consequences that must necessarily flow from its practical application raise some doubt in my mind as to its validity, but my opinion is not invited on this point.

As to the case in which the judgment of the juvenile court is reversed or modified by the appellate court, I am of the opinion that there is no provision, whatever, for costs in such a case. It will not do to say that, in that event, the losing party in the appellate court must pay all the costs, for the reason that the statues make provision for the payment of costs, on affirmance, in such a way as to show that the losing party is not, on that account, to be made liable for the costs. Nor will it do to say that the appellate court may dispose of the matter of costs in the exercise of its implied power; for the general assembly has so clearly provided for the payment of certain costs, in the event of the judgment of affirmance, as, in my opinion, to remove the case from the field of judicial discretion.

In my opinion, while the costs are taxable in such case, there is no authority for their payment. I am clearly of the opinion that they cannot be taxed against the pensioner, for the reason that she is, in no proper sense, a party. I doubt the authority to charge the county treasury with their payment unless it be under section 1682, General Code, supra. However, the reference there to "all such cases" is clearly limited, in my mind, to juvenile court cases proper, and the scope of the section cannot be extended to cover mothers' pension proceedings. The case is somewhat analogous to that of misdemeanor cases where the defendant proves insolvent. Unless there is some statutory authority, the costs, though legally chargeable, cannot be recovered by those entitled to the fees.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1064.

BOILER INSPECTION FEE NOT A PREFERRED CLAIM.

The claim of the state for boiler inspection fee is not a preferred claim.

COLUMBUS, OHIO, July 20, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I have your letter of June 6, 1914, asking whether your claim of $16.00 against the Lennox Hotel Company, of Columbus, for boiler inspection fees, must be considered by the receiver as a preferred claim.

Section 11138, of the General Code, reads:

> "Taxes of every description assessed against the assignor upon personal property held by him before his assignment must be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor. Each person who has performed labor as an operative in the service of the assignor, within twelve months preceding the assignment, shall be entitled to receive out of the trust funds before the paying of other creditors, the full amount of wages due for such labor, not exceeding three hundred dollars."

The fees your bill covers are not taxes and it can not come within the provisions of this section, nor am I able to find any other statute that makes them a preferred claim. I am, therefore, of the opinion that the state in the case you refer to, must be content to receive the same dividends as the general creditors of the corporation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1065.

COSTS OF THE PROCEEDING ON A FUGITIVE FROM JUSTICE—WHERE SUCH COSTS ARE CHARGEABLE.

The cost of a proceeding before a magistrate on a fugitive from justice warrant sworn out by the sheriff of a foreign state is chargeable to the foreign state, but the witness fees of the defendant's witnesses are not a part of the costs, and, therefore, are not to be so charged.

COLUMBUS, OHIO, July 20, 1914.

HON. CHAS. L. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of April 1, 1914, inquiring substantially as follows:

> "A trial was had in the city and justice court of the city of Toledo, Port Lawrence township, Lucas county, on a fugitive from justice warrant, sworn out by the sheriff of Lenawee county, Mich. To whom were the costs of such proceedings chargeable?"

Section 1772 of the General Code reads:

> "In the city of Toledo and the township lying wholly therein, the boundaries whereof are or hereafter may be concurrent with the boundaries of such

city, there shall be three judges and justices of the peace in and for such city and township. They shall be elected at the regular municipal election therein in the same manner, shall hold office for the same term, possess the same jurisdiction, powers, duties and liabilities, and be subject to the same qualifications and disqualifications as justices of the peace for townships."

Section 109 to 118 of the General Code, in regard to fugitives from justice, make provision for costs only in cases where a hearing is had before a judge of the supreme, circuit or common pleas court. Sections 13520 to 13522, General Code, deal with fugitives from other states, but make no provision for costs. Section 13520 reads:

"When an affidavit is filed before a judge of a common pleas, probate or police court or a justice of the peace, setting forth that a person charged with the commission of an offense against the laws of another state or territory of the United States, which, if committed in this state would, by the laws thereof, have been a crime, at the time of filing such affidavit, within the county where it is filed, such judge or justice of the peace shall issue a warrant directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before him the person so charged."

Section 13521 of the General Code, reads:

"When a person is arrested in pursuance of the next preceding section, and brought before the officer who issued the warrant, he shall hear and examine such charge, and, upon proof, adjudged by him to be sufficient, commit such person to the jail of the county in which such examination is had or cause him to be delivered to a suitable person to be removed before such judge or justice of the proper county in which to take such examination, who shall take it and proceed as if the warrant had been issued by him."

Section 13522 of the General Code, reads:

"When a person is committed to jail by a judge or justice of the peace, under the next preceding section, such judge or justice shall forthwith give notice, by letter or otherwise, to the sheriff of the county in which such offense was committed, or to the person injured by such offense. A person so committed shall not be detained in jail longer than to allow a reasonable time to the persons receiving such notice to apply for and obtain the proper requisition for such person."

Since the accused must be a fugitive from justice before he can be extradited (19 O. D., N. P., 587), the proceeding had in the case submitted seems to me to have been a necessary part of the extradition proceeding, and inasmuch as section 5278 of the Revised Statutes of the United States provides that:

"Whenever the executive authority of any state or territory demands any person as fugitive from justice, of the executive authority of any state or territory to which such person has fled, * * *. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

It seems clear that the costs in this case should be paid by the state of Michigan. The only remaining question then is, are the fees of witnesses summoned on behalf

of the defendant to be included in such costs? In volume 11 of Cyc., page 283, is stated:

> "Ordinarily, statutes imposing payment of costs on a county, do not render it liable for costs made by the defendant."
> Williams vs. Northumberland County, 110 Pa. State, 48.
> Com. vs. Kurren, 2 Chest. County Reports, (Pa.) 393.
> Shaunee County vs. Whiting, 4 Kans., 273.
> Fremont County vs. Wilson, 3 Colo. App., 492.

In the case of Williams vs. Northumberland County, 110 Pa., page 48, the statute provided that:

> "In all cases of conviction of any felony, *all costs* shall be paid forthwith by the county unless the party convicted shall pay the same."

A defendant was convicted of murder in the second degree and sentenced, and was unable to pay the costs. Held:

> "The fees and mileage of witnesses called and examined on behalf of the defendants in trials for felony cannot be recovered by such witnesses from the county."

The court at page 53 said:

> "Officers do not know why they are required to serve subpoenas and attachments in criminal cases without pay unless they can get it of the defendant. The answer is, that this duty or burden is an incident of their office. The law required this when they took it. If persons are unwilling to perform the duties pertaining to the office to which they ask to be elected, they must not ask for or accept them. As to witnesses, the law requires their attendance, and if the defendant is too poor to pay their fees, they must set it down to the duty they owe to the government that protects them in the enjoyment of all their rights, civil and religious."

In the case of Wayne County vs. Waller, 9 Norris, 104, which was decided four years after the statute quoted in the above case was passed, Mr. Justice Sterrett says:

> "We are not aware of any law, common or statutory, that required the county to pay a defendant's costs in a criminal case, or authorizes the court to call upon the county to advance money to be expensed by a prisoner or his counsel in subpoenaing witnesses and otherwise preparing for trial."

From a consideration of these authorities, it is my opinion that the state of Michigan in the case submitted should pay the costs, exclusive of the fees of witnesses summoned by the defendant. It is assumed in this opinion that extradition papers were issued in this case.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1066.

THE WORD "CHAUFFEUR" DEFINED—THOSE WHO OPERATE MOTOR VEHICLES FOR HIRE—THOSE WHO OPERATE SUCH VEHICLES AS AN EMPLOYE OF THE OWNER.

Under the provisions of section 6291, General Code, chauffeurs are divided into two classes:

First, those who operate motor vehicles for hire, and

Second, those who operate such vehicles as an employe of the owner thereof.

The first class is held to include an owner of an automobile who personally operates the same for hire. The second class includes only those employes whose employment contemplates the operation of a motor vehicle and not those who operate their employer's vehicles occasionally. The latter are not chauffeurs under the statute, and need not register.

The driver of a motor truck used to deliver goods for a wholesale house, which is the owner of the truck, and persons employed by doctors to run automobiles, are chauffeurs and must register. The registration act does not apply solely to persons operating vehicles for hire or the carrying of passengers and freight.

COLUMBUS, OHIO, July 21, 1914.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—Under date of April 8, 1914, Mr. O. G. Taylor, deputy clerk of Knox county, submitted to this department for opinion the following:

> "Section 6291, General Code, defines a chauffeur as follows: 'The term chauffeur, as used in this chapter and in the penal laws, includes every person operating a motor vehicle for hire or as an employe of the owner thereof.' The point of difference is this: for example, we have a wholesale house here that employs a man to drive a truck. Is the driver of this truck required to be a licensed chauffeur? Again, we have doctors that employ drivers for machines. Are these drivers compelled to have a chauffeur's license, or does this law apply only to machines that are run for hire, that is, livery business, to haul passengers?"

Two classes of persons are designated by the statute as chauffeurs; first, every person operating a motor vehicle for hire; second, every person operating a motor vehicle as an employe of the owner thereof. The first class includes the owner of a motor vehicle who personally operates the same for hire.

Not every employe would come within the provisions of the statute defining a chauffeur. The employes intended to be included in the second class are those whose employment contemplates the operation of a motor vehicle, and not those who might be permitted by their employer to operate such vehicle occasionally, but whose employment does not contemplate such service.

In both of the illustrations given, it will be necessary for the parties to be registered chauffeurs because their respective employments expressly require them to operate motor vehicles.

The registration act does not apply solely to persons operating motor vehicles for hire in the carrying of passengers or merchandise.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1067.

HIGHWAY DEPARTMENT—RIGHT TO EXPEND HIGHWAY FUNDS FOR THE PUBLICATION OF A MONTHLY MAGAZINE.

The state highway commissioner has the right to expend highway funds for the publication of a monthly devoted to the interest of good roads, since section 1183, General Code, empowers said highway commissioner to "prepare, publish and distribute bulletins and reports."

COLUMBUS, OHIO, July 21, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 14th, wherein you state:

> "Enclosed you will find a letter from Hon. James R. Marker, state highway commissioner, in which he purports to publish a monthly devoted to the interests of good roads.
>
> "The question has been called to my attention as to whether Mr. Marker has the right to expend the highway funds in this capacity, and I shall ask you to render me an opinion as to whether the same, in your opinion, is a legal charge against the funds available in the highway appropriations."

The letter from Mr. Marker calls attention to the fact that his department has entered upon the publication of a bulletin known as the Highway Monthly. The purpose of this bulletin, as stated by Mr. Marker, in his letter, and in the initial issue, is to conduct an educational campaign to the end that the funds raised by the half-mill levy under the Hite law, may be wisely and economically expended and that a greater degree of co-operation between the state highway department and local authorities may be secured. That issue contains a series of special articles, giving information relating to various phases of the construction, improvement, maintenance and repair of highways, reports to the state highway commissioner by his deputies of the progress of the work in their respective departments, illustrations of the various kinds of road construction and material, and a department for the answering of queries relating to the construction, maintenance and repair of highways. In the subsequent issues of this bulletin, the general plan outlined above has been carried out. Under authority of section 1183, General Code, as amended in 1913, (103 O. L., p. 449), the state highway commissioner is empowered to "prepare, publish and distribute bulletins and reports." It is further provided in said section, that "all expenses incurred by reason of the provisions of this chapter shall be paid out of any fund or funds available for the use of the department." The statute does not furnish any specific definition of what was intended by the words "bulletin" and "report," so the legislature must have been regarded as having used these words in their ordinary sense.

The meaning of the word "report" is so well known that it is not necessary to quote definitions. Insofar as this publication contains statements of the progress of the work of the state highway department, it is a report within the meaning of section 1183.

The word "bulletin" is defined in Funk & Wagnall's new standard dictionary as:

> "1. An announcement of news, orders or the like, written or placarded in a conspicuous place.
>
> "2. An official summary or statement of intelligence on some matter of public interest.
>
> "3. A periodical publication as of proceedings of a society."

This highway monthly, it seems to me, has the elements of the above definition of a bulletin, and I am of the opinion that the cost of printing the same is a legal charge against the funds available for the use of the state highway department.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1068.

LIQUIDATION OF A BUILDING AND LOAN ASSOCIATION—INTEREST ON DEPOSITS—BUILDING AND LOAN ASSOCIATION DEPOSITING MONEY WITH ANOTHER BUILDING AND LOAN ASSOCIATION—RIGHTS.

1. In the case of the liquidation of a building and loan association receiving deposits at a stipulated rate of interest, the claimants are entitled to their claim including interest up to the date of insolvency. Such claimants are entitled to interest at six per cent from the date of the insolvency up to the date of payment, provided there are sufficient funds; the amount which is available for this purpose must be shared pro rata.

2. A building and loan association having money in another building and loan association becomes a depositor upon the same basis as other depositors. In order to make such depositor a preferred creditor the deposit would have to be made under some trust agreement, expressed or implied.

COLUMBUS, OHIO, July 21, 1914.

HON. JAMES A. DEVINE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—On June 27, 1914, you made the following request for my opinion:

> "I desire your opinion upon the following questions:
>
> (1) "In case of the liquidation of a building and loan association receiving deposits at a stipulated rate of interest, would the depositors be allowed interest to the date of payment of their claims or only to the date of notice of liquidation?
>
> (2) "Would a building and loan association having money on deposit in another building and loan association at a stipulated rate of interest different from the specified rate of interest paid to other depositors be preferred as a creditor in the matter of liquidation of the association in which they had the deposit?"

Answering your questions in their order, first: The matter of the allowance of interest on claims against a building and loan association, in process of liquidation, is governed by the same rules as to allowance of interest on claims against any other corporation in the process of liquidation.

It seems to be well settled, in the United States at least, that in the matter of the distribution of an insolvent estate, interest should be computed up to the time of the insolvency, (that is, up to the time of the closing of the doors of the institution, for the purpose of liquidation), upon all claims bearing interest, either by contract or as legal damages for non-payment.

The matter of Murray, 6 Paige (N. Y.) 204.
Clemmons vs. Clemmons, 69 Vt., 545.
22 Cyc. 1316.

In the first cited case, 6 Paige, 204, being a decision of the court of chancery, in the state of New York, the chancellor, on page 205, makes the following pertinent statement as to this matter:

> "Equality among creditors is equity; and where interest is recoverable either upon the express agreement of the parties or as legal damages, for the non-payment of the debt when it should have been paid, the creditors are all entitled to participate in the distribution of the fund, ratably, in proportion to the amount due to them respectively for principal and interest up to the date of the assignment. In settling the tableau of distribution, therefore, the interest upon those debts which bear interest, or upon which it is recoverable as damages, upon settled legal principles, should be computed at that time; * * *"

It would make no difference when the claims were presented, just so they are presented within the statutory time; all claims proven should be proved for the amount of the principal including interest at the rate contracted for, or the rate at which the claim is entitled, up to the date of the insolvency.

It also seems to be well settled in the United States that if there is a surplus of the funds of the insolvent institution remaining after payment of the principal and interest, up to the date of the insolvency on all claims, then all claims are entitled to interest from the date of the insolvency, up to the time of the final payment of the claims. That is, interest should be allowed on all claims, and, of course, at the same rate, from the date of the appointment of the trustee or receiver. 5 Cyc. 569 and cases there cited.

In the case of Richmond vs. Irons, 121 U. S., 27, Mr. Justice Maxwell says:

> "In the case of book accounts in favor of depositors * * * interest would begin to accrue, as against the bank, on the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the accounts then due, as against the shareholders, to the time of payment."

Claims against insolvent institutions, for the purpose of interest, may be regarded in the same manner as judgments. That is, the claim would be regarded, in law, in exactly the same manner as if the creditor had sued the corporation and obtained a judgment against it for the amount claimed. This judgment would bear interest from the date of its rendition until the date of its satisfaction.

> The National Bank of Commonwealth vs. The Mechanics National Bank, (94 U. S., 437).

Though different claims might bear different rates of interest, up to the date of insolvency from the time of the insolvency, for the purpose of interest, all claims are on an equality, and would bear the same rate of interest, which, in this state, would be six per cent.

The whole matter may be summed up, thus: Claimants are entitled to prove their claims against an insolvent institution, including interest up to the date of the insolvency. All such claims are entitled to interest at six per cent. from the date of the insolvency until the date of payment, provided there are sufficient funds with which to pay the interest. If there are not sufficient funds to pay interest in full, but enough to pay something on account of interest, then the amount which is available for this purpose must be shared, pro rata, by the respective claim holders.

Answering your second question, if a building and loan association deposits money in another building and loan association, it thereby becomes a depositor upon the same basis as other depositors; the fact that it, by contract, received a different rate of interest upon its deposits from that received by other depositors, would have no bearing, whatever, upon the nature of the deposit and would not make it a preferred creditor. To make it a preferred creditor the deposit would have to be made under some trust agreement, expressed or implied.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1069.

BOARD OF HEALTH OF THE CITY OF CLEVELAND (CREATED BY CHARTER) MUST YIELD TO THE GENERAL LAWS WHEN IN CONFLICT WITH THEM.

The health board of the city of Cleveland (created by charter) does not have absolute power locally, but its regulations must yield to the general laws when in conflict with them. Such local regulations do not conflict with the general laws if they merely add to the requirements of the latter and are otherwise consistent with them.

Sections 4425 and 4436, General Code, though a part of the municipal code, were intended to be general laws applicable in part at least to the health agencies so that these provisions constitute general laws within the meaning of the home rule amendment, with which local sanitary regulations are not permitted to conflict.

COLUMBUS, OHIO, July 21, 1914.

HON. HERMAN FELLINGER, *Member House of Representatives, Cleveland, Ohio.*

DEAR SIR:—In your letter of July 1st, you request my opinion upon the following questions:

> "1. Is the health board of the city of Cleveland subject to the general laws of Ohio, or has it absolute power locally?"
> "2. Do sections 4425-4436, inclusively, of the General Code of Ohio, govern and control the action of the health board of the city of Cleveland?"

The city of Cleveland being at present governed by a charter, framed and adopted by its people, these questions involve consideration of sections 3 and 7 of article XVIII of the constitution, known as the "Home Rule Amendment." They are as follows:

> "Section 3. Municipalities shall have 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.
> "Section 7. Any municipality may frame and adopt or amend a charter for its government, and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

I have not before me a copy of the Cleveland charter; I assume, however, that it provides independently of the general law for the health department, or at leas makes provision in some manner for the exercise of local legislative and administrativ

powers, with respect to the subjects committed by the general laws to the municipal boards of health, as municipal officers created and governed by such general law. In other words, I assume that the charter provides a *frame work* of local government for health matters different from that provided for cities generally by the municipal code of the state.

Without knowledge of the exact provisions of the charter, I cannot, of course, determine whether or not they are in such detail as to constitute a code of regulations defining or attempting to define the powers and duties of the health agency which they create, i. e., as to regulate substantively the exercise of power in addition to the mere creation of an arm of government, and the delegation to it of general power or jurisdiction in health matters. In the view which I take, however, the presence or absence of such provisions in the charter is immaterial for the purposes of your question.

The interpretation of sections 3 and 7 of the newly enacted article XVIII of the constitution, with reference to the limitations therein upon the exercise of the power to enforce or adopt local police, sanitary or other similar regulations, was called in question in the case of Fitzgerald vs. Cleveland, 88 O. S., 338.

The syllabus in that case does not throw light upon the views of the members of the court in this particular. However, there were four opinions, three supporting the judgment of the court and one dissenting therefrom. On this question there may be found in the opinion of Johnson, J., at page 359, the following:

> "Concerning the provision in section 3, article XVIII (may adopt such local police, sanitary and other similar regulations as are not in conflict with general laws), the general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as regulate the morals of the people, the purity of their food, the protection of the streams, and safety of buildings and similar matters.
>
> "Manifestly, therefore, it was necessary, when the constitutional convention was conferring all powers of local self-government on cities, to provide that, in the adoption of such regulations by any city for itself (police, sanitary and similar ones), they should not conflict with general laws on the subject.
>
> "It is a well settled rule that the body adopting amendments, such as are here involved, will be presumed to have had in mind the course of legislation and existing statutes touching the subjects dealt with. People ex rel. Jackson vs. Potter, 47 N. Y., 380, and cases cited. The legislature of Ohio, in the codifications adopted by it, covering many years, including the last one adopted, has included a separate title, designated by it 'Police Regulations,' in which it has included the general laws of the character we have above described. If it had been intended that the limitation should comprise the wide and elastic scope contended for, it would have been so expressed.
>
> "We think it clear that the regulations referred to in section 3 are such, and such only, as we have indicated, and that it would be contrary to the import of the language and to the intent of the framers of the amendment to hold that by this clause there is denied to cities the authority to adopt charter provisions concerning the manifold subjects within the field of proper municipal activity, unless they are 'not in conflict with general laws' on the subjects proposed to be dealt with."

Wanamaker, J., concurring, expresses the view at pages 366, et seq., that the power to regulate the method of making a nomination is not within the purview of the police power.

The same idea seems to have been in the mind of Wilkin, J., although it is not expressed exactly as I have phrased it.

The dissenting opinion of Donahue, J., is devoted almost exclusively to a discussion of the bearing of section 7 of article V of the constitution, as amended, upon the question then before the court.

From all the foregoing, I do not think that it can be said that the case of Fitzgerald vs. Cleveland, supra, throws much light upon the question which you submit. I might say in passing, however, that I do not believe that the above quoted remarks of Judge Johnson are to be taken as indicating that the only states law, which under article XVIII, sections 3 and 7 of the constitution, which are paramount to local regulations, are those which happen to be codified under the title "Police Regulations." On the contrary, I interpret them as meaning that he regards the laws found under that title as indicative of the kind of general laws that are paramount; or rather, the kind of local regulations that must yield to such general laws.

Concluding then that the question which lies at the threshold of the consideration of your inquiry is not foreclosed by anything in the decision cited, I feel free to express the opinion that public health regulations, and particularly those of the kind concerning which you specifically inquire, are within the category of the "local police, sanitary and other similar regulations," which may not conflict with the general laws.

Such is the rule in Michigan, where in People vs. Hurlbut, 24 Mich., 44, a distinguished bench declared the existence of the right of local self-government superior to state legislative control.

In Davock vs. Moore, 20 L. R. A., 783, the supreme court of that state held that the protection of the public health is not a matter of purely local concern, so that in the face of decisions like that in People vs. Hurlbut, supra, the general assembly might provide for the appointment of members of a local health board by the governor of the state. Numerous authorities are cited in support of the fundamental proposition upon which the decision is based, among them, Judge Cooley's own language, page 62, second edition of his work on taxation, which is as follows:

> "The state may have a state board of health, but it will provide for local boards of health also; and as their duties concern the community at large, their members are to be regarded as state rather than local officers."

But, it is to be admitted that the Michigan decisions are not analogous under the Ohio constitution, although the principle laid down has a certain manifest application.

The reason why the Ohio rule is not established by the Michigan authorities is disclosed by consideration of the case of People ex rel. vs. Williamson, 135 Cal., 415. The constitution of the state of California at the time provided for municipal home rule through language to the general effect that in municipal affairs the provisions of the city charter should supersede those of the general laws. The general law provided for a board of health of the city and county of San Francisco; a charter adopted by the people of that city and county provided for a similar health agency. Action was brought to determine the validity of the provisions of the charter; the court, four out of seven judges rendering supporting and concurring opinions, held that the establishment of a local board of health was a "municipal affair," and that such police regulations as might be promulgated through its agency, though constituting an exercise of the police power, would be local in character. All the judges, however, conceded that the superior necessities of the state might require a subsequent holding in an appropriate case, that in certain matters the laws of the state should be paramount.

California cases are relied upon by Johnson, J., in his principal opinion in Fitzgerald vs. Cleveland, supra, and I am of the opinion, as already indicated, that the rule of Ohio, as well as in California, is that so far as the frame-work of government pertaining to the creation of local health agencies is concerned, the power to provide

for it resides in the people of the charter city, so that the general laws of the state, insofar as they provide for the creation of the board of health for the exercise of certain powers and duties within, and as a part of the government of the municipality, are superseded by the provisions of the charter.

But the principle established in the Michigan case, and also conceded in the California case, is to the effect that whatever may be the agency and the means of its operation, the subject matter, i. e., the protection of the public health from danger of epidemics etc., is not one of purely municipal concern.

Under article XVIII, section 3 of the Ohio constitution, however, it is not necessary to establish that a given subject matter is not one of municipal concern, either purely or partly in order to establish the superior force of the state laws, for by the plain reading of the sections, *local* police, sanitary and other similar regulations are to yield to general laws, so that the regulation may be in every sense a local one, and yet if it is one of a police, sanitary or other similar nature, its force is destroyed if it conflicts, with the general law of the state.

The present constitution of the state of California contains language identical with that of the latter part of article XVIII, section 3, of the constitution of Ohio; article XI, section 11, of the constitution of that state, empowers the making and enforcing within its limits all such police, sanitary, and other regulations as are not in conflict with general laws. In re Hoffman, 155 Cal., 114, it was held that a municipal ordinance regulating the sale of milk, and prescribing a standard of pure milk within a city, must yield to a general law respecting the same subject-matter, to the extent that it conflicts therewith. Proceeding to define what constitutes a conflict, the court holds that where the standards of the city ordinance are more exacting than those of the state law, there is no conflict, in other words, where the general law makes certain regulations respecting a given matter within the field of police, sanitary and other similar activities, the authority of the city to act in the premises is not thereby taken away as in the case of the exercise of a power of congress within a certain field in which the states may act until congress has entered; but the city may impose *additional* requirements of the same nature.

The principle then may be stated thus: where the local regulations are more exacting than those of the state law, there is no conflict, and in a sense, both are operative; but where the local regulations are less exacting than those of the state law, there is a conflict, and the latter governs.

I am convinced that the principles laid down in the case last cited are applicable to the solution of the question which you submit, insofar as it depends upon an interpretation of article XVIII, section 3 of the constitution.

I am, therefore, of the opinion that regulations, whether found in the charter itself, or imposed by the local authority, having legislative and administrative control under the charter, of the subject of public health, are effective so long as they do not conflict with any requirements of the general law applicable to the subject matter, and in force in the city of Cleveland; and if that the local regulations pertain to the subject matter which state laws deal with is not of itself sufficient to establish a conflict, but both will stand, if it appears that the municipal regulations are merely additional to those of the state law and are otherwise harmonious with the latter.

This brings me to a consideration of the specific sections of the General Code, the application of which in the city of Cleveland you question. Said sections are as follows:

> "Section 4425. In time of epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board of health, after a personal investigation by the members or executive officer thereof, to establish the facts in the case, and not otherwise, may impose a quarantine on vessels, railroads, stages, or other public or private vehicles conveying

persons, baggage or freight, or used for such purpose. It may make and enforce such rules and regulations as such board deems wise and necessary for the protection of the health of the people of the community or state, but the running of any train or car on any steam or electric railroad, or of steamboats, vessels or other public conveyances shall not be prohibited. A true copy of such quarantine rules and regulations adopted by such board of health, shall be immediately furnished by it to the state board of health, and thereafter no change shall be made except by the order of the state board of health or by the local board to meet a new and sudden emergency.

"Section 4426. The board of health shall not close public highways, prohibit travel thereon, interfere with public officers in the discharge of their official duties not afflicted with or directly exposed to a contagious or infectious disease, nor establish a quarantine of one city, village or township against another city, village or township, as such, without permission first obtained from the state board of health and under regulations established by the state board.

"Section 4427. Each physician or other person called to attend a person suffering from smallpox, * * * or any other disease dangerous to the public health, or required by the state board of health to be reported, shall report to the health officer within whose jurisdiction such person is found, the name, age, sex, and color of the patient, and the house and place in which such person may be found. In like manner, the owner or agent of the owner of a building in which a person resides who has any of the diseases herein named or provided against, or in which are the remains of a person having died of any such disease, and the head of the family, immediately after becoming aware of the fact, shall give notice thereof to the health officer."

Sections 4425 and 4426 originally constituted sections 188 and 189 of the municipal code of 1902, 96 O. L., 80. The question at once arises as to whether or not these sections, which were enacted as a part of the scheme of government for all municipalities were intended to be applicable to any municipality other than those to which the provisions of the code should apply; in other words, is the phrase "the board of health" as therein used to be interpreted as meaning any local health agency; or, having regard to the purpose of its original enactment, is it to be interpreted as meaning the board of health created and existing under the municipal code of 1902?

To my mind, the exact relation of the health provisions of the municipal code to the remaining provisions thereof, is shown by consideration of certain other sections of the municipal code of 1902. By examining sections 187-189, inclusive, of that act, it will be found that all the body of the state laws relating to boards of health in municipalities as in existence prior to the adoption of the municipal code, with the exception of those provisions which are included within the three sections cited. That is to say, the existing provisions of sections 2115, 2116, 2118, etc., Revised Statutes of Ohio, now found in sections 4406 to 4476, inclusive, General Code, (with the exception of the two sections now under discussion) constituted certain substantive regulations and groups of powers and duties imposed upon local boards of health, meaning thereby local health agencies. These sections were not amended or repealed; instead they were retained in force in the manner following:

Section 189, municipal code of 1902, was as follows:

"The board of health herein provided for shall have all the powers and perform all the duties, not inconsistent with this act, which are conferred or required in sections 2115, 2116, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138,

2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, and 2148 of the Revised Statutes of Ohio, as amended May 7, 1902 (95 O. L., 421), and section 2114, of the Revised Statutes of Ohio, as amended May 12, 1902, (95 O. L., 643), and for all purposes such sections as amended shall remain in full force and effect; and nothing therein contained shall be held to impair, restrict or repeal any portion of the act passed April 23, 1902, entitled 'An act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension or relief funds, and to create and perpetuate boards of trustees for the administration of such funds;' provided, further, that local boards of health shall not have power to close public highways or to prohibit travel thereon, nor to interfere with public officers not afflicted with or directly exposed to any contagious or infectious disease, in the discharge of their official duties; nor to establish a quarantine of one city, village or township against another city, village or township, as such, without permission first obtained from the state board of health, and under such regulations as may be established by the state board. 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 this provision the general assembly clearly recognized the independent force and effect of the sections thus referred to and perpetuated that force for all proper purposes. The boards of health provided for in the municipal code were to have the powers and duties created by the general statutes referred to; but, these powers and duties were not created as mere incidents to the creation of the offices as such. From this it follows that the clearly expressed intention of the legislature of 1902 was that at least such regulations as come within the purview of section 189 of the municipal code of that year are to be regarded as regulations of general character, applicable to health agencies and not merely as the powers and duties of a board created by the act of which it is a part, and hence, subject to destruction when the board itself is destroyed.

But, what is so clear of the provisions of section 189 is not less clear to my mind of the provisions of sections 187-188. These were as follows:

"Section 187. The council of each city and village shall establish a board of health; such board shall be composed of five members to be appointed by the mayor and confirmed by council, who shall serve without compensation, and a majority of whom shall constitute a quorum; and the mayor shall be president by virtue of his office. In villages the council may appoint a health officer instead of a board of health, and fix his salary and term of office; such appointee to be approved by the state board of health, who shall have all the powers and perform all the duties granted to or imposed upon boards of health, except that all rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health. And if any city, village or township fails or refuses to establish a board of health or appoint a health officer, the state board of health may appoint a health officer for such city, village or township and fix his salary and term of office, and such health officer shall have the same powers and duties as health officers appointed in villages in lieu of a board of health, as herein provided, and the salary of such health officer, as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against the city, village or township for which such health officer is appointed to serve.

"Section 138. The state board of health, or the board of health of any

city, village or township, in time of epidemic or threatened epidemic, or when any dangerous communicable disease is unusually prevalent, may, after a personal investigation by the members or executive officer of such board to establish the facts in the case, and not otherwise, impose a quarantine on vessels, railroads, stages, or any other public or private vehicles conveying persons, baggage or freight, or used for such purpose, and may make and enforce such rules and regulations as such board may deem wise and necessary for the protection of the health of the people of the community or state; provided, however, that the running of any train or of any cars on any steam or electric railroad, or of steamboats, vessels or other public conveyances shall not be prohibited. A true copy of such quarantine rules and regulations adopted by a local board of health, shall be immediately furnished by such board to the state board of health. Such quarantine rules and regulations, when established by a local board of health, after careful investigation by the state board of health, may be altered, relaxed or abolished by order of said state board and thereafter no change shall be made except by the order of the state board of health, or by the local board, to meet some new and sudden emergency."

The pertinent provisions of section 187 are now found in sections 4404 and 4405, General Code; except that in process of codification, reference to township boards of health has been eliminated and a corresponding provision inserted in the statutes relating to township trustees.

The same is true of section 188, which has now become section 4425, with the addition that the reference to the state board of health therein has been eliminated in codification and is found in the appropriate provision relating to the powers and duties of the state board of health.

The very fact that these two sections treat of the powers and duties of township boards of health, and the state board of health as well as of the powers and duties of city and village boards of health, shows, I think, that these sections are not merely provisions for the frame work of municipal government, but were intended to be of universal application, so that the withdrawal of a given municipality from the field of the operation of the municipal code, as a framework of government, would not establish the immunity of its health agencies from the force of their provisions.

I am of the opinion then that section 4425, General Code, is intended to be of universal application, and that its force is not limited to the boards of health created by and existing under the general municipal code.

This statement, however, must be qualified insofar as section 4425 constitutes a grant of power affecting matters of local concern. I am constrained to hold that it is to be superseded by the provisions of a charter to the extent that if the local charter provides for a health agency, which it calls a "board of health," yet reposes in some other agency of the municipal government, such as the council, the power to impose quarantine, such a distribution of power would control; but I am satisfied that by force of these statutes the state may compel the creation of some adequate health agency in a charter city, and however the group of powers pertaining to such an agency may be distributed under the charter, or even in the absence of any provisions of a health agency in the charter (in which case the state board of health might appoint a health officer, as provided in section 4405, General Code), the necessary health measures contemplated in section 4425 must be taken.

But insofar as section 4425 constitutes a prohibition interfering with the running of trains and other public conveyances, it is to be given controlling effect, and a charter board of health or other health agency, is in my mind without authority to prohibit the running of trains, or cars, or other public conveyances.

Furthermore, I am of the opinion that when a charter board of health estab-

lishes quarantine rules and regulations, it is its duty immediately to furnish a true copy thereof to the state board of health, which thereupon acquires jurisdiction in the premises to the extent that no change is to be made, except by its order.

Coming now to section 4426, it will be noted that its provisions were found in original section 189 of the municipal code. In my mind there is even more reason for characterizing its prohibitions as universal than there is for reaching a similar conclusion with respect to the negative provisions of section 4425. The very subject matter of these provisions—both those found in section 4426 and those found in section 4425—in point of fact is such as to remove them from the field of purely municipal affairs.

A quarantine established by one city against another is not a municipal affair; it involves an inter-relation of two or more municipalities and becomes ipso facto a matter of state-wide concern; so also with respect to the running of trains and other public conveyances.

I am of the opinion, therefore, that a charter board of health, or other health agency, is without power to prohibit travel on public highways or interfere with public officers in the discharge of their official duties not exposed to a contagious or infectious disease, or to establish a quarantine against another locality without permission or consent of the state board of health, under the regulations established by the state board.

As already remarked, the remaining provisions concerning which you inquire, viz., sections 4427 to 4436, inclusive, constitute laws of early origin and of application clearly independent of the mere frame work of the municipal code of 1902. Indeed, the nature of these provisions is such as to establish this conclusion by reasoning independent of their legislative history.

Section 4427, for example, relates to the duty of the physician called to attend a person suffering from certain contagious or infectious diseases, and likewise to the duty of the owner or agent of a building in which such person resides. The provision is that the fact of the existence of the disease, together with the facts relating to the identity of the person and the place in which he is found, shall be reported to the health officers, under the provisions already laid down. The charter board of health, or other health agency, may add to these requirements, others of a similar or not inconsistent nature; but such an agency may not subtract from them.

Section 4428 requires the local health agency to cause an inspection to be made of any house or other locality wherein the existence of an infectious or contagious disease has not been reported by the physician, or by the owner of the building, or his agent. To this extent, it is in effect a command to the charter board of health, binding upon such a tribunal; but in so far as it is a grant of power to establish a quarantine or to send a diseased person to a quarantined hospital, I am of the opinion that its provisions are superfluous as applied to the health agency created by charter, if the charter itself vests like power. I am inclined to the belief, however, that in the absence of any distinct provision in a charter, a charter-created board of health, or other health agency would have the powers enumerated in this section.

Section 4429 provides for the placing of quarantine cards and prohibits their removal until after the patient has been removed, or has recovered, and the house and its contents have been properly disinfected. This is a regulation of universal character, controlling with respect to the action of a charter-created health agency in the sense already discussed; that is, local regulations consistent with these, or additional to them may be imposed by such health agency, but regulations inconsistent with them, or less stringent than those found in the statute may not be imposed.

Section 4430 relates to the duration of quarantine. Upon the authorities above cited, a charter-created board of health may increase the duration of quarantine in connection with any of the specified diseases, but may not reduce it.

Section 4431 authorizes the local board of health to employ quarantine guards, and vests in such guards certain police powers. The relation of this provision to a

board of health created by a charter is established by the same principles already outlined in dealing with grants of power.

The same remark may be made with respect to sections 4433 and 4434.

With respect to section 4432, I am of the opinion that its provisions are of universal application and that they are binding upon a health agency created by a charter. In fact, I am of the opinion that the disinfection and purification of a house and its contents, which the statutes require to be done, in accordance with the rules and regulations of the state board of health, cannot be done in any other way. Perhaps as a matter of strict law, the local board of health, created by a charter, might add to the rules of the state board of health other similar and not inconsistent regulations, but if the state board of health should be of the opinion that there is any inconsistency, I would be inclined to hold that its opinion would control.

Sections 4435 and 4436 provide for the payment, by the council of the municipality, of certain expenses incidental to quarantine. In my opinion, these things are binding upon a charter municipality.

As to section 4436, I might say that if the board of health of a chartered municipality sees fit to incur expenses for purposes other than therein specified, and the charter authorizes such action, such payment may be made and such expenses incurred other than for the protection of the public may be charged to the person or persons quarantined.

I have discussed in a general way the manner in which the provisions of the General Code of the state apply to the health board of the city of Cleveland. From the detailed discussion in which I have indulged, the following general answer may be given to your questions.

1. The health board of the city of Cleveland is subject to such general laws of the state as constitute regulations of a police and sanitary nature, and is without power, even in local matters to make and enforce regulations which are inconsistent with those of the general laws.

2. Sections 4425 to 4436 of the General Code of Ohio, inclusive, govern and control the action of the health board of the city of Cleveland to the extent that insofar as the rules of that board may affect individuals, other localities and public conveyances, the Cleveland board can impose no regulations prohibited by these sections, nor any inconsistent with them. Where the thing required by the regulation of the local board is not prohibited by the general law, the local regulation will stand, if it is supplementary to and consistent with those found in the general law, but not if it destroys the force of any provision of the general law, or is otherwise inconsistent therewith.

I think I have made clear, however, that so far as the mere machinery, which may be found in these sections is concerned, the provisions of the general law are not controlling; the local health agency so long as its action is consistent with the provisions just outlined, may proceed by methods authorized by the charter, if such there are and need not rely upon the general laws as a grant of power to do any specific thing nor as a rule of action prescribing how such a thing shall be done.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1070.

CONSTRUCTION OF THE 1914 BUDGET BILL—CONSTRUCTION AS IT APPLIES TO CONVICT LABOR.

Section 2314, General Code, in reference to requiring buildings and improvements involving a cost in excess of $3,000 to be constructed and made only on contracts let on competitive bidding is susceptible by force of its own terms to two constructions:

First: As meaning to the extent that the labor of inmates of state institutions is employed, expenditures for repairs and improvements are to be exempt under section 2314, General Code.

Second: As meaning that in cases where or whenever the labor of inmates of state institutions is employed, expenditures for repairs and improvements are to be exempt under section 2314, General Code.

On consideration of the convict labor law the second construction should be adopted and said language held to mean that in cases where or whenever the labor of inmates of state institutions is employed, repairs and improvements are to be exempt from the operation of section 2314, General Code.

COLUMBUS, OHIO, July 21, 1914.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You recently submitted to this department an inquiry with reference to the proper construction of certain language in House Bill No. 47, commonly known as the Budget Bill, (104 O. L., 64, 69), making appropriations for the board of administration.

So much of the act, making appropriations for your board, as is pertinent to the particular inquiry you make, reads as follows:

> "Maintenance receipts from federal government ---------- and $2,103,995.00. Balances in the appropriation for ordinary repairs and improvements and balances, in all appropriations for specific purposes.
>
> "In so far as the labor of inmates of state institutions is employed, expenditures for repairs and improvements to be exempt from section 2314 of the General Code of Ohio."

The particular language of the act, the construction of which is sought, is that last contained in the language above of the act above quoted, as follows:

> "In so far as the labor of inmates of state institutions is employed, expenditures for repairs and improvements to be exempt from section 2314 of the General Code of Ohio."

Section 2314 of the General Code, referred to in the language quoted, provides as follows:

> "Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefore, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily

understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

It seems plain that the intent and purpose of the language of the act last above quoted is to exempt expenditures for repairs and improvements, coming within the meaning of the language employed, from the requirement that repairs and improvements of public buildings of the state shall be made on contracts entered into after competitive bidding. The inquiry is as to the proper construction and meaning of the language of the act, last above quoted.

Looking to the language in question alone, two, and, as I see it, only two possible constructions, of the language in question can be made. The first construction of the language in question, which is suggested, is that it means that to the extent that the labor of inmates of state institutions is employed, expenditures for repairs and improvements are to be exempt from section 2314 of the General Code. The other construction as to the meaning of this language, which suggests itself, is that it means that in cases where or whenever the labor of inmates of state institutions is employed, expenditures for repairs and improvements are to be exempt from section 2314 of the General Code.

Pertinent to a consideration of the question as to which of these two suggested constructions is correct, I note the provisions of sections 2228, 2229 and 2230, General Code, which read as follows:

"Section 2228. The board of managers of the Ohio penitentiary, the board of managers of the Ohio state reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter.

"Section 2229. The board of managers of the penitentiary and the board of managers of the reformatory, so far as practicable, shall cause all prisoners serving sentences in such institutions, physically capable, to be employed at hard labor for not to exceed nine hours of each day other than Sundays and public holidays.

"Section 2230. Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or on the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

These sections, the proper execution of which is now vested in the Ohio board of administration, are part of an act passed March 29, 1906 (98 O. L., 177), the primary

purpose of which was to withdraw convict labor from competition with free labor in the manufacture of trade commodities, and to confine the labor of such convicts to work for the state and other public agencies or institutions, or in the production of commodities to be used by such public agencies or institutions.

Looking to the provisions of section 2230, General Code, I note that it provides that such convict labor shall be "for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair."

It is obvious that to the extent that convict labor is employed, pursuant to the authority of these sections, in the repair, improvement or construction of buildings and institutions of the state, to that extent such repair, improvement or construction and the cost and expense thereof is withdrawn from the operation of section 2314, et seq. of the General Code, providing for the making and construction of such repairs and improvements upon contracts entered into after competitive bidding.

A familiar and fundamental rule of interpretation requires that in the construction of a statute, meaning must, if possible, be given to every part and word, and the presumption always is that every word in a statute is designed to have some effect, and hence the rule that in putting a construction upon any statute, every part shall be regarded and it shall be so expounded, if practicable, as to give some effect to every part of it.

Lewis' Sutherland Stat. Con., section 380.
State ex rel. vs. Durflinger, 73 O. S., 154, 159.
Turley vs. Turley, 11 O. S., 173, 179.

It quite clearly follows, from the application of the rule of construction just noted that the first suggested construction as to the meaning of the language in question, is wholly inadmissible, for the reason that wholly independent of this language in House Bill No. 47 (104 O. L., 69), expenditures in the repair and improvement of state institutions are necessarily exempt from the operation of section 2314, to the extent of labor performed thereon by inmates of state institutions. In fact, if the language in question is to be so construed, it becomes wholly meaningless, in view of prior provisions of section 2230, authorizing such labor. The only other alternative as to the proper construction of this language is that above suggested, to wit, it means in cases where and whenever the labor of inmates of state institutions is employed, expenditures for repairs and improvements are to be exempt from the requirement as to competitive bidding contracts.

Pertinent to the consideration of questions of this kind, the following rule of construction has been stated:

> "Where the meaning of a statute or any statutory provision is not plain, the court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment."

Lewis' Sutherland Stat. Con., section 456.

Looking to the provisions above noted, with reference to the employment of convict labor, it is plain that the same policy that dictated the withdrawal of such labor from competition with free labor, in the manufacture of trade commodities, also dictated

that such labor should be employed as far as possible, in the several matters coming within the authority of the convict labor statutes above noted; among which matters covered by said statutes is the employment of such labor, in the preparation and manufacture of building material for the construction or repair of state institutions and in the work of such construction or repair. As a result of the use of such labor, in the repair and improvement of state buildings and institutions, and on a consideration of the policy dictating that as to such repairs and improvements, such labor should be employed as far as possible, it was difficult, as to any particular repair or improvement to anticipate or estimate just how far such labor would or could be used in such repair or improvement, with the further and consequent result that it became likewise difficult to estimate just what the expenditure for such repair or improvement would be, over and above such convict labor so employed. As a result of this condition, the legislature, prior to the enactment of House Bill No. 47 (104 O. L., 69), with respect to previous appropriations to the board of administration for repairs and improvements of state buildings and institutions, provided that the expenditures from the appropriations for this purpose should be exempt from the operation of section 2314, General Code. As witness, the language of the same legislature, in regular session, making appropriation for such purposes to said board as follows:

> "Ordinary repairs and improvements; balance and..... $326,000 00
> Expenditures from the appropriation for ordinary repairs and improvements to be exempt from section 2314 of the General Code of Ohio."
> (103 O. L., page 620.)

It is obvious that the provisions of the legislative act, just noted, were broader in their result than the considerations which induced their enactment; for, by the provisions of this particular act, just noted, expenditures for repairs and improvements out of the appropriation made, were exempted from the operation of section 2314, even though no convict labor was employed in such work at all. To correct this, and to limit the exemption of expenditures for repairs and improvements on state buildings and institutions from the operation of section 2314, to cases where such labor was actually employed, the legislature, in making appropriation to the board of administration for such purposes, stated such exemption and the limitation thereof, in the language, the consideration of which has been the subject of this opinion.

Upon the foregoing considerations, I am of the opinion that in cases where and whenever the labor of inmates of state institutions is employed, pursuant to authority of law, on repairs and improvements to state buildings and institutions, such repairs and improvements and all expenditures therefor, payable out of the appropriation made for such purposes, are exempted from the operation of section 2314, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1071.

ATTACHMENT CASES—AMOUNT OF COSTS TO BE TAXED AGAINST DEFENDANT—JURY TRIAL IN ANY SUCH CASES—FEES FOR MAGISTRATES, CONSTABLES, JURORS.

Section 10271, General Code, does not provide that full fees cannot be taxed in attachment and garnishee cases, but on the contrary holds that said section specifically provides that when personal earnings are attached under the provisions thereof, only ten per cent. of such personal earnings plus two dollars, court costs, and fifty cents garnishee fee for the garnishee, if such garnishee demands the same, shall be subject to such attachment. Any additional fees over and above this amount may be legally taxed and collected the same as in any other cause of action, but cannot be collected from the defendant in such ancillary proceedings.

Where a jury trial is had, persons summoned as jurors are required to serve, unless exempt by virtue of the General Code. When so required to serve as jurors, section 10357, General Code, in substance provides that upon the verdict being delivered to the justice before judgment is rendered thereon, each juror shall be entitled to receive seventy-five cents per day for each day of service at the hands of the successful party, which shall be taxed in the bill of costs against the losing party, the same to be then collected according to the procedure provided for the collection of such fees, the same as in the case of the collection of other court costs.

The term "costs" employed in section 10271, General Code, includes magistrates' and constables' fees as well as the fees of witnesses and jurors.

COLUMBUS, OHIO, July 22, 1914.

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

GENTLEMEN:—Under date of April 16, 1914, you request an opinion of this department upon the following questions:

> "*First.* May additional fees be taxed in attachment and garnishee cases if the defendant demands jury?
>
> "*Second.* We presume that witnesses may demand their fees of the party subpoenaing them, but how may a juror receive compensation for his services, and may he be compelled to serve as such juror without compensation?
>
> "*Third.* Does the recent amendment to section 10271, General Code, relate only to magistrates' and constables' fees, and may the fees of witnesses and jurors be taxed as costs in the case in addition to the fees of the officers?"

Section 1746 of the General Code, provides for the fees that may be charged by justices of the peace, and covers fees that accrue in attachment and garnishee cases, as well as providing for fees in cases where a jury is demanded for the trial of cases, for the impaneling of the same and issuing venire therefor.

Section 3347 of the General Code provides for the fees of constables and the provisions therein contained cover attachment and garnishee proceedings, as well as the matter of summoning and serving jurors.

Section 11725, General Code, provides for exemptions to heads of families and widows as follows:

> "Every person, who has a family, and every widow, may hold property exempt from execution, and attachment or sale, for debt, damage, fine or amercement, as follows:
>
> * * * * * * * * * *
>
> "6. The personal earnings of the debtor, and the personal earnings of his

or her minor child or children, for three months, when it is made to appear by affidavit of the debtor, or otherwise, that such earnings are necessary to the support of the debtor or of his or her family. Such period of three months shall date from the time of issuing an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject such earnings to the payment of a debt. If the claim, debt or demand for the payment of which it is sought to subject personal earnings, is one for necessarries furnished to the debtor, his wife or family, only ninety per cent. of such earnings shall be so exempt as against such claim, debt or demand. Nothing herein contained shall render the personal earnings of such debtor's minor child or children, for three months, subject to its payment;

* * * * * * * * *."

Section 10271 of the General Code, as amended April 11, 1913, 103 O. L., 567, provides as follows:

"The personal earnings now exempted by law, in addition to the ten per cent. for necessaries, shall be further liable to the plaintiff for the actual costs of any proceeding brought to recover a judgment for such necessaries, in any sum not to exceed two dollars and the necessary garnishee fee. Such garnishee may pay to such debtor an amount equal to ninety per cent. of such personal earnings, less the sum of two dollars and the necessary garnishee of fee not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs as herein provided, due at the time of the service of process or which may become due thereafter and before trial and be released from any further liability to such creditor, or to the court or any officers thereof, in such proceeding, or in any other proceeding, brought for the purpose of enforcing the payment of the balance of the costs due in said original action. Both the debtor and the creditor shall likewise be released from any further liability to the court or any officers thereof in such proceeding or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action."

So that ten per cent. of the personal earnings of a debtor are not now exempt by statute when a claim for necessaries is asserted against such personal earnings, under the provisions of sections 11725 and 10271 of the General Code, supra. It will be noted that said section 10271, supra, does not provide that the full fees cannot be taxed in attachment and garnishee cases, but on the other hand, specifically provides that when personal earnings are attached under the provisions of said section, only 10 per cent. of such personal earnings, plus $2.00 court costs, and 50 cents garnishee fee for the garnishee, if the garnishee demands the same, shall be subject to such attachment. So far as the costs are concerned, I take it that it was the intent of the legislature in enacting this section, to limit the amount of costs which could be taken from the defendant in such attachment proceedings, to the sum of $2.00, and no more, to apply on the costs of the court, plus 50 cents for the garnishee if the latter demand such fee. Any additional fees over and above this amount may be legally taxed and collected the same as in any other case, but cannot be collected from the defendant in such ancillary proceedings. This answers your first question.

In answer to your second question, I wish to say that witnesses have the right to demand their fees from the party subpoenaing them, by virtue of the provisions contained in section 11508 and 11509 of the General Code. As regards jurors in justices' courts, section 10324 provides that in all civil actions, after the appearance of the defendant and before the court proceeds to inquire into the merits of the cause

either party may demand a jury to try the action, which shall be composed of six lawful men, having the qualifications of electors, etc.

Section 10327, General Code, provides a method of selecting such jurors.

Section 10343, General Code, provides for the service of summons.

Section 10344, General Code, provides the penalty for neglecting or refusing to attend, when properly summoned as a juror, as follows:

> "For neglecting or refusing to attend when properly summoned, or refusing to serve when in attendance, jurors shall be liable to the like penalty, and be proceeded against in the same manner as witnesses who fail to attend, or refuse to testify."

By virtue of the immediate foregoing sections, as cited and referred to, it follows that it is compulsory for parties who are selected as jurors, to serve as such unless they come within the exemption of the General Code, otherwise provided, or are excused from such service by the court. It manifestly was not the intention of the legislature that such jurors should serve without compensation, by virtue of the provisions contained in section 10357 of the General Code, as follows:

> "Upon the verdict being delivered to the justice and before judgment rendered thereon, each juror shall be entitled to receive seventy-five cents per day for each day's service as such juror, at the hands of the successful party, which shall be taxed in the costs against his adversary. When the jury is not able to agree upon a verdict, the same compensation shall be paid them by the party calling the jury, and it must be taxed in the cost bill against the losing party, except as otherwise provided."

Said section specifically provides that upon the verdict being delivered to the justice and before judgment rendered thereon, each juror shall be entitled to receive 75 cents per day for each day's service as such juror, at the hands of the successful party, which shall be taxed in the bill of costs against the losing party and the same to be collected in accordance with the procedure provided for the collection of such costs if the collection can be enforced against such losing or unsuccessful party. Therefore, in answer to your second question, I wish to say that a juror may be compelled to serve as such, in accordance with the foregoing provisions and must receive his compensation in accordance with said section 10357, supra. That is to say, the successful party paying the jury fees and the same then being taxed in the cost bill against his adversary, the losing party, to be collected in accordance with the procedure provided for the collection of such fees, the same as in the case of the collection of other court costs.

In answer to your third question, section 10271, supra, says that the personal earnings shall be further liable to the plaintiff for the actual cost of any proceedings brought to recover a judgment for such necessaries, etc. The term "actual cost" involves all costs accruing in such cases and is not limited to the magistrates' and constables' fees only, but includes witness fees and the fees of jurors, if a jury is demanded in the trial of such cases. In attachment and garnishee actions for the attachment of ten per cent. of the personal earnings of a debtor, for a claim for necessaries, the cost accruing in such cases including the fees of the justices, the constable, the witnesses and the jurors are to be taxed and collected in accordance with the procedure provided for the collection of such costs the same as in other cases but with the limitation that in such attachment proceedings only $2.50 can be collected from the debtor by reason of the provisions contained in section 10271 of the General Code supra.

Yours very truly

TIMOTHY S. HOGAN

Attorney General.

1072.

RIGHT OF COUNTY COMMISSIONERS TO REDUCE OR INCREASE AMOUNT OF COMPENSATION AND DAMAGES ASSESSED BY ROAD VIEWERS FOR THE OPENING OF A COUNTY ROAD.

County commissioners may not reduce or increase the amount of compensation and damages assessed by viewers in favor of persons whose land is taken for the opening of a county road.

COLUMBUS, OHIO, July 22, 1914.

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

GENTLEMEN:—On April 6th you inquired of me as follows:

> "May the county commissioners either reduce or increase the amounts of compensation and damages assessed and determined by county road viewers as provided by sections 6867 and 6882, General Code, as seems to be implied by the language of a clause in section 6883, General Code, which reads: 'and they are satisfied that the amount so assessed and determined is just and equitable?' "

The sections cited by you are a part of the statutes relating to the laying out, altering, changing, widening of or vacating county roads. Section 6867 provides for the appointment by the county commissioners, on the presentation of a petition, and if they are satisfied that lawful notice has been given, of three disinterested freeholders of the county, as viewers, who are also made a jury to assess and determine the compensation and damages to be paid by reason of the opening and construction of a county road. The intervening sections deal with the procedure for making a view of the road and for assessment of compensation and damages, and need not be quoted.

Section 6883, General Code, reads:

> "The county commissioners shall cause such report to be publicly read on the third day of the session at which it was received, and if no petition for review or alteration has been presented and received, and they are satisfied that the amount so assessed and determined is just and equitable, and that the road will be of sufficient importance to the public to cause the damages which have been assessed to be paid by the county, they shall order them to be paid to the applicants from the county treasury. If in their opinion the road is not of sufficient importance to the public to cause the damages to be paid by the county, they may refuse to establish the road as a public highway unless the damages which have been assessed are paid by the petitioners. The commissioners may order a portion of such damages to be paid out of the county treasury and require the petitioners to pay the remainder thereof before such roads are opened."

The county commissioners may pay all of the amount awarded by the viewers out of the county treasury; they may require the petitioners to pay all or may order part to be paid by the petitioners and part by the county. Before the county commissioners can order the whole amount assessed as compensation and damages to be paid out of the county treasury, they must find that such amount is just and equitable and that the road will be of sufficient importance to the public to cause the damages to be paid by the county. The language of section 6883, quoted in your letter, does

not justify the interpretation that the commissioners have implied power to increase or decrease the amount allowed by the viewers as compensation and damages. If the commissioners do not deem the amount so assessed to be just and equitable, there is but one course open to them, viz.: they may refuse to order the amount assessed to be paid out of the county treasury, but they cannot increase or decrease the amount fixed by the viewers.

That the commissioners have no such power is manifest from section 7078, General Code, wherein it is provided that a claimant for compensation and damages for land taken for the establishment of a county road may appeal to the probate court "from the final decision of the county commissioners or township trustees, confirming the assessment of compensation and damages made by the viewers in his behalf, or the refusal of the viewers to award damages to him."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1073.

ORGANIZATION FOR THE DETECTION AND ARREST OF HORSE THIEVES —RIGHT OF MEMBERS OF SUCH ORGANIZATION TO CARRY CONCEALED WEAPONS.

The officers of a county or township organization for the detection and arrest of horse thieves are not entitled to carry concealed weapons without giving bond as required by section 12819, General Code.

The members of such association are not specially appointed police officers, and consequently are not entitled to carry concealed weapons at all; if they did carry such concealed weapons, section 13693 would apply.

COLUMBUS, OHIO, July 22, 1914.

HON. E. E. KERLIN, *Prosecuting Attorney, Darke County, Greenville, Ohio.*

DEAR SIR:—Under date of April 10, 1914, you present to this department the following questions:

> "First: Does section 12819, of the General Code of Ohio, as amended April 7, 1913, (103 vol. O. L., page 553) prohibit officers of a county or township organization for the detection and arrest of horse thieves and other criminals, from pursuing criminals as provided by section 10199 and subsequent sections of the General Code, unless they comply with the requirements as to the giving of bonds?
>
> "Second: Are such pursuing officers, such police officers, within the meaning of said section, as are authorized to go armed when on duty within the meaning of said amended section 12819?
>
> "Third: If such officers are authorized to give such bond and go armed when on duty would it be necessary for each pursuer who is appointed for a short period of three or six months required to give an individual bond, or could each company give a blanket bond for all of the pursuing officers of such company or society?"

Before directly answering your questions, I shall briefly state the purport of the sections authorizing the organization of a township society for the detection and arrest of horse thieves and criminals.

Under section 10199 when a society of persons in a township is formed for the detection and arrest of horse thieves and other criminals, and for the mutual protection of the property of its members, such society may become a body corporate with the right to levy such assessment, not exceeding $3.00 annually from each member, as may be required to carry out the objects of the society. In addition to this it is provided by following sections that any number of persons, not less than fifteen, a majority of whom must be residents of the state, may become incorporated for the purpose of apprehending and convicting any person or persons accused of either a felony or misdemeanor. An association so incorporated is authorized to adopt a constitution, provide a seal, elect or appoint officers, and perform the duties required by law. The presiding officer may appoint deputies, not exceeding one in each township in the county where the corporation is located. The officers and members of the association upon proper certificate of the presiding officer, if a felony has been committed, may pursue and arrest without warrant any person whom they believe, or have reasonable cause to believe guilty of the offense, and arrest and detain the alleged criminal in any county of the state to which he has fled, and return him to any officer of the county wherein the offense was committed, and there detain him until a legal warrant can be obtained for his arrest. An officer or member of the association may, under such certificate of authority, obtain a warrant for the arrest of a person accused of a felony, and shall have the same power to arrest and detain offenders as is vested in constables. This latter association is authorized to make and collect assessments from each of the members and also to indemnify them for losses caused by horse thieves or other felons. Upon the apprehension and conviction of a person charged with felony by such association, the commissioners of a county may reimburse it in any sum not exceeding $100.00 for necessary expenses, not otherwise provided by law, incurred in the apprehension and conviction of such criminal. When the crime is a misdemeanor the amount of reimbursement shall not exceed $75.00.

I am unable to tell from your question whether the association which you have in mind was formed under section 10199, or under the following sections. As the first cited section simply provides for the organization of an association, and does not vest in it the same powers reposed in organizations under sections 10200 et seq., it would seem that there is a radical difference between the two classes of associations. As the former is not given the same power of making arrests as is the latter, it stands on a parity with a private individual who has a right to arrest a person who has committed a felony, but this does not convey any right of any character to carry concealed weapons. Therefore, my opinion will deal principally with those associations upon whose members is conferred the right of making arrests.

Section 12819, as amended 103 O. L., 553, reads thus:

> "Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857, of the General Code, to go armed when on duty. Provided, further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857, of the General Code, to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

The inhibition of this section against the carrying of concealed weapons does not apply to sheriffs, regularly appointed police officers of incorporated cities and villages, regularly appointed constables and special officers, as provided by sections 2833, 4373 10070, 10108 and 12857, of the General Code, when such designated persons are on duty. The members and officers of the organizations to which you refer in your question do not come within the foregoing exception.

It will be observed that it is also made lawful for deputy sheriffs and specially appointed police officers to go armed if they first give the bond required by the foregoing quoted section.

I can find no authority under section 10199 which authorizes a township society for the detection and arrest of horse thieves and criminals, or the members of such association or organization to make arrests or pursue felons. This power, however, is vested in associations organized under section 10200 et seq., to which I have before referred.

This brings us to your second question. I cannot bring myself to the belief that the members of these associations are specially appointed police officers, as in its ordinary signification the expression "police officer" means one who is charged with the detection and arrest of those who violate any of the laws of the state or ordinances of a municipality, and who, during the time he is acting, has the obligation of continually engaging in such service. It does not comprehend the doing of police work in a particular case, nor is the expression "specially appointed" to be regarded as in any way modifying the view which I have just expressed. These terms last quoted have reference to those officers who are not members of a regular police force, but who while on duty are performing the work or service of police officers as hereinbefore defined, and such designation, no doubt, was intended to refer to those officers designated in sections 151, 1821 et seq., 5889 et seq., 9150 et seq. and 9913 of the General Code. From this it must follow that the answer to your second question must be in the negative.

Having answered your second question in the foregoing manner, it is unnecessary to discuss your third inquiry, because if these persons are not authorized to go armed when on duty, within the meaning of section 12819, it must follow that they cannot give bond as prescribed in section 12819.

I have not directly answered your first question for the reason that I wish to call your attention to section 13693 of the General Code as modifying, to some extent at least, the provisions of section 12819. The section last quoted does not in any way prohibit the officers of the organizations referred to from pursuing criminals, and I take it you desire merely to know whether there are any circumstances under which they may carry concealed weapons. It is because of this that I have called attention to the following section:

> "Section 13693: Upon trial of an indictment for carrying a concealed weapon the jury shall acquit the defendant if it appear that he was at the time engaging in a lawful business, calling or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property or family."

Under sections 10200 et seq., a member of the organizations therein referred to would be engaged in a lawful calling when he was pursuing, arresting or detaining criminals or alleged criminals, whether with or without a warrant, if a felony had been committed, and with a warrant when the accused was charged with a misdemeanor provided, however, that when acting without a warrant he believed or had reasonable cause to believe the accused to be guilty of the offense. Hence it follows that if the persons mentioned were in pursuit of criminals, or alleged criminal in the manner herein specified, and the circumstances would have justified a prudent man in carrying

a concealed weapon for the defense of his person it would follow that it would be the duty of the jury to acquit such persons if they were charged with carrying concealed weapons. Of course, they would have to assume this risk, as a jury might find that they were not justified under the circumstances in carrying such weapons. In any event, the foregoing is the section upon which they must rely for their right to carry the weapons in question, as they can place no reliance on section 12819.

The question as to the right of members and officers of associations, organized under sections 10200 et seq. to carry concealed weapons upon giving bond, is an extremely difficult one, and my answer is not free from doubt, but in view of the fact that it might cause members and officers of such associations serious difficulty if I should hold they were entitled to carry such weapons and my holding should be reversed by the courts, I have regarded the foregoing as the safer rule to adopt.

You can readily see the very grave danger of holding that these persons have the right to carry concealed weapons and then have a court hold otherwise when they were prosecuted for so doing.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1074.

PAYMENT OF CONTINGENT EXPENSES INCIDENT TO THE ADMINISTRATION OF THE MOTHERS' PENSION LAW—FROM WHAT FUND SUCH EXPENSES ARE PAYABLE.

The contingent expenses incident to the administration of the mothers' pension law are expenses of the juvenile court, payable out of the fund for its support, not out of the mothers' pension levy.

COLUMBUS, OHIO, July 22, 1914.

HON. SAMUEL L. BLACK, *Probate Judge and Juvenile Judge, Columbus, Ohio.*

DEAR SIR:—In your letter of June 26th, you call my attention to the fact that under sections 1683-2 and 1683-3 of the General Code, constituting parts of the so-called "Mothers' Pension Law," it is required that the juvenile court shall cause preliminary and periodical investigations and examinations to be made of the homes of the mothers applying for and receiving pensions, and request my opinion as to whether or not these administrative expenses are chargeable to the fund to be created by the levy, under section 1683-9, General Code.

The pertinent provisions of the statutes are as follows:

> "Section 1683-2. * * * Such homes shall be visited from time to time by a probation officer, agent of an associated charities organization, a humane society, or such other agents as the court may direct, provided that the person who actually makes such visits shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order.
>
> "Section 1683-3. Such allowance may be made by the juvenile court, only upon the following conditions: * * *. Sixth:—a careful preliminary examination of the home of such mother must first have been made by the probation officer, an associated charities organization, humane society, or such other competent person or agency as the court may direct, and a written report of such examination filed.

"Section 1683-9. It is hereby made the duty of the county commissioners to provide out of the money in the county treasury such sum each year thereafter as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

It will be observed that the salaries of the probation officer and other specially designated agents referred to in these sections are not specifically made a charge upon the fund to be created by the levy under section 1683-9. The administration of mothers' pensions is a function of the juvenile court, as such, and in my opinion, expenses of this sort must be provided for in the same manner as other expenses of that court and are not payable out of the levy provided for in section 1683-9.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1075.

ASSESSMENT OF LOTS IN MAKING A STREET IMPROVEMENT—POWER OF COUNCIL TO SETTLE AND ADJUST EXCESS ASSESSMENTS.

1. Where in making a street improvement certain lots are assessed in excess of the limitations provided in section 3819, General Code, council has power under the statutes authorizing assessment to settle and adjust such excess and distribute the same to the other lots abutting on such improvement, provided such settlement and adjustment is made with the persons interested and made effective by a reassessing ordinance passed in the form and manner required for original assessing ordinances.

2. A property owner who signs a petition for an improvement wherein he states the number of feet front he owns is estopped to attack the validity of an assessment therefor. Bremen vs. Gibson, 14 O. C. C., n. s. 48, 77 O. S., 602. It does not follow from this that one who owns two lots abutting on an improvement is estopped to question an assessment where in signing the petition he describes the one and says nothing as to the other.

COLUMBUS, OHIO, July 22, 1914.

HON. DEAN C. TALBOTT, *City Solicitor, Galion, Ohio.*

DEAR SIR:—I have your letter of June 22nd, in which you inquire:

"Several years ago the city of Galion improved a street by paving and constructed a sewer and made special assesments upon the abutting property which were, on a number of lots, far in excess of the thirty-three and one-third per cent. limitation of General Code section 3819. Some of these assessments have been paid under protest and some of the other lot owners have refused to pay any taxes whatever and as there have been no purchasers at tax sales, there lots will soon revert to the state according to General Code.

"I am writing you to inquire if you know of any provision of law by which the council may adjust these assessments to conform to General Code 3819, without suit being brought by the property owners. The violation of

General Code 3819 is so flagrant that it is a matter of expediency for the city to adjust this matter without legal proceedings if possible.

"2nd. If the property owner waives the limitation imposed by General Code 3819 as to one lot, by signing his name, foot frontage and lot number, would this waiver be construed as a waiver of the limitation upon another lot owned by him upon the same street?"

In answer to your first question, I desire to state that no express authority to settle, adjust and compromise claims may be found as is the case in section 2416, General Code, in regard to county commissioners. However, it is not always necessary that such express authority be found; it may exist as a necessary incident to the carrying granted powers into effect, or it may be deduced from other granted powers, and as being in effect, the doing of the things authorized but not in the manner prescribed.

By section 3902, the council, under certain circumstances, may authorize the making of a reassessment, and by section 3903, the proceedings upon such reassessment are the same as upon an original.

Provision is made in sections 3848, 3849 and 3850 whereby, when an assessment is objected to, an equalizing board may be appointed by council, which board shall equalize the assessments, report the same to the council, where it may be confirmed, set aside or a new appraisement ordered.

From your statement, the assessment under consideration is invalid, and the power of the council to direct a reassessment cannot be questioned. When it comes to a consideration of the duty of this board, it must take from the lots the excess above the limitations fixed in section 3819, and distribute the same justly, equitably and in accordance with the foot frontage of the residue of the improvement. This reassessment must be reported to council and collected in the same manner as an original assessment. (Section 3903, General Code).

That this end may be as well reached by agreement of parties cannot be doubted, and if council may make the correction in the specific manner stated, and by legislative action, why may it not do so by entering into an agreement with the parties in interest, and all of them, by which the amount of the deductions and the lots subject thereto shall be set forth, and the lots upon the same are to be added, and the amount of addition stipulated?

I think the remedy under sections 3902 and 3903 is not exclusive; neither is it necessary to compel the owner of the lot excessively assessed to go to the trouble and expense of a lawsuit to enjoin, in which the court will have power to adjudge the amount of the over-assessment, fix the amount the plaintiff should pay, and still leave it up to council to make a reassessment to take care of such excess, and consequently I am of the opinion that council may fully adjust the matter by an agreement, not merely with those who are, or claim to be excessively assessed, but with them and all others who may be in any manner affected by the re-assessment. Of course this would not do away with the duty of council to make a reassessment in the formal and usual manner, which, when done, would end the matter insofar as future action concerning collection was concerned.

Your second question as to whether the waiver of a limitation as to one lot waives as to others, will depend entirely upon the character of the petition signed. In a case as you state, where the signing is accompanied with the lot number and foot frontage, the waiver would only extend to the property described, whereas, if it was signed generally to a petition, it would operate as a waiver to all lots owned and abutting on the improvement. In other words, a person may sign a petition generally and thereby make a general agreement to the improvement, or, he may own several lots abutting on the improvement and word his waiver so that it applies only to the described lots, it being clear that a person might own a lot abutting on an improvement, where he would desire the improvement very greatly, and another lot along the same proposed

improvement where he would not want to be charged with the expense of the improvement. Such being the case, I construe the signing as you describe it, as a waiver attaching to the described property only and not to any lot or lots abutting on the improvement.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1076.

CONTRACT FOR PURCHASE OF ELECTRIC CURRENT FOR A VILLAGE MUST BE MADE ON BEHALF OF THE VILLAGE BY THE COUNCIL—NOT BY THE BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Since prior to the enactment of the amendatory provisions of section 3809, General Code, (103 O. L., 526), municipalities in this state had no power to purchase electric current for furnishing light, heat or power to the municipality or its inhabitants, and inasmuch as by the express provisions of this section as amended, the council of a village is given express authority to contract for the purchase of such current, a contract between a village and a public service company furnishing electricity must be made on behalf of the village by the council, and not the board of trustees of public affairs of such village.

COLUMBUS, OHIO, July 22, 1914.

HON. HERBERT W. MITCHELL, *City Solicitor, St. Clairsville, Ohio.*

DEAR SIR:—Under date of June 30, 1914, you write asking my opinion upon questions stated by you as follows:

> "The village of St. Clairsville owns and operates a municipal electric light plant. This plant is under the control of the board of trustees of public affairs. A proposition has been made by an electric lighting company of Wheeling, that has a power and service line through this county, to sell electricity to the village on the switch-board of the local plant for considerably less than it now costs the municipality to manufacture the same. The question now arises as to whether a contract should be entered into by the board of trustees of public affairs or by the council with the company selling the electricity."

By the provisions of section 3618, General Code, municipal corporations have power to establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, heat and power. By section 3990, General Code, municipalities may not only erect electric works, but may purchase, or if necessary, appropriate existing plants belonging to any person or company within the municipality.

Section 4357, General Code, provides, among other things, that in each village in which an electric light plant is situated, or when council orders an electric light plant, it, (council) shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall each be elected for a term of two years.

Section 4361, General Code, as amended (103 O. L., 561), provides, with respect to the question at hand, that the board of trustees of public affairs shall manage, conduct and control electric light plants, furnish electricity, and appoint necessary officers, employes and agents. It provides further, that such board may make by-laws and

regulations for the management and protection of such plants, and for the purpose of paying the expenses of conducting and managing the same and making necessary additions thereto and extensions thereof, it may assess rents for light furnished upon all tenements and premises supplied. This section further provides, generally, that this board shall have the same power and perform the same duties as are possessed by and are incumbent upon the director of public service with respect to municipal utilities, and more specifically provides that all powers and duties relating to waterworks in certain sections therein named shall extend to and include electric light plants, and that such board shall have such other duties as may be prescribed by law or ordinance not inconsistent with the provisions of the section.

It is manifest from the provisions of the foregoing sections that comprehensive powers have been invested in municipalities with respect to the establishment, operation and management of electric light plants. I see nothing, however, in the provisions of any of these sections authorizing municipal corporations to purchase electric current, for clearly the power granted to municipalities to establish, maintain and operate an electric light plant for the purpose of manufacturing a certain product to wit, electricity, for the purpose of furnishing the municipality and its inhabitants with light, power or heat, does not authorize the municipality to purchase that product from others to be used for such purposes.

Ottawa Electric Light Co. vs. Ottawa 12 Ont. Law Rep. 290.

Express power, however, has been given to municipalities to purchase electric current for furnishing light, heat or power to the municipality or its inhabitants. In granting this power, section 3809, General Code, as amended, 103 O. L., 526, provides:

> "The council of a city may authorize, and the council of a village my make a contract * * * for the leasing of an electric light plant and equipment * * * of any person, firm, company or municipality, or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years."

It appearing that prior to the enactment of the amendatory provisions of section 3809, General Code, municipal corporations in this state had no power to purchase electric current for the purpose of furnishing light, heat or power to the municipality or its inhabitants, and that by the provisions of this section, as amended, the power of contracting for the purchase of electric current for said purpose is vested in the council of villages making such contracts, it follows that this is the body having sole authority to enter into the contract in question.

I am, therefore, of the opinion that the proposed contract between the electric light company and your village should be entered into on behalf of the village by the council and not the board of trustees of public affairs.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1077.

COUNTY COMMISSIONERS TO PAY COST OF REMOVAL AND MAINTENANCE OF A TUBERCULOSIS PATIENT FROM A CITY OF THE COUNTY TO A HOSPITAL OWNED BY ANOTHER CITY OF THAT COUNTY.

It is the duty of the county commissioners of a county to pay the cost of removal and maintenance of a tuberculosis patient from a city of the county to a hospital owned and maintained by another city in that county.

COLUMBUS, OHIO, July 23, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 1, 1914, wherein you request my opinion as to whether or not the county commissioners of Hamilton County have to pay the cost of removal and maintenance of a tuberculosis patient from the city of Norwood to a hospital owned and maintained by the city of Cincinnati.

You state in your letter that your poor or infirmary fund is made up entirely from Dow tax receipts, and that the city of Norwood and the city of Cincinnati have their receipts from the same source.

I have read your opinion of June 26th to the board of county commissioners of your county in reference to this question; I agree with your conclusion in that opinion.

I wish to call your attention to house bill No. 265 relating to county and district tuberculosis hospitals, found on page 492, 103 O. L., and especially to section 3143 of this act, which provides as follows:

> "Instead of joining in the erection of a district hospital for tuberculosis, as hereinafter provided for, the county commissioners may contract with the board of trustees, as hereinafter provided for, of a district hospital, the county commisssioners of a county now maintaining a county hospital for tuberculosis or with the proper officer of a municipality where such hospital has been constructed, for the care and treatment of the inmates of such infirmary or other residents of the county who are suffering from pulmonary tuberculosis. The commissioners of the county in which such patients reside shall pay to the board of trustees of the district hospital or into the proper fund of the county maintaining a hospital for tuberculosis, or into the proper fund of the city receiving such patients, the actual cost incurred in their care and treatment, and other necessaries, and they shall also pay for their transportation. Provided, that the county commissioners of any county may contract for the care and treatment of the inmates of the county infirmary or other resident of the county suffering from pulmonary tuberculosis with an association or corporation, incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis; but no such contract shall be made until the institution has been inspected and approved by the state board of health, and such approval may be withdrawn and such contracts shall be cancelled if, in the judgment of the state board of health, the institution is not managed in a proper manner. Provided, however, that if such approval is withdrawn, the board of trustees of such institution may have the right of appeal to the governor and attorney general and their decision shall be final."

Under the provisions of this section, I am clearly of the opinion that it is the duty of the county commissioners of the county in which such patients reside to pay into the proper funds of the city receiving such patients, the actual cost incurred in their

care and treatment, and other necessaries, and they shall also pay for their transportation thereto.

I am enclosing herewith correspondence sent by you with this request.

Trusting that this fully answers your question, I am,

Yours very truly,

TIMOTHY S. HOGAN

Attorney General.

1078.

RIGHT OF THE INDUSTRIAL COMMISSION TO REVIEW THE ACTION OF THE STATE BOARD OF CENSORS IN REFUSING TO APPROVE MOTION PICTURE FILMS.

The industrial commission of Ohio has no authority to review or entertain an appeal from the action of the state board of censors in refusing to approve motion picture films.

COLUMBUS, OHIO, July 31, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your commission has presented to this department the following inquiry:

> "Has the industrial commission of Ohio authority to review or entertain an appeal from the action of the state board of censors in refusing to approve motion picture films, there being no charge that the board of censors has been in any way influenced by improper motives in such refusal?"

The act providing for a board of censors of motion picture films and prescribing its duties, is to be found in 103 O. L., 399, et seq. The first section contains the following language:

> "There is created under the authority and supervision of the industrial commission of Ohio a board of censors of motion picture films. Upon the taking effect of this act the industrial commission shall appoint, with the approval of the governor, three persons * * * who shall constitute such board."

Under section 2 it is made the duty of the industrial commission to furnish this board with suitable office rooms and equipment; the board being empowered to organize by electing one of its members president. The secretary of the industrial commission is to act as secretary of the board. The following is the concluding paragraph of this section:

> "The members of the board shall be considered as employes of the industrial commission and shall be paid as other employes of such commission are paid. The industrial commission shall appoint such other assistants as may be necessary to carry on the work of the board."

Section 3 makes it

> "The duty of the board of censors to examine and censor as herein pro-

vided, all motion picture films to be publicly exhibited and displayed in the state of Ohio."

The following language appears in section 4:

> "Only such films as are in the judgment and discretion of the board of censors of a moral, educational, or amusing and harmless character shall be passed and approved by such board * * * Before any motion picture shall be publicly exhibited, there shall be projected upon the screen the words "Approved by the Ohio board of censors" and the number of the film."

Section 5 authorizes this board to work in conjunction with censor boards of other states as a congress. Section 6 prohibits the exhibition of pictures within this state "unless they have been passed and approved by the board or the censor congress." Section 7 provides a penalty for violation of the law. Section 8 reads thus:

> "Any person in interest being dissatisfied with any order of such board shall have the same rights and remedies as to filing a petition for hearing on the reasonableness and lawfulness of any order of such board or to set aside, vacate or amend any order of such board as is provided in the case of persons dissatisfied witht the orders of the industrial commission."

While this act in plain and unambiguous language places the board of censors under the supervision of the industrial commission, and designates its members as employes thereof, nevertheless, the act contains language, which, in my judgment, substantially modifies or limits the broad expressions contained in sections 1 and 2 to which I have above referred. It will be noted that it is made the express duty of the censors to examine the films to be publicly exhibited, provision being made for the submission of these pictures to the board, which shall approve only such films as are in its judgment and discretion of a moral, educational, or amusing and harmless character. Under language such as this the only conclusion at which one can arrive is that the board of censors is to exercise its judgment and discretion in determining whether the films meet with the statutory requirements. There is nothing to indicate that the aesthetic taste or moral perception of any other board or commission is to be substituted for that of the censors, nor is there anything to indicate that such censors act purely in a ministerial capacity as agents of the industrial commission when they pass upon the films. In addition to this, the board is authorized to work in conjunction with other censors boards, and no films may be shown until they have been approved by the board or the censor congress. If the general assembly had intended to authorize review of the action of the censor board by any other body, it seems to me that there would have been some distinct statement to that effect in the statute, especially when provision is made for action in conjunction with other censor boards. If the action were to be jointly with or under the control of the industrial commission, apt language to accomplish this purpose would, no doubt, have been employed. It is worthy to note that the only public servants who are referred to in the conferring of power to approve or disapprove films, is the board of censors, or the censor congress. This is clearly and definitely stated in unequivocal language, and the discretion and judgment of such board seem to be the determining features in the authorization of the exhibition of motion pictures.

Section 8, I think, fully recognizes the foregoing theory of the law and is decisive on the question. A person dissatisfied with the order of the board of censors has the right to file a petition for hearing on the reasonableness and lawfulness of any order of this board, if he is dissatisfied, and he may ask to set aside any order of such board in the same manner as is provided in the case of persons dissatisfied with the orders

of the industrial commission. Here the general assembly clearly evidenced the fact that it had in mind the powers of the industrial commission, as well as the powers of the board of censors, and it is plain that there was no aim or desire on the part of the general assembly to require dissatisfied persons to file a petition for hearing with the industrial commission. The statute provides that the petition may be filed for hearing. The same provision is to be found in the industrial commission act, 103 O. L. 95, section 27; and it is there made patent that, after the order of the commission is made, a hearing may be had on the reasonableness and lawfulness of such order. In other words, the commission is to act first without any hearing, but may subsequently grant a hearing if the petition shows that it should be granted.

It was the intention of the general assembly to provide the same machinery and methods of procedure when the board of censors had acted on matters within its jurisdiction. It is to approve or disapprove all the films without any hearing in the first instance, then if objection is made, such board may conduct a hearing to decide whether its ruling should be adhered to. In case it should have erred in its judgment and would not correct the same, it may be that appeal may be had to the court, as is authorized by the industrial commission act in cases coming before that commission, but it is not necessary here to decide that question, and I shall not for that reason discuss the same. Section 8 very carefully avoids any vesting of authority in the industrial commission to review the action of the board of censors in a case such as that suggested in your inquiry, and it does not appear to me that the other provisions of the statute contain such language as would justify the holding that such authority has been conferred by implication. It may very well be, and probably is true, that the industrial commission has a certain degree of authority and supervision over the board of censors, and in that respect the members of that board are to be treated as employes of the commission with reference to their official conduct and certain phases of their ministerial work, but when they have exercised their discretion in the manner suggested by the question submitted, it is my judgment that your commission has no authority to consider their action for the purpose of determining whether it should be affirmed or set aside.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1079.

THE EFFECT OF THE CHANGE IN THE LANGUAGE OF ARTICLE XII, SECTION 2, OF THE CONSTITUTION FROM "INSTITUTIONS OF PURELY PUBLIC CHARITY" TO "INSTITUTIONS USED EXCLUSIVELY FOR CHARITABLE PURPOSES."

The change in the language of article XII, section 2 of the constitution from that authorizing the exemption of "institutions of purely public charity" to that authorizing the exemption of "institutions used exclusively for charitable purposes," has no effect upon statutes passed prior to the amendment. If invalid under the constitution of 1851 such invalidity is not cured by the constitutional amendment alone, but the legislature must act under the new constitution before its provisions become operative.

In particular sections 5364, 5365 and 5365-1, General Code, if and to the extent that they were unconstitutional before the amendment are not rendered valid by the amendment.

COLUMBUS, OHIO, August 3, 1914.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of March 13, 1914, you requested my opinion upon the following general questions:

> "By the opinion of yourself and former attorneys general, it has been held that most, if not all, of the exemptions provided for in sections 5364, 5365 and 5365-1 are in contravention of section 2 of article XII of the constitution. These opinions were rendered prior to the action of the recent constitutional convention, which changed the words 'institutions of purely public charity' to 'institutions used exclusively for charitable purposes.'
>
> "The commission requests an opinion from you as to the effect of the change in wording of this section upon the exemptions provided for in the sections of the General Code above referred to.
>
> "Does the amended constitution, without additional action of the legislature, make any or all of the provisions of these sections constitutional?"

The sections, as they stand in the General Code, are as follows:

> "Section 5364. Real or personal property belonging to an incorporated post of the grand army of the republic, union veterans' union, grand lodge of free and accepted masons, grand lodge of the independent order of odd fellows, grand lodge of the knights of Pythias, association for the exclusive benefit, use and care of aged, infirm and dependent women, a religious or secret benevolent organization maintaining a lodge system, an incorporated association of ministers of any church, or incorporated association of commercial traveling men, an association which is intended to create a fund or is used or intended to be used for the care and maintenance of indigent soldiers of the late war, indigent members of said organizations, and the widows, orphans and beneficiaries of the deceased members of such organizations, and not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or income derived therefrom, shall not be taxable, and the trustees of any such organizations shall not be required to return or list such property for taxation.
>
> "Section 5365. Moneys, funds or credits belonging to the representative body of Indiana meeting of friends or the religious society known as the German baptists or dunkers, in this state, which moneys, funds or credits or

the income therefrom are exclusively used for the support of the poor of such denomination, society or congregation, shall be exempt from taxation. The person or persons having the care and supervision of such moneys, funds or credits, shall not be required to return or list them for taxation.

"Section 5365-1. Every fraternal benefit society organized or licensed under this act is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment."

I shall not under take in this opinion, to interpret these sections. For example, I shall not undertake to determine what the phrase "belonging to," as used in the first line of section 5364 means—whether it signifies that all real or personal property of the societies therein mentioned, is, on account of its mere ownership, attempted to be exempted from taxation, or whether, as held under similar statutes, the implied limitation of use is to be read into the statute, so that such property belonging to such associations and societies is not to be exempted from taxation unless directly used for the purposes of such association or societies, and not leased or otherwise used for profit. (Library Association vs. Pelton, 36 O. S., 253.)

Again, I shall not attempt to analyze the inconsistency between section 5365-1 and section 5364; the former of which limits the exemption to fraternal benefit societies to taxes other than taxes on real estate and office equipment, while section 5364 attempts to exempt all real or personal property belonging to "* * * secret benevolent organizations maintaining a lodge system."

Nor shall I consider what portions of the related statutes were constitutional under original article XII, section 2 (assuming the statute to be separable), nor what portions would still be unconstitutional under amended article XII, section 2.

In the view which I take of the broad question which you submit, it will be sufficient if I confine myself to the single question as to whether or not the amendment to the constitution had the effect of making these sections constitutional, in so far as they were not constitutional before and in so far, also, as they do not violate the amended constitution.

If the question were doubtful, and, if under the familiar rules, recourse to the debates were permitted, it would be found that the author of the change desired to accomplish the result which you question, and was of the opinion that the change would accomplish it.

I quote from page 1880, Vol. 2 of the Proceedings and Debates of the Constitutional Convention of 1912:

"Mr. Winn: 'I offer an amendment.' The amendment was read as follows:

"In line 15, strike out the words 'of purely public charity,' and insert in lieu thereof the words, 'used exclusively for charitable purposes.'

" 'If I may have your attention for just a minute I will explain the importance of this amendment. It will not exempt from taxation any property now taxed, *but it will make constitutional some laws enacted by the general assembly exempting certain property from taxation, which laws are now unconstitutional.* I will call your attention to three institutions in the city of Springfield, used exclusively for charitable purposes. For thirteen years I was intimately connected with one of them, which was the Pythian Home, at which there are now being kept, housed, clothed and educated at the hands of the members of the order of the State two hundred little boys and girls. Since that institution was established probably fifteen or sixteen years ago, there

had been admitted to that institution probably five or six hundred orphan children. Just out to the right of this institution is the Masonic Home, where old men and old women who are not able to support themselves, and who but for that institution would be public charges, are given a home and all the comforts of life during their old age. Just off to the left of the Pythian Home is the Odd Fellows institution, where orphan children, old men and old women are kept. There are other institutions of that sort. I know one in the city of Cleveland, a splendid institution, maintained by the Jews. There are institutions of a similar kind maintained by capitalists and maintained by other civic institutions besides those which I have mentioned.

* * * * * * * * * *

"Mr. Winn: 'A few years ago the members of these different fraternities and different societies and organizations came before the general assembly and asked the general assembly to pass a law exempting them from taxation, and that law was passed almost unanimously. But I have always had very grave doubts respecting the constitutionality of that law. A committee of these institutions has visited some of the members of this convention since we have been here and has asked that this be inserted, removing all doubt on the subject. It will not exempt any property from taxation that is now taxed, *but it will make constitutional the exemption of all institutions used purely for charitable purposes.* I hope the amendment will be agreed to and I hope the agreement will be unanimous.'

"The amendment was agreed to."

However, in the case presented, the question is not doubtful. The effect of an amendment to a constitution upon the statutes of this kind, unconstitutional when enacted and not re-enacted after the amendment, is well understood and perfectly established; so that no expression of opinion, on the part of members of the convention, or otherwise, could, in any way, affect the application of the settled rules in question.

The principle which I have in mind will be found stated in 8 Cyc. 768, as follows:

"An unconstitutional statute is absolutely null and void *ab initio,* having no binding force; and cannot be validated by a subsequent constitutional amendment removing the legislative restriction by which its enactment was prohibited. * * *. But if from the language of the validating amendment or other provision it expressly or by necessary implication appears that it was intended to operate retrospectively by validating antecedent unconstitutional legislation, all such legislation to which such a provision relates will be rendered valid, without re-enactment by the legislature. * * *."

(See the authorities cited in the notes at the above page).

Again in 37 Cyc., 886, is found the following:

"A constitutional provision merely authorizing the legislature to exempt certain kinds of property does not, of itself, grant any exemption. Nor do constitutional provisions, defining or limiting the power of the legislature in regard to the granting of exemptions, affect or repeal exemptions already existing."

I regard these propositions as so elementary as not to require the support of cases or authorities other than those cited in the notes.

The situation with respect to article XII, section 2, may be described in a word, so far as the matter of the exemption of charitable institutions is concerned. The original section, as adopted in 1851, *authorized* the legislature, by general laws, to exempt from taxation "institutions of purely public charity." Of course, this provision was not self executing. Of course, too, the legislature had no power to exempt, from taxation, any charitable institution not "purely public." The constitutional provision afforded an apt example of the application of the doctrine that the expression of one thing is the exclusion of all others.

In this state of the constitutional law, the sections under consideration were passed, and to a certain extent, at least, they undoubtedly exceeded the legislative authority and were, to that extent, at least, void.

(Morning Star Lodge vs. Hayslip, 23 O. S., 144).

The only change made in 1912 was to substitute for the phrase "institution of purely public charity," the phrase "institution used exclusively for charitable purposes." (Though just what is meant by an "institution" being "used" is not exactly clear—probably the idea relates to the use of the property of the institution and not to the "use" of the institution, itself, but it is certainly very awkwardly expressed). There is no express language in the article itself, nor in the schedule of the amendments of 1912 showing an intention on the part of the electors, in adopting the same, to validate unconstitutional acts theretofore passed. On the contrary, the general schedule provided as follows:

> "The several amendments passed and submitted by this convention, when adopted at the election, shall take effect on the first day of January, 1913. * * *. All laws *then in force*, not inconsistent therewith, shall continue in force until amended or repealed. * * *."

The sections in question, in so far as they were violative of the constitution of 1851, never were "laws;" similarly, they were not in effect on January 1, 1913. Therefore, the mere fact that they are not inconsistent with the amended constitution, which became effective on that date, does not render them valid.

In a word, in order to validate the sections of the General Code, under consideration, to the extent that conformity with amended section 2 of article XII might have validated them, it would have been necessary for the amended section or the schedule to the constitution to reach back and by appropriate, express language, exert a retrospective and curative effect. So, far from doing so, the amended section is, like the one which it supplemented, merely permissive in so far as it relates to exemptions; it provides that by general laws the legislature *may* exempt the property of institutions used exclusively for charitable purposes. Surely, on the face of the amended constitution, itself, this provision can only become effective by *subsequent* action of the law-making power.

For all the foregoing reasons, then, I am clearly of the opinion that in spite of the declared purpose of the mover of the particular amendment in question, the verbal change in article XII, section 2 of the constitution, respecting the exemption from taxation of the property of charitable institutions, in no way affects the validity of any provisions of sections 5364, 5365 and 5365-1 of the General Code.

As already stated, the question as to the partial validity of these sections, or any of them, measured by the constitution of 1851, under which they were passed, has not been considered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1080.

REVISION OF A SCHOOL BOOK—WHEN THE LISTING OF SCHOOL BOOKS EXPIRES.

The revision of a school book is the same as the offering of a new book under sections 7709 and 7710, and therefore, the expiration of the listing of such revised school book expires five years from the date such revised edition is filed.

COLUMBUS, OHIO, July 31, 1914.

HON. F. W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of July 22, 1914, you submitted for an official opinion the following request:

> "Sections 7709 and 7710 of the General Code prescribe the manner in which books shall be listed by publishers and also prescribes the time these books shall be listed. A certain company offers a book for listing in 1910. A revision of the book is made in 1912 and the book is relisted.
>
> "The question I desire to know is when will the expiration of the listing occur? Five years from the time it was listed in 1910 or five years from the time the book was listed in 1912?"

Said sections 7709 and 7710 of the General Code, which you mention in your request, were both amended February 16, 1914, in 104 Ohio Laws, pages 230 and 231. Section 7709, as amended, provides as follows:

> "Any publisher or publishers of school books in the United States desiring to offer school books for use by pupils in the common schools of Ohio as hereinafter provided, before such books may be lawfully adopted and purchased by any school board, must file in the office of the superintendent of public instruction, a copy of each book proposed to be so offered, together with the published list wholesale price thereof. No revised edition of any such *book shall be used in common schools until a copy of such edition has been filed in the office of the superintendent together with the published list wholesale price thereof. The superintendent must carefully preserve in his office all such copies of books and the price thereof.*"

Section 7710 of the General Code, as amended in 104 Ohio Laws, at page 231 provides as follows:

> "*When and so often as any book and the price thereof is filed in the office of the superintendent of public instruction as provided in section 7709* a commission consisting of the governor, secretary of state and superintendent of public instruction, immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, as hereinafter provided, which price must not exceed seventy-five per cent. of the published list wholesale price thereof. The superintendent of public instruction immediately shall notify the publisher of such book so filed, of the maximum price fixed. If the publisher so notified, notifies the superintendent in writing to furnish such book during a period of five years at that price, such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to such boards of education."

It will be noted that said section 7709, supra, carries a provision to the effect that no revised edition of any such book shall be used in common schools until a copy of such edition has been filed in the office of the superintendent together with a published list wholesale price thereof, and closes with a further provision to the effect that the superintendent must carefully preserve in his office all such copies of books and the price thereof. In other words, the superintendent must carefully preserve such copies of books, etc. This, I take it, means that he must preserve the books which are lawfully adopted and filed in the office of the superintendent of public instruction, in the first instance, as well as the revised edition of such books, which, also must be filed in the office of the superintendent of public instruction before such revised editions can legally be used in the common schools of Ohio. At this point, I direct attention to the language employed in section 7710, supra, wherein it says "when and so often as any book and the price thereof is filed in the office of the superintendent of public instruction, as provided in section 7709, a commission consisting of the governor, secretary of state and the superintendent of public instruction immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, etc., then follows the provision, in substance, that the superintendent of public instruction shall immediately notify the publisher of such book so filed and of the maximum price fixed, and if the publisher so notified in turn notifies the superintendent in writing that he accepts the price fixed and agrees in writing to furnish such books during a period of five years at such price, then such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to such boards of education. This latter clause refers to the first part of the section wherein it says that when and so often as any book and the price thereof is filed in the office of the superintendent, etc.

In my judgment, a revised edition of a book which is required to be filed in the office of the state superintendent of public instruction before it can be used in the common schools of the state constitutes a filing thereof, just as much and to the same extent as the filing of the original book, in the first instance, before its revision.

In an opinion which this department rendered to your department under date of July 26, 1911, I held, in substance, that after a certain publisher fixes the price at which his books may be sold, to wit, at seventy-five per cent. of the wholesale price, the state school commissioner cannot, within five years, reduce such price unless the publisher re-files such books for listing with the commissioner.

It is my judgment that the filing of a revised edition of a book, within the meaning of sections 7709 and 7710, supra, constitutes a re-filing of such book, and that the five year period, mentioned in section 7710, supra, means a period of five years from and after such refiling, or rather, the filing of the revised edition.

Now, answering your question, specifically, I am of the opinion that the expiration of the listing of such books, as revised, expires five years from the date such revised edition was filed, which, as stated in your question, would be five years from the year 1912.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1081.

RIGHT OF THE CHIEF JUSTICE TO ASSIGN A JUDGE OF THE COMMON PLEAS COURT TO HOLD COURT IN ANY COUNTY OF THE STATE—COMPENSATION AND EXPENSES OF A JUDGE SO HOLDING COURT.

1. Under favor of amended section 3 of article 4 of the constitution, and section 1469, General Code, passed in pursuance thereof, a chief justice is authorized to assign a judge of the common pleas court to hold court and try causes in any county of the state.

2. In virtue of an order so made, it is the duty of the judge named in the order to follow the directions mentioned, and he is entitled under amended section 2253, General Code, to his actual expenses and $10.00 per day when employed in so holding court.

3. The payment of expenses and per diem as above mentioned is neither a change nor an increase of the compensation or salary of such judge and is not in violation of section 20, article 2, of the constitution.

COLUMBUS, OHIO, August 6. 1914.

HON. CYRUS NEWBY, *Hillsboro, Ohio.*

DEAR SIR:—Your letter of July 28, 1914, is at hand. You inquire:

> "The chief justice of the state, acting under section 1469, 103 O. L. 408, has assigned me to go to Darke county, Ohio, and try a cause pending in the court of common pleas of that county.
>
> "I would like your opinion as to whether under section 2253, as amended 104 O. L. 251, Darke county is liable to pay my per diem and expenses while performing the service directed by the chief justice, and if not the per diem, are the expenses payable? I was elected and in office before the enactment of amended section 2253."

Section 1469, General Code (103 O. L. 408), to which you refer, reads:

> "The chief justice shall preside at all terms of the supreme court. When he receives satisfactory information that an unusual amount of business has accumulated in the common pleas court of any county, he may assign a judge or judges from another county in the state to aid in disposing of such business. In case of the absence or disability of the chief justice, the elder of the two judges having the shortest time to serve, and not holding office by appointment to fill a vacancy, shall preside and perform the duties of chief justice."

Section 2253, as amended February 16, 1914 (104 O. L. 251), insofar as pertinent here, reads:

> "Each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

The above sections are plain and unambiguous, and do not require construction,

for which reason I refer to your statement at the close of your letter—"I was elected and in office before the enactment of amended section 2253," and conclude that what you really want to know is whether, under the provisions of section 20 of article II of the constitution, you are precluded from receiving and Darke county would have no right to pay you the per diem and expenses described in the latter part of amended section 2253.

Section 20 of article II reads:

> "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 is abolished."

Section 3 of article IV of the constitution, as amended September 3, 1912, provides that the chief justice "may assign any judge to any county to hold court therein." This provision, which was not found in the constitution prior to said amendment, clearly authorizes the enactment of section 1469, and the order of the chief justice in sending you to Darke county.

Prior to this amendment, judges of the court of common pleas were neither authorized nor required to hold court outside of the district in which they were elected, and the provision for their expenses, found in section 2253, prior to the amendment referred to and still retained as the first part of said section, has reference, solely, to the holding of courts in counties of the district in which they were elected outside of the one in which the judge resided. The salary and expenses of common pleas judges were fixed on this basis and with reference thereto prior to 1912.

The amendment of section 3 of article IV, above referred to, created a new order of things and the amendment of February 16, 1914, had reference to this change, and undertook to provide the expenses of a common pleas judge when directed to hold court (which might be in any county of the state), by the chief justice, under the authority of the amendment to the constitution and section 1469, as found in 103 Ohio Laws, 408.

The question then arises, may a common pleas judge, elected and in office prior to the amendment of section 2253, above cited, receive the per diem and expenses provided by said section, or, does it operate as a change of his salary so as to preclude him from receiving it because of section 20 of article II? The question so stated is not so readily solved as some might think.

In the case of Thompson vs. Phillips, 12 O. S., 617, Thompson, who was the treasurer of Franklin county, Ohio, claimed that his compensation was fixed by section 8 as found in S. & C. statutes, 1477, being the act in force when his term commenced, first Monday of September, 1860, while the auditor claimed that his compensation was fixed by the act of April 9, 1861 (58 O. L. 110), and under instructions from the state auditor refused to allow Thompson more than was provided in such later act. It made a difference of about four hundred dollars ($400.00) to Mr. Thompson, and he brought proceedings in mandamus to compel the allowance of the compensation he claimed. Thompson, through his counsel, Judges Thurman and Bartley, relied upon section 20 of article II, of the constitution as exempting him from the effect of the act of April 9, 1861. The decision is per curiam, is brief and as follows:

BY THE COURT. The relator, to show that he is not affected by the act of April 9, 1861, relies on the following section of the constitution:

> " '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. Section 20, article II.

" '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—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.

" 'Peremptory mandamus refused.' "

The above cause was followed in Gobrecht vs. Cincinnati, 51 O. S., 68. Various other cases may be found in which the above cases were cited, including Harrison vs. Lewis, 8 N. P., 84, wherein the Gobrecht case was distinguished. In this last case, Speigel, J., very aptly states the rule to be:

"When a public officer is employed to render services in an independent employment not germane or incidental to his official duties, to which the law has annexed compensation, he may receive for such services additional compensation."

In Lewis, Auditor, vs. Harrison, 11 O. C. D., 647, the syllabus reads:

"The services performed on the decennial county board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners are without the scope of their official duties as such, and are not so 'incident' or 'germane' to the regular duties of the offices to which they have been respectively elected, as to make the provisions for compensation contained in the Hendley law, in contravention of the act of the legislature, 94 O. L., 396, or of the constitution, article 2, section 20."

The question of incident or germane duties is considered in this last case, and it is, therefore, thought best to inquire whether the sending you to Darke county is incident or germane to your election as a common pleas judge for the third subdivision of the fifth district. Because of the fact that you had no right to go to Darke county to hold court, and prior to the late changes alluded to above, there was no power to send you there, I am of the opinion that your services under the assignment in question are neither incident nor germane to your office, as above described.

However, I am of the opinion and state the rule to be that where, after an officer has been elected and entered upon the discharge of his duties, the legislature sees fit to charge him with additional duties not included in his office when he was elected, and prescribe compensation therefor, such officer may receive such compensation notwithstanding the constitutional provision above discussed, for the reason that it is not an addition to or change of his salary as fixed when he accepted the office, but merely compensation for duties devolving upon him, because and on account of legislative action after entering upon the discharge of his official duties, and for which the act, adding the duties, fixed the compensation.

In an opinion rendered to the bureau of inspection and supervision of public offices on June 19, 1914, in which the question of the right of Judge Fricke to receive an increase of salary after August, 1913, under the Cincinnati municipal court law, Judge Fricke, having by said law been made presiding judge of said municipal court, he might receive the salary of a municipal judge, which was greater than that of a police judge, after reviewing a number of authorities, and in line with what has been above quoted, it is said:

"In other words, the additional duties required by the passage of the municipal court law were not germane to the old office. Under such circumstances it is fundamental, we think, that additional compensation may be allowed for the added duties without any infringement of the constitutional provision, if such provision were here applicable. It has been held under a similar constitutional provision that when new duties are imposed, which are not within the scope of the office, and extra compensation is provided, such increase is not violative of such constitutional inhibition.

"Love vs. Baehr, 47 Calif., 364.
"County vs. Fols., 37 Pac., 780.
"County vs. Collings, 28 Pac., 175.
"Thomas vs. O'Brien, 129 S. W., 103.
"State vs. Carson, 6 Wash., 250.

"This doctrine has received approval in the following Ohio cases:

"Lewis vs. State, 21 O. C., 410.
"State ex rel. vs. Coughlin, 6 N. P. n. s., 101."

I, therefore, conclude that you are entitled to receive the expenses incident to your holding court in Darke county, under the last part of section 2253, for the reasons herein above set forth, and the further reason that under section 2253, prior to its amendment, you would have been entitled to receive your expenses had Darke county been in your district. You may also receive the $10.00 per diem for the reasons above stated, that it is not compensation for your services as common pleas judge of your district, does not change your salary, as such, being the compensation fixed by the legislature for and at the time of imposing duties you were not required to perform under your election, and which were beyond your jurisdiction until after the constitution and section 2253 were amended.

Believing that this answers your question, and hoping that it may settle the matter, I am

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1082.

AUTOMOBILES OPERATED BY CHIEF OF FIRE DEPARTMENT CONTAINING FIRE EXTINGUISHERS MUST BE REGISTERED.

Automobiles operated by the chief of the fire department and other city employes, containing small fire extinguishers, are not exempt from registration under section 6290, General Code, because they are neither fire extinguishers nor fire trucks.

COLUMBUS, OHIO, August 3, 1914.

HON. J. A. SHEARER, *Registrar of Automobiles, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 24, 1914, wherein you state:

"Section 6290 of the automobile law exempts from registration fire engines and fire trucks. We now find that in many municipalities the city authorities

place small fire extinguishers in automobiles operated by the fire chief, and other city employes, and do not register such motor vehicles. They claim that inasmuch as the machine carries a fire extinguisher, it should be exempt from registration, under the provisions of section 6290."

My immediate predecessor had occasion to consider whether, under section 6290 General Code, as originally enacted, an automobile used by a city fire department was exempt from registration. That section then exempted from the definition of a motor vehicle, among others, fire engines, and my predecessor held that the term "fire engine" should not be extended beyond its ordinary meaning and could not be held to include other motor vehicles used by city fire departments. I agree with the opinion of my predecessor, which will be found on page 231 of the annual report of this department for 1910.

The only change made by the present statute insofar as fire apparatus is concerned was to bring fire trucks within the exempted class, while retaining fire engines therein.

Unless an automobile comes clearly within the exemption, it must be registered. The principle purpose for which an automobile is designed and used should be looked to to determine whether it would be exempt from registration. The difference between fire engines and fire trucks and automobiles designed to carry passengers and ordinary freight is so apparent that it needs no more than casual mention. Certainly it would not be seriously contended by any one that a fire engine or fire truck would lose its character as such merely because it was capable of carrying firemen to a fire, nor would an ordinary passenger automobile lose its character as such because a fire extinguisher was carried in it. The placing of a fire extinguisher in such an automobile certainly would not convert it into a fire engine or fire truck.

I am firmly of the opinion that automobiles such as those you describe are subject to registration.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1083.

CONSTRUCTION OF SECTION 12664, GENERAL CODE, IN REFERENCE TO POISON AND PROPRIETARY MEDICINE DELETERIOUS TO HEALTH.

The words "that contain poison or other ingredient that is deleterious to health" in section 12664, General Code, qualifies the words "a drug or medicine" only, and therefore a patent or proprietary medicine or tablet is within the statute whether the same contains poison or other ingredient deleterious to health or not.

COLUMBUS, OHIO, August 3, 1914.

HON. FRED M. CROMLEY, *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—Under date of March 28, 1914, you submitted the following request for an opinion, to wit:

"Under section 12664 of the General Code, is it a violation of the same if the medicine or tablet, etc., does not contain poison or is not deleterious to health?"

In reply thereto section 12664 of the General Code provides as follows:

"Whoever leaves, throws or deposits upon the doorstep of premises owned or occupied by another or hands, gives or delivers or causes the same to be done to any person, except in a place where it is kept for sale, a patent or proprietary medicine, preparation, pill, tablet, powder, cosmetic, disinfectant or antiseptic, or a drug or medicine that contains poison or any ingredient that is deleterious to health, as a sample, or for the purpose of advertising, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than thirty days nor more than one hundred days, or both."

It will be noted that the clause in the foregoing section "that contains poison or any ingredient that is deleterious to health" follows the phrase "or a drug or medicine" and that there is no comma between the words "medicine" and "that." Therefore, in strict accordance with grammatical construction, the clause "that contains poison or any ingredient that is deleterious to health" modifies the phrase "or a drug or medicine" only and does not modify anything that precedes. Under this construction, then, it would be unlawful for one to leave, throw, deposit upon the doorstep or premises owned or occupied by another, or to hand, give or deliver or to cause the same to be done to any person, etc., a patent or proprietary medicine, a preparation, pill, tablet, powder, cosmetic, disinfectant or antiseptic, whether the same contained a poison or ingredient deleterious to health or not.

Therefore, answering your question directly, I am of the opinion that it is a violation of section 12664, General Code, to leave, throw, deposit upon the doorstep or premises owned or occupied by another, or to hand, give or deliver or cause the same to be done, except in a place where it is kept for sale, a patent or proprietary medicine, preparation, pill, tablet, etc., even though the same does not contain a poison or an ingredient that is deleterious to health.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1084.

CITY SCHOOL DISTRICT—SUCH TEACHERS ATTENDING COUNTY TEACHERS' INSTITUTES NOT ENTITLED TO COMPENSATION—A CITY SCHOOL DISTRICT TEACHER MAY ACT AS SECRETARY OF COUNTY TEACHERS' INSTITUTE AND RECEIVE COMPENSATION THEREFOR.

Teachers who are teaching in city school districts are not entitled to compensation when attending county teachers' institutes, when the board of education of the city school district wherein such teachers are teaching provides a city teachers' institute for the teachers of its district.

If a teacher who is teaching in a city school district wherein a city teachers' institute is provided, attends the county institute, and such teacher acts as secretary, then such teacher is entitled to the compensation provided for under section 7866, General Code.

COLUMBUS, OHIO, August 3, 1914.

HON. R. G. CURREN, *City Solicitor of Lakewood, Cleveland, Ohio.*

DEAR SIR:—Under date of April 10, 1914, this department rendered to Hon. T. J. Ross, solicitor of the village of Lakewood, an official opinion upon the following questions:

"Whether or not, a teacher attending the county institute and receiving compensation as secretary, and for making the report provided for in sections 7865 and 7866, General Code, is also entitled to compensation under section 7870, General Code, the county institute having been held during vacation."

Under date of April 28, 1914, this department received from you a request for an opinion on said question, but modified to the extent of attaching the following clause:

"When the school board of the city in which said teacher is employed has established an institute for the teachers employed in the schools of said city and which institute was held the week following the county institute, all teachers having knowledge thereof, including the one who attended the county institute."

Regarding the city institutes concerning which you request an opinion in your questions as modified, section 7871 of the General Code provides that the board of education of each city school district may provide for holding an institute yearly for the improvement of the teachers of the common schools therein.

Section 7872, General Code, provides that the expenses of such institute shall be paid from the city institute fund hereinbefore provided for, as follows:

"The expenses of such institute shall be paid from the city institute fund hereinbefore provided for. In addition to this fund the board of education of any district annually may expend for the instruction of the teachers thereof, in an institute or in such other manner as it prescribes, a sum not to exceed five hundred dollars, to be paid from its contingent fund."

Said city institute fund is provided for by section 7855 of the General Code.

Section 7870 of the General Code provides the pay that shall be given to teachers and superintendents for attending such institutes, as follows:

"The board of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendent presenting certificates of full regular daily attendance, signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance, as certified by the president and secretary of such institute, for not less than four, nor more than six days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

It will be noted that section 7870 applies to boards of education of all school districts, city school districts as well as all other school districts, and the provision for such payment to teachers attending institutes applies to city institutes as well as county institutes. So that if teachers of city school districts attend a city teachers' institute in such city district, then they are entitled to the compensation provided in section 7870 of the General Code, supra.

Section 7873 of the General Code provides that if a board of a city district does not provide for such institute in any year, then the institute funds in the hands of the

district treasurer shall be paid to the treasurer of the county wherein the district is situated, who shall then place it to the credit of the county institute fund, as follows:

> "If the board of a district does not provide for such institute in any year, it shall cause the institute fund in the hands of the district treasurer for the year to be paid to the treasurer of the county wherein the district is situated, who shall place it to the credit of the county institute fund. The teachers of the schools of such district in such case, shall be entitled to the advantages of the county institute, subject to the provisions of sections seventy-eight hundred and sixty-nine and seventy-eight hundred and seventy. The clerk of the board shall make the report of the institute required by the next following section."

It will be noted that said last cited section further provides that if the board of a city district does not provide for such institute in any year, then the teachers of the schools of such district, in such case, shall be entitled to the advantages of the county institute, subject to the provisions of sections 7869 and 7870.

From the phraseology employed in section 7873, it seems to follow if a city school district provides for the holding of an institute in such district, then the teachers of such district are not entitled to the advantages of the county institute. In other words, it is only when a board of education of a city district fails to provide a teachers' institute, that the teachers of such city district are entitled to the advantages of a county institute and entitled to the pay for attending such institute, under section 7870 of the General Code.

Therefore, in direct answer to your question, as modified, I am of the opinion that teachers teaching in city school districts are not entitled to compensation for attending county institutes when the board of education of the city district wherein they teach provides a city teachers' institute for the teachers of its district.

Regarding the fees of the secretary of the executive committee, I wish to say that my opinion rendered to Hon. T. J. Ross, on April 10, 1914, covers that point and it is not necessary to change the same for the reason that if such teacher, even though teaching in a city school district, and the board of education of such district provided a city teachers' institute—nevertheless, the teacher having performed the services required by sections 7863, 7864 and 7865, is entitled to the compensation provided under section 7866 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1085.

BANKS IN PROCESS OF LIQUIDATION LIABLE FOR WILLIS LAW TAXES AND PENALTIES UNTIL ITS DISSOLUTION—DUTY OF THE SUPERINTENDENT OF BANKS IN REFERENCE TO SUCH TAXES AND PENALTIES.

A banking corporation, the assets of which have been seized by the superintendent of banks for the purpose of liquidation continues to be liable for Willis law taxes and penalties until its dissolution. In the case of a bank that is hopelessly insolvent, the superintendent of banks, upon determining that fact may take an order of dissolution or winding up in the common pleas court of the county in which the corporation had its office and cause a certificate thereof to be filed with the secretary of state as provided by section 11975, General Code.

In the case of a bank whose assets are sufficient to pay all debts and to leave a balance for distribution among the stockholders, such order may be taken and certificate issued after the meeting of the stockholders provided for in section 742-11, General Code.

COLUMBUS, OHIO, August 3, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—In your letter of May 7th you request my opinion as to whether or not banks incorporated under the laws of Ohio that have been closed for the purpose of liquidation by your department, must make annual reports and pay annual fees thereon under the provisions of the act of May 31, 1911, which now consists of section 5495 to 5521 inclusive of the General Code.

You state in this communication that when a bank has been taken over for liquidation by your department the payment of taxes of this character is virtually an exaction from the depositors; that the corporation does not have the right to exercise any of its franchise powers; that there are no officers of the corporation to make the report; that the corporation is not doing business; and that in your judgment it should not be compelled to pay the tax.

It will not be necessary to quote fully from the taxation statutes in question. It is sufficient to state that they require annual reports in the month of May from each corporation organized under the laws of this state for profit, with certain exceptions, which do not include banking corporations; that on the filing of such report a fee is charged, based upon the total subscribed or issued and out-standing capital stock of the company and must be paid to the treasurer of state on or before the first day of the following December. Such annual fees are made a lien on the property of the corporation, whether employed by it in the transaction of its business or in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. In the event of failure to make the report or to pay the tax or fee certain drastic provisions become operative, among which is the cancellation of the articles of incorporation of the company.

The following related sections, however, deserve perhaps specific quotation:

> "Section 5520. The mere retirement from business of voluntary dissolution of a domestic or foreign corporation, without filing the certificate provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act.

"Section 5521. In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made by it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid.

"Section 11974. In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation.

"Section 11975. In case of dissolution or revocation of charter by action of a competent court, or the winding up of a corporation either domestic or foreign, by proceedings in assignment or bankruptcy, such certificate shall be signed by the clerk of the court in which such proceedings were had. The fees for making and filing it shall be taxed as costs in the proceeding, be paid out of the corporate funds, and have the same priority as other costs."

A few general observations as to the effect of the provisions which have been abstracted and quoted will suffice for the present purpose.

In the first place, so long as a corporation remains alive, so to speak, the liability for the reports and taxes continues. In the second place, the existence of the corporation is not terminated except by the filing of the proper certificate in the office of the secretary of state. In the third place, it is immaterial under this statute that the effect of exacting a fee or tax from a corporation may be to the detriment of its creditors only. In fact, it clearly appears that the tax is to be a lien upon the property even though the property is held for the benefit of the creditors and stockholders by some person acting in an official or representative capacity.

In my opinion your question is to be answered as much by a consideration of the laws governing the liquidation of banks by your department as by consideration of the statutes already referred to. I direct your attention to sections 737 et seq., General Code, and particularly the following:

"Section 742-1. Upon taking possession of the property and business of any such corporation, company, society or association, the superintendent of banks shall forthwith give written notice of such fact to all banks, trust companies, associations and individuals holding or in possession of any assets of such corporation, company, society or association. No bank, trust company, association or individual knowing that the superintendent of banks has taken possession of such company or association, shall have a lien or charge for any payment advanced or any clearance thereafter made, or liability thereafter incurred against any of the assets of the corporation, company, society or association of whose property and business the superintendent of banks shall have taken possession. *Such corporation, company, society or association may, with the consent of the superintendent of banks resume business upon such conditions as may be approved by him.*"

It is clear that by failing to mention the lien of the state for franchise taxes in the second sentence of this section the general assembly has left that lien unaffected by its provision.

The last sentence of this section makes it clear that after the property and business of the corporation has been taken possession of by the superintendent of banks, the corporation, as such, continues to exist and to have the corporate power to resume business with the consent of the superintendent of banks, and upon the conditions

approved by him. This last point is of special importance. From this provision it becomes clear that you are in error when you assume that the corporate powers of the company are cut off when you, as superintendent, assume charge of its assets for the purpose of liquidation. So long as the corporation continues to have the power to resume business with your consent, it is an existing corporation. Furthermore, it must exist with its corporate organization as such, unimpaired, for the implication of the section is that the corporation is to enter into an agreement of a contractual nature with the superintendent of banks, and that being the case its officers must continue to act as such because a corporation can only act through its officers. Section 742-1, then, is sufficient authority for the statement that the assumption by the superintendent of banks of control of the assets and business of a bank does not destroy the corporation nor in any way impair the corporate organization. The president, secretary and directors of the corporation continue to hold their offices and the corporation, as such, continues to exist.

Section 742-2, as amended, and certain other succeeding sections need not be quoted as they direct what shall be done by the superintendent of banks in the liquidation of the assets of the bank.

The next provision to which I desire to call your attention is section 742-11, which is as follows:

> "Whenever the superintendent of banks shall have paid to each depositor and creditor of such corporation, company, society or association (not including stockholders) whose claim or claims as such depositor or creditor shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed or unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such corporation, company, society or association, by giving notice thereof for thirty days in one or more newspapers published in the county wherein the office of such corporation, company, society or association was located."

Section 742-12 must be read in connection with this section. It provides as follows:

> "At such meeting of the stockholders shall determine whether the superintendent of banks shall continue to administer the assets and wind up the affairs of such corporation, company, society or association, or whether an agent or agents shall be elected for that purpose; and in so determining the said stockholders shall vote by ballot in person, or by proxy, each share entitling the holder to one vote and the majority of the stock shall be necessary to a determination. In case it is determined to continue the liquidation under the superintendent of banks, he shall complete the liquidation of the affairs of such corporation, company, society or association, and after paying the expenses thereof shall distribute the proceeds among the stockholders in proportion to the several holders of stock, in such manner and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located."

Sections 742-13 and 742-14 provide for the powers and duties of the agents appointed by the stockholders to liquidate the affairs of the bank.

In my opinion the life of the corporation is terminated when all of its debts have been paid, and its stockholders' meeting referred to in section 742-11 has been held, and the method of distribution of the remaining assets determined upon, for after this takes place the bank cannot again resume business. The corporation, as such, is at

an end and nothing remains to be done except to divide its remaining assets among its members and stockholders. In short, then, I am of the opinion that the dissolution of the corporation, as such, automatically occurs when the meeting referred to in section 742-11 has been held and one or the other alternatives therein prescribed has been chosen.

In my opinion the case falls within the spirit, if not within the exact letter, of section 11975, supra, General Code. The related statutes provide for numerous actions on the part of the common pleas court of the county in which the office of the corporation is located, such as the approval of the sale of bad debts, the approval of the sale of real estate and the direction of the terms thereof, etc., (section 742-2). In other words, the proceedings for liquidation, while carried on by the superintendent of banks, as an executive officer, partake of the nature of court proceedings, giving to section 11975 the general and not limited application that it was doubtless designed to have, it follows that when the liquidation has progressed to the point at which the corporation must necessarily cease to exist a case is presented of "dissolution by action of a competent court," or of "winding up * * * by proceedings in assignment" as contemplated by section 11975.

Accordingly, I am of the opinion that an order of dissolution should be taken in the common pleas court when the meeting referred to in section 742-11 has been held and a certificate thereof should be transmitted to the secretary of state as prescribed in section 11975, General Code.

In my opinion the taking of a court order is to be preferred to formal action to dissolve at the meeting provided for in section 742-11 for the sufficient reason that when this meeting has been held the effect thereof is to dissolve the corporation in the substantive sense. So that the corporation would stand dissolved whether any formal resolution to dissolve were passed or not.

I presume, however, that there are numerous cases in which the state of the proceedings provided for in sections 742-11 et seq., would never be reached, i. e., in which the assets of the corporation are insufficient to pay the depositors and creditors, the expenses of the liquidation, and to make adequate provision for unclaimed deposits, etc. Here is where the difficulty arises. The superintendent of banks knows that the corporation is hopelessly insolvent. Therefore he would, of course, never consent to the resumption of business by it. The corporation is virtually at an end, although no formal steps, such as the holding of the meeting provided for in section 742-11, have been or ever will be taken. The debts of the corporation never will be paid, so that it cannot dissolve by resolution of its stockholders as provided in the case of solvent corporations by section 8740, General Code. The corporation cannot be dissolved by court proceedings as provided in section 11938, because this method of dissolution involves the appointment of a receiver and is absolutely inconsistent with the provisions of the banking law and particularly with section 742-10, General Code, which provides for the ousting of any receiver appointed for the property of any bank upon action by the court on the relation of the superintendent of banks. Therefore, unless some way be found other than those already discussed, there is no way whatever by which the formal dissolution of an insolvent banking corporation can be compassed. Yet at some point or another the corporation surely comes to an end, for its power to resume business would appear at the end of the liquidation to have been previously cut off.

In my opinion there is presented a case where the courts would devise a remedy within the purview of the most appropriate statute for the purpose of serving an obvious necessity. Section 11975, already discussed, seems to contemplate just such a situation as this. It speaks of the winding up of a corporation by proceedings in assignment and at least by implication creates the inference that a corporation may be wound up by proceedings in assignment. Without further discussion, I may state

that my opinion is that when the superintendent of banks has determined that the assets of which he has taken possession will certainly be insufficient to leave any balance for distribution among the stockholders after the payment of the cost of liquidation and the claims of depositors and creditors he should so represent to the common pleas court of the county in which the office of the bank was situated and should secure from that court a decree winding up or dissolving the corporation as such; a certificate of which action should be filed with the secretary of state as provided in section 11975.

The foregoing is a technical discussion of the law as applicable to the questions which you present. It is impossible to avoid the exaction of the tax as a claim superior to that of the depositors, because of the provision of section 5506, General Code, above referred to, to the effect that such fees, taxes and penalties, "shall be the first and best lien on all property of the * * * corporation, whether such property is employed by the * * * corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof." In my opinion the superintendent of banks in exercising the powers and discharging the duties cast upon him by the statute as a liquidating agent, is such an officer as is contemplated by the foregoing section, although he is not specifically mentioned therein. Therefore, it would not be practicable, as you suggest, merely to ignore the matter of reports and fees and permit the tax commission to order a cancellation of the articles of incorporation of a hopelessly insolvent banking company; because by so doing certain penalties would be incurred and these penalties would be a lien superior to the rights of the depositors and general creditors under the section last above referred to.

It is possible that the law should be amended, as it seems that the policy of the taxing laws of the state runs counter to that of the banking laws which seek to promote the interest of the depositors. However, there is an existing provision of law which might be taken advantage of to ameliorate the conditions which your letter discloses. I refer to section 5524, General Code, which provides as follows:

> "With the advice and consent of the commission, the attorney general may, before or after any action for the recovery of fees, taxes or penalties certified to him as delinquent, under the provisions of this act, compromise or settle any claim for delinquent taxes, fees or penalties so certified.
>
> "And all claims compromised or settled as herein provided shall be set forth in the annual report of the tax commission to the general assembly and governor, giving in detail the terms and conditions of such compromise or settlement."

While I am not authorized to speak for the tax commission, on my own part I feel that whenever the superintendent of banks would give assurance that a banking corporation, the property and business of which is under liquidation in his hands, is hopelessly insolvent so that there will be nothing left for the stockholders, such a case would afford a proper instance for the exercise of the power of compromise; and the basis of such compromise should be one which would reduce the payment out of the assets of the bank to the minimum.

In passing I beg leave to point out that your assumption that the annual report required by the statute must be made by the superintendent of banks is not clearly correct. The officers of the corporation have the right to make reports so long as the corporation remains in existence which is, as already indicated, until its debts have been paid or its total assets distributed among creditors and depositors, unless it has been previously dissolved. In case the officers fail or refuse to make such report, then I believe, however, it would be the duty of the superintendent of banks, in order

to avoid incurring the penalty which might further impair the assets in his hands, to assume the function of a "general manager" and make the report himself.

It is my opinion, then, upon the legal questions involved in your inquiry that where a bank is found by the superintendent, upon taking possession of its assets, to be hopelessly insolvent, he should take immediate action in the court of common pleas of the county in which the office of the bank is situated to secure a decree winding up the corporation, upon the filing of the certificate of which, and the payment of taxes then due, the corporation would be dissolved and liability for the payment of franchise taxes would terminate. Where, however, the superintendent finds that there will be a balance for distribution to the stockholders after the payment of other claims such action should not be taken by him, but upon the holding of the meeting provided for in section 742-11 a similar order of court should be taken and a like certificate filed. In either event the superintendent should see that proper reports are filed and that the annual fees thereon are paid out of the assets up to the time of the filing of said certificate.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1086.

DISTRIBUTION OF SCHOOL FUNDS AT THE RATE OF THIRTY DOLLARS FOR EACH TEACHER EMPLOYED—MUSIC TEACHERS EMPLOYED IN MORE THAN ONE DISTRICT ARE TO BE COUNTED AS TEACHERS IN EACH DISTRICT IN WHICH THEY ARE EMPLOYED—AVERAGE DAILY ATTENDANCE OF PUPILS IN DISTRIBUTION OF COMMON SCHOOL FUNDS TO BE COMPUTED ON THE BASIS OF THE LEGAL SCHOOL YEAR—INTEREST ON COMMON SCHOOL FUND MONEY—DISTRIBUTION OF SCHOOL FUNDS UNDER SECTION 7600, GENERAL CODE.

1. Under section 7600, General Code, as amended, 104 O. L., 159, requiring state common school funds to be distributed among school districts on the basis of thirty dollars for each teacher employed, each regular member of the teaching force of the district, though employed for part time only, as in the case of music and drawing teachers, is to be counted as a teacher. Substitute teachers or teachers elected to fill vacancies in the regular force are not to be counted as additional teachers.

2. Music teachers, etc., regularly employed in more than one district are to be counted as teachers in each district, and each district is entitled to thirty dollars on account of such a teacher.

3. Average daily attendance under section 7600 as amended, in the distribution of common school funds is to be computed for the time during which the schools are in session during the current year, but in no event less than a legal school year.

4. The interest on common school fund moneys received from the sale of school lands and constituting a part of the irreducible debt of the state is to be distributed by the state to the counties at the February settlement, and by the county treasurer to the districts at the same settlement. In case more than one school district is located within the territorial limits of an original surveyed township, section 7600, General Code, governs the distribution of such interest, except in parts of such districts located in the original surveyed township only, which are to be taken into consideration. In the event the territory of a school district is co-extensive with that of an original surveyed township, there is no need of applying the rule of section 7600, because the district will receive all of the interest in such case.

5. Section 7600 requires the distribution of common school funds among the districts of the county, to be made at the August settlement, and it is applicable to the settlement to be made in August, 1914, but the succeeding February distribution of such funds is to be made in accordance with the apportionment of the preceding August and need not await distribution until the succeeding August.

COLUMBUS, OHIO, August 3, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of July 9th requesting my opinion upon the following questions:

> "*First.* Is it necessary for an instructor to teach continuously during a legal school year in order to entitle the district to receive $30.00 provided in section 7600 (104 O. L., 159), General Code?
>
> "*Second.* In case a teacher in music divides his time teaching a stated number of hours each week in a number of districts, how shall this part of the state common school moneys be apportioned in the various districts in which he is employed?

"*Third.* For what period should average daily attendance be taken in estimating amount due a district?

"*Fourth.* Should money received since the last distribution by a county treasurer under provisions of section 7579 be disbursed as are the funds referred to in section 7600? If so, in which one of the semi-annual settlements should it be included (section 2689, General Code)?"

Said section 7600, General Code, as amended, provides as follows:

"After each annual settlement with the county treasurer, each county auditor shall immediately apportion school funds for his county. The state common school funds shall be apportioned as follows:

"Each school district within the county shall receive thirty dollars for each teacher employed in such district, and the balance of such funds shall be apportioned among the various school districts according to the average daily attendance of pupils in the schools of such districts. If the enumeration of the youth of any district has not been taken and returned for any year and the average daily attendance of such district has not been certified to the county auditor such district shall not be entitled to receive any portion of that fund. The local school tax collected from the several districts shall be paid to the districts from which it was collected. Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the territory designated by the auditor of state as entitled thereto on the basis of thirty dollars for each teacher employed and the balance according to the average daily attendance. All other money in the county treasury for the support of common schools and not otherwise appropriated by law, shall be apportioned annually in the same manner as the state common school fund."

In connection with this request you submit a letter from one of the examiners to the auditor of state, which seems to raise a somewhat different question, viz., as to when the first apportionment under section 7600 is to be made. I shall consider this as a separate and distinct question.

As to your first two questions, I confess that they require what substantially amounts to a conjecture as to the legislative intention, which is not expressed in the section above quoted with clearness. The language is, "each teacher employed in such district." No test is found in the statute as to what constitutes "employment" within the meaning of this provision. I am of the opinion, however, that the phrase as a whole indicates the number of positions in a permanent teaching force, so that it would exclude substitute teachers employed for the purpose of filling temporary vacancies.

In answer to your first question, then, I would say that in my opinion it is necessary for an instructor to teach *regularly* during the school year in order to entitle the district to count him as one teacher for the purpose of receiving the $30.00 apportionment provided for in section 7600. I observe, however, a possible distinction between a teacher whose services are regular and one whose services are continuous if by your use of the adverb "continuously" you mean that a teacher shall serve the district every day, i. e., give full time. It is well understood that in certain branches such as music and drawing, and possibly some others, the practice is to employ a teacher for regular but not continuous service. That is, such a teacher may be employed in a district, the enumeration of which is not large, to teach on certain days of the week only; such a teacher would be a regular member of the teaching force, but would not in a sense be serving continuously. I am of the opinion that regularity rather than continuity is the test, and that a teacher who gives only a portion of his

time to the district, but is nevertheless giving his services with regularity, should be counted as a teacher employed in the district within the meaning of section 7600, as amended.

Fully answering your first question, then, I am of the opinion that the number of regular positions in the teaching force of a school district, including those positions, the requirements of which do not contemplate the giving of full time, is the number of 'teachers employed in such district," within the meaning of section 7600, as amended, but that substitute teachers permanently employed to fill permanent vacancies are not to be counted for this purpose. So that if a teacher should be employed at the beginning of the year, and should die or resign before the end of the school year, and a successor should be chosen, there would be an instance of one teacher and not two for the purposes of the section.

The answer to your second question has already been suggested. In my opinion, if a music teacher divides his time in the manner in which you describe, he is to be counted as a teacher employed in both or all of the districts, and each of the several districts would be entitled to a distribution of $30.00 on his behalf.

Answering your third question, I may say that I find that the section explicitly requires the return of the enumeration "for any year," and in the same sentence speaks of the "average daily attendance" of the district. I gather, therefore, that the legislative intention is that the "average daily attendance" shall be that ascertained from the figures for the entire school year then current, during which the schools were held and in no event less than a legal school year. Accordingly I so hold.

Your fourth question requires consideration of section 7579, General Code, which has not been amended, and which reads as follows:

> "The money which has been and may be paid into the state treasury on account of sales of land granted by congress for the support of public schools in any original surveyed township, or other district of country, shall constitute the "common school fund," of which the auditor of state shall be superintendent, and the income of which must be applied exclusively to the support of common schools, in the manner designated in this chapter."

This section must be read in connection with the following provisions of the General Code:

> "Section 3227. The county auditor shall keep an account with the county treasurer of all sales made and leases surrendered and moneys paid thereon by each purchaser or lessee, and on the first day of February, May, August and November, in each year, make a report thereof to the auditor of state, which report shall distinguish between the amount paid in as principal and the amount paid in as interest. From the time of such report the state shall be liable to pay interest on all sums of principal so reported as paid. On receiving a certified copy of such account from the auditor of state, the treasurer of state may immediately draw the money paid in as principal, from the county treasury. The amount so reported as interest shall be retained in the county treasury, and apportioned to the several civil townships and parts of civil townships, in the original surveyed townships or fractional township to which such lands belong."
>
> "Section 7580. The common school fund shall constitute an irreducible debt of the state, on which it shall pay interest annually, at the rate of six per cent. per annum, to be computed for the calendar year, the first computation on any payment of principal hereafter made to be from the time of payment to and including the thirty-first day of December next succeeding. The auditor of state shall keep an account of the fund, and of the interest

which accrues thereon, in a book or books to be provided for the purpose, with each original surveyed township and other district of country to which any part of the fund belongs, crediting each with its share of the fund, and showing the amount of interest thereon which accrues and the amount which is disbursed annually to each."

Section 7582, as amended 104 O. L., 159.

"The auditor of state shall apportion the state common school fund to the several counties of the state semi-annually, upon the basis of the enumeration of youth therein, as shown by the latest abstract of enumeration transmitted to him by the superintendent of public instruction. Before making his February settlement with county treasurers, he shall apportion such amount thereof as he estimates to have been collected up to that time, and, in the settlement sheet which he transmits to the auditor of each county, shall certify the amount payable to the treasurer of his county. Before making his final settlement with county treasurers each year he shall apportion the remainder of the whole fund collected, as nearly as it can be ascertained, and in the August settlement sheet which he transmits to the auditor of each county shall certify the amount payable to the treasurer of his county."

"Section 7583. In each February settlement sheet the state auditor shall enter the amount of money payable to the county treasurer on the apportionment of interest specified in section seventy-five hundred and seventy-seven, and also enter in each February settlement sheet the amount of money payable to the county treasurer on account of interest for the preceding year on the common school fund, and designate the source or sources from which the interest accrued. With each February settlement sheet he shall transmit a certified statement, showing the amount of interest derived from the common school fund payable to each original surveyed township or other district of country within the county.

"Section 2689. Immediately after each semi-annual settlement with the county auditor, on demand, and presentation of the warrant of the county auditor therefor, the county treasurer shall pay to the township treasurer, city treasurer, or other proper officer thereof, all moneys in the county treasury belonging to such township, city, village or school district."

It is apparent from these sections that:

1. The proceeds of the sale of section 16 lands constitute a trust fund, and a part of the irreducible debt of the state, the interest on which is to be paid out for the benefit of the schools of a given original surveyed township.

2. Therefore, such interest moneys are not to be distributed to the counties upon any basis of enumeration. Unless the words "in the manner designated in this chapter" can be construed as referring to the provisions of amended section 7600, General Code, there is no way by which division or distribution can be made as among different school districts maintaining schools within a single original surveyed township.

3. The distribution of interest on the common school fund is not governed by section 7582, but by section 7583. Section 2689, General Code, is general and does not specify what moneys are to be distributed at a given settlement time. It seems to me that section 7583 specifically answers the last part of your fourth question and that disbursement of interest moneys belonging to the schools of an original surveyed township as between the state and the county takes place at the February settlement.

Answering the first part of your fourth question, I beg to state that section 7600, General Code is the only section governing the distribution of the common school

fund within the county, i. e., to the several school districts. When, therefore, at the February settlement the county treasurer has received from the state the interest moneys due to the schools of a given original surveyed township, such moneys shall not be immediately distributed but must await the distribution provided for in section 7600. This distribution, if among different school districts, i. e., if the property of the original surveyed township comprises parts of more than one school district, will be made on the basis outlined in section 7600, regard being had, however, not to the number of teachers and enumerated youth in the whole district but rather to the number of teachers and enumerated youth in the territory of the district embraced within the original surveyed township. In the event, however, that the original surveyed township is co-extensive with a single school district, then the whole amount due is to be paid to the district and no calculations under section 7600 are neceassary.

Answering the question suggested by the letter of your examiner, I beg to state that in my opinion "each annual settlement" as used in section 7600, General Code, means and designates the August settlement. This term has a well defined meaning established by the provisions of sections 2596 and 2683, General Code. See also section 5401, General Code.

The August settlement is the final distribution as distinguished from that which takes place in February, which is to be regarded as a partial distribution. In this case, however, there is an additional reason for holding that the August settlement is to be regarded as the annual settlement. Under the Smith one per cent. law, so-called, and particularly section 5649-3c thereof, the expenditures of a school district must be provided for out of appropriations made at the beginning of each fiscal half-year, which, in turn, must be made from moneys known to be in the treasury at that time.

It follows therefore, that the moneys distributed in August are to be applied to the operations of the schools during the succeeding half of the school year which begins in September. Inasmuch as the legislature at its first extraordinary session in 1914 revised the whole school code, and inasmuch as the amendment to section 7600 is a part of that revision; and inasmuch further as the other new laws, with respect to the schools will become operative in a practical sense at the beginning of the school year in September, 1914, it would seem at least appropriate to hold that the revised scheme of distribution provided for in amended section 7600 should be put into effect at the same time.

I may add that there is nothing inconsistent with this conclusion in the fact that the current appropriation from the common school fund provides for distribution on the basis of the enumeration of youth. This is the distribution among the counties and is governed by section 7582, which still provides for apportionment upon the basis of enumerated youth. The apportionment within the counties and among the school districts is a separate thing, and in my opinion, moneys apportioned to the counties under the appropriation referred to, may, without violating the appropriation, and without the necessity of making a new appropriation, be distributed within the counties at the August settlement, 1914, in accordance with section 7600, General Code.

In holding that section 7600 designates the August settlement as the time of apportioning among the several school districts of the county the amount received from the state on account of the distribution of the state school funds, however, I do not mean to indicate that the actual distribution of money must all take place at this time. The statute speaks of "apportionment" and in my judgment its intention is that the basis of apportionment shall be fixed annually, in August. That is to say, at that time the number of teachers and the average daily attendance, both for the school year just closing in August, shall be ascertained by the auditor, and shall become the basis of the distribution of funds by him for the following year.

The requirement of the statute that $30.00 for each teacher employed be received

by the school districts at the time of the apportionment seems to be mandatory, and, in my judgment, this part of the distribution must all take place at once if there is sufficient money in the hands of the county and received from the auditor of state to make a complete distribution on the basis of employed teachers; but at the succeeding February settlement additional funds will be coming to the county from the state under the provisions of amended section 7582, General Code. This money, in my judgment, should be applied immediately to the support of the schools and not held in the possession of the county treasurer for ultimate distribution until the following August. The basis of distribution of such money is that adopted at the preceding August. If in August the entire amount due the various districts on account of employed teachers has not been distributed, the balances of such amounts due to the several districts should be first distributed out of the succeeding February common school funds moneys; then further distribution should take place on the basis of the average daily attendance ascertained at the preceding August settlement. If, however, at the August settlement the entire amount due the several districts on account of employed teachers has been distributed, then the entire distribution of the succeeding February will be on the basis of the average daily attendance.

The conclusion just expressed is arrived at by giving a liberal interpretation to section 7600, General Code. That section has always provided in terms for an annual apportionment; yet it is my understanding that the practice has always been to make the actual distribution of money semi-annually. In my judgment, the legislature in amending section 7600, intended to preserve this practice.

It is in accordance with this interpretation of section 7600 that I have held already in this opinion that the interest on the irreducible debt due to the schools of designated territories within the county is to be paid out to such schools in February when it comes into the possession of the county treasurer by settlement with the auditor of state, on the basis outlined in section 7600 instead of awaiting the succeeding August settlement.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1087.

REPAIRS ON SCHOOL BUILDING—WHEN COMPETITIVE BIDDING FOR SUCH REPAIRS MAY BE DISPENSED WITH—URGENT NEED.

In case the state building inspector orders repairs on a school building to be made by a date certain, the impossibility of completing them by such date without dispensing with competitive bidding, etc., does not create a case of "urgent need," or for the "security and protection of school property" within the meaning of section 7623, General Code, permitting such bidding and other formalities to be dispensed with in such cases.

The interests of the schools themselves, that is, the use of the building by the pupils with safety and convenience must be consulted in order to determine whether a case for dispensing with the statutory requirements exists so that if it is anticipated that although the work cannot be completed before the building must be used for school purposes, the part remaining undone can be prosecuted without impairing the safety and usefulness of the schools, the statutory requirements may not be dispensed with; otherwise they may be disregarded.

COLUMBUS, OHIO, August 3, 1914.

HON. H. STANLEY MCCALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR:—On July 2nd you requested my opinion on the following question:

> "Section 7623 of the Ohio General Code provides that when a board of education of a city school district makes repairs to a school house that will cost in excess of $1,500.00, except in cases of urgent necessity or for the security and protection of school property, it must advertise for bids in some newspaper of general circulation and in two if there are that many, for a period of four weeks.
>
> "The state inspector of school houses has served notice on the local board to make certain changes in the plumbing and toilet room equipment, drinking fountains, floors and ventilation systems of certain school houses by September 1, 1914. These conditions for which changes have been ordered have been known to exist for several years past by both the board of education and the inspector. As soon as the order was received the board having no other funds available, called a special election requesting authority to issue bonds in the amount of $115,000. The people voted favorably on same and they are now being advertised for sale.
>
> "However, the board of education is of the opinion that if it is required to advertise four weeks for bids that the work cannot be gotten out by September 1, 1914, as ordered by the inspector and that all of said work cannot be completed during this vacation period."

Your question is as to whether or not the circumstances mentioned constitute a case of "urgent necessity" within the meaning of section 7623, General Code.

Section 7623, General Code, is in part as follows:

> "When a board of education determines to build, repair, enlarge or furnish a school house or school houses, 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 must proceed as follows: * * *."

There is no universal rule by which one can define the term "urgent necessity" or the term "for the security and protection of school property" as used in this section. (Mueller vs. Board of Education, 11 N. P. n. s. 113.)

Despite the fact, however, that each case must be determined upon its own conditions, it is true that if the facts do not justify a finding of urgency, or that the security and protection of school property is at stake, failure to comply with the requirements of the section renders a contract void. (Mueller vs. Board of Education, supra.)

Upon the authority of the case which I have cited, I am of the opinion that if the work in question can be so far completed by the time that it is necessary for the pupils to use the school building that it can be used by them with safety and without great inconvenience, the board of education may not lawfully dispense with competitive bidding.

I agree with you that the date fixed in the order of the state inspector should not be controlling with respect to the question at hand, it being his practice, as you correctly state to extend the time for the completion of work in cases of this sort where it is undertaken and prosecuted with good faith and diligence.

If, therefore, before the schoolhouse in question must be used by pupils for school purposes the next school year such changes, for example, in the floors and ventilating systems or otherwise as might seriously interfere with the use of the schools can be completed, and the remaining repairs, such as changes in the plumbing, toilet room equipment, drinking fountains, etc., can be undertaken and prosecuted without endangering the safety of the pupils of the efficiency of the schools during the sessions of the school, or can be done outside of school hours, in such event it would be unlawful to dispense with competitive bidding as required by section 7623. But if, on the other hand, and without regard to the date fixed by the inspector the work cannot be completed before it would be necessary to use the school building for the accommodation of pupils, and if such work as would remain undone at that time would be such as to interfere with the use of the schools, in that event I would be of the opinion that the board of education might lawfully declare a case of "urgent necessity" involving the "security and protection of school property," and proceed without inviting competitive bids.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1088.

DISCUSSION OF SECTION 7629, GENERAL CODE, PROVIDING FOR THE ISSUANCE OF BONDS BY BOARDS OF EDUCATION—OPERATION OF THIS SECTION UNDER SMITH LAW AND ARTICLE 12, SECTION 11, OF THE CONSTITUTION.

On authority of Rabe vs. Board of Education, 88 O. S., 403, section 7629, General Code, providing for the issuance of bonds under certain circumstances, by boards of education, is still in effect. This opinion discusses the present operation under the Smith law and article 12, section 11, of the constitution.

COLUMBUS, OHIO, August 3, 1914.

HON. H. F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 16th, requesting my opinion upon the following question:

"Is section 7629, General Code, in force?"

As bearing upon this question I quote sections 7629,7630, 7591, 7592 and 5649-2 General Code, as follows:

"Section 7629. The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal.

"Section 7630. In no case shall a board of education issue bonds under the provisions of the next preceding section in a greater amount than can be provided for and paid with the tax levy authorized by sections seventy-five hundred and ninety-one and seventy-five hundred and ninety-two, and paid within forty years after the issue on the basis of the tax valuation at the time of issue.

"Section 7591. Except as hereinafter provided, the local tax levy for all school purposes shall not exceed twelve mills on the dollar of valuation of taxable property in any school district, and in city school districts shall not be less than six mills. Such levy shall not include any special levy for a specified purpose, provided for by a vote of the people.

"Section 7692. A greater or less tax than is authorized above may be levied for any school purposes. Any board of education may make an additional annual levy of not more than five mills for any number of consecutive years not exceeding five, if the proposition to make such levy or levies has been submitted by the board, to a vote of the electors of the school district, under a resolution prescribing the time, place and nature of the proposition to be submitted, and approved by a majority of those voting on the proposition.

"Section 5649-2. Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness that may hereafter be incurred by a vote of the people."

The last section above quoted has been amended since its original enactment in 1911. From its inception, however, it has provided maximum limitations upon the rate or amount of taxes levied in the territory of a taxing district, including those for school purposes, less than the school levies, authorized by sections 7591 and 7592. Obviously, sections 7591 and 7592 were impliedly repealed or at least suspended by the statutory force of the subsequently enacted section 5649-2.

The question then being as to whether or not the repeal or suspension of sections 7591 and 7592 repeal or suspend section 7630, General Code, I beg to refer you to the case of Rabe vs. Board of Education of Canton, 88 O. S., 403,wherein it is definitely held that such is the case. The earlier decision of State ex rel. vs. Sanzenbacher, 84

O. S., 506, which has been cited by you, would afford a basis for this conclusion, but it is explicitly so held in the case which I have cited.

As stated in the language of Donahue, J., at page 409, Rabe vs. Bd. Education:

> "The provisions of sections 5649-2 et seq., in reference to the rate that may be levied in any taxing district, are so clearly in conflict with the provisions of sections 7591 and 7592, General Code, that these sections are necessarily repealed by implication. That being true, section 7630, General Code, must fall with them, for that section provides only for the application of the limitation in these repealed sections to the issue of bonds under section 7629, General Code. It is suggested in the brief of counsel for defendant in error that section 7630, General Code, is not necessarily repealed, but that, on the contrary, the provisions of this later legislation, limiting the rate of taxes that may be levied in any taxing district, should be read into this section, instead of the specific sections named, to wit, sections 7591 and 7592, General Code. In answer to this it is only necessary to suggest that a law cannot be amended in this way. If sections 7591 and 7592, General Code, are no longer the law of Ohio, it necessarily follows that section 7630, General Code, furnishes no rule for determining the rate of taxes levied or to be levied which may be anticipated by an issue of bonds under the provisions of section 7629, General Code.
>
> Our attention is called to the fact that the general assembly of Ohio passes an act amending sections 5649-3a, 5649-3b, 5649-3c, 5649-3d, 5649-3e and sections 5640-5a, 5649-5b, General Code, relating to the maximum tax rate which may be levied in any one taxing district, on the same day it passed an act amending sections 7620 and 7625, General Code; that the former act was approved June 2, 1911, and the latter act was approved June 7, 1911; that in the act amending section 7625, sections 7629 and 7630 are referred to, and that, therefore, if there is to be a repeal by implication, this act amending sections 7620 and 7625, being the later act, sections 5649-2 et seq., General Code, are the sections that are repealed by implication.
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> "Section 5649-2 was passed May 10, 1910, and its provisions being in conflict with sections 7591 and 7592, these statutes were necessarily repealed by implication.
>
> "Section 16 of article II of the constitution of Ohio, provides that no law shall be revived or amended unless the act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed. It therefore follows that if these statutes were repealed by implication by the passage of sections 5649-2 et seq., General Code, and of this there can be no doubt, then there could not be revived, reenacted or amended by any method in direct conflict with the positive prohibition of the constitution. Sections 7591 and 7592, General Code, were not even referred to in the act amending section 7625, General Code; but it is claimed that as that act refers to section 7630, General Code, and section 7630 in turn refers to sections 7591 and 7592, General Code, it clearly indicates that the legislature of Ohio did not consider these sections repealed. The fact remains, however, that these sections were repealed by implication regardless of whether the general assembly recognized that fact or not."

If, then, section 7630, General Code, is to be regarded as clearly repealed, as the supreme court holds, what becomes of section 7629, General Code, which is a part of the scheme of issuing bonds without a vote of the people?

On this point, Donahue, J., continuing, used the following language:

"It is claimed on behalf of the plaintiff in error that the board of education has no authority to issue bonds under the provisions of section 7629, without first submitting the question of issuing such bonds to a vote of the electors.

"The history of this legislation is of very great importance in the consideration of this question. The first school code of Ohio was passed by the legislature on May 1, 1873. Section 1 of this Code divided school districts into city districts of the first class, city districts of the second class, village districts, special districts and township districts, and this distinction was carefully observed in all the sections of the Code. Section 61 of that code was the original of section 7625, General Code, and specifically applied to the board of education of any school district, except a city school district of the first class. Section 56 of this code, a part of which is the original of section 7629, General Code, provided that any board of education of any city district of the first class might issue bonds in anticipation of income from taxes levied or to be levied.

"On the 25th day of April, 1904, the legislature of Ohio adopted a new code of laws for the government of the common schools of the state of Ohio. In this code, adopted in 1904, the distinction between the boards of education of the different school districts is eliminated. Section 3991, Revised Statutes, now section 7625, General Code, reads: 'When the board of education of any school district determines,' etc., while the original act read:'Whenever the board of education of any school district, except city districts of the first class, shall determine,' etc. Section 3994, Revised Statutes, now section 7629, General Code, reads: 'The board of education of any school district may issue bonds.' The original act read: 'Any board of education of any school district of the first class.'

"It is insisted that these two sections as amended apply to every board of education of any school district in Ohio, and can now serve no separate or several purpose if a vote of the electors is necesary to authorize the issue of bonds under both sections; and that it clearly appears that the limitation of section 7629, General Code, to the amount of bonds equal to the aggregate of a two-mill levy on the preceding year payable from taxes levied under the provisions of sections 7591 and 7592, General Code, means that to this extent the board of education has authority to issue bonds without submitting the question to a vote, but when bonds are to be issued in excess of this amount, and to be paid by a levy additional to the levies authorized by section 7591 and 7592, General Code, then a vote is required

"In view of the change in the wording of these sections from their original form in the school code of 1873, making the provisions of each section applicable to all boards of education of any school district in Ohio, it would appear that this is the only possible purpose in retaining both sections 7625 and 7629, General Code. Unless this distinction does obtain the rendition of these separate sections, applicable as amended to any and all boards of education, could serve no purpose whatever. The contention that the provisions in section 7629, General Code, stipulating that the bonds issued under that statute must be issued subject to the restriction specified in section 7626 and 7627, General Code, which requires that the issue of such bonds shall be submitted to the electors, because by the provision of section 7626, General Code, it is provided that 'If a majority of the electors, voting on a proposition to issue bonds, vote in favor thereof, the board thereby shall be authorized to issue bonds for the amount indicated by the vote' cannot be sustained in view of the provisions of section 7628, General Code. This section authorizes a tax levy in addition to the maximum levy authorized by

sections 7591 and 7592, General Code, for the purpose of providing for the payment of the principal and interest of the bonds issued under the authority of the next three preceding sections when the proposition to issue such bonds has been approved by a majority vote of the electors, while section 7630, General Code, provides that the tax that may be levied for the payment of principal and interest of bonds issued under section 7629, General Code, shall not exceed the levy authorized by sections 7591 and 7592, General Code; so that if in both cases the question of the issue of bonds is to be submitted to the electors, there would be no reason whatever for the separate provisions of sections 7628 and 7630, General Code.

"Conceding then the authority of the board of education to issue bonds under the provisions of this section, without first submitting the question of their issue to a vote of the electors of the school district, how stands this case? This school code of 1873, and its successor of 1904, were designed to cover the whole subject-matter. The sections therein were related to each other and mutally interdependent one upon the other. The provisions of section 7629, General Code, were modified, aided and restricted by the provisions of sections 7626, 7627, 7630, 7591 and 7592, General Code. These material parts of this code being no longer in force or effect, the whole plan and scheme is weakened and possibly destroyed.

"If section 7629, General Code, has survived the wreck of the plan provided by the school code of 1904, for the issuing of bonds by the board of education, it is not only bereft of its fellow sections of that code in reference to the same subject-matter, but it is deprived of the aid of their correlative provisions with reference not only to the issuing but to the retirement of bonds."

Thereupon the judge who writes the opinion proceeds to discuss the possibility of providing for the interest and sinking fund requirements of the particular bond issue involved in the case in addition to the levies for current expenses, and at least, for the purpose of argument, seems to take the view that there is authority to issue bonds under section 7629, provided the limitations of that section are not exceeded, and provided also that the interest and sinking fund requirements can be taken care of within the Smith law limitation without impairing current levies. His conclusion is that under the facts of the case adequate provision for the retirement of the bonds could not be made within the Smith law limitations if the sinking fund levies were postponed to the current expense levies.

It appears, therefore, that the court has distinctly held that section 7630, General Code, was repealed in 1911 because of the inconsistencies existing between its provisions and those of the then enacted Smith law. On the other hand, it appears that the court did not consider that section 7629 had been similarly repealed; for if that had been the court's conclusion, the portion of the opinion last above quoted would not have been necessary. The general rule is that a later statute will repeal or modify a former statute only to the extent that the two cannot be harmonized. In my opinion, and I think in the opinion of the supreme court, as indicated by the decision in the case cited, it is possible to reconcile section 7629 with the Smith law and to preserve the essential legislative idea embodied originally in sections 7629 and 7630, except in so far as that idea is modified by the Smith law. That is to say, the power to issue bonds without a vote of the electors continued to exist after the Smith law was passed, as provided for in section 7629, but the limitation upon the right to issue bonds, growing out of a limited levying power, is to be found now in the provisions of the Smith law instead of the provisions of section 7630. In other words, the board of education could, after the passage of the Smith law, issue bonds in an amount not exceeding a levy of two mills on the duplicate for the preceding year under section 7629, provided

t could meet the interest and sinking fund requirements of the bonds by levying taxes n addition to those for current needs within all the limitations of the Smith law.

Subsequently in 1914, viz., in the act found in 104 O. L., 12, the general assembly so amended section 5649-1 as to require that interest and sinking fund levies should be placed upon the duplicate "before and in preference to all other items, and for the full amount thereof." It seems that the effect of this legislation is to reverse the rule laid down in the Rabe case and to do away with the necessity of determining whether or not there is a margin, so to speak, between the amount of the levy which the board of education will require for current needs and the total amount which, under the practical operation of the Smith law limitations it may levy within the district. If that is the case, of course the only limitation upon the power to issue bonds without a vote of the people other than that specifically set forth in section 7629 is the difference between the amount which can be levied for all purposes and the amount already required for sinking fund purposes; it being possible, apparently, to incur indebtedness without reference to the needs of the district for current expenses. The question presented in your letter, however, does not require me to pass upon this question and I express no opinion in respect to it.

There is another similar consideration which may be mentioned. The Rabe case was decided under the state of the law as it existed prior to the adoption of article XII section 11, of the constitution. The court distinctly states in the opinion that that section of the constitution does not enter into the case then before it (see page 422). There are certain states in the union, the constitutions of which contain provisions similar to that of article XII, section 11, and in addition provide limitations upon the levying power similar to those found in the Smith law. In these states it has been held that where provision cannot be made for levying and collecting the tax necessary to meet the interest and sinking fund requirements of the bond issue because of the effect of the limitations upon the levying power, the bonds, to the extent that their interest and sinking fund requirements would necessitate such excessive levy, are void; or at the very least could be enjoined by such an action as that of Rabe vs. Board of Education, for example.

I need not discuss this feature of the case you present further, because your question is, as already stated, limited to the single proposition as to whether or not section 7629 of the General Code is in force.

Having reached the conclusion then, that the section about which you inquire was not repealed by the Smith law, and being of the opinion that subsequent legislation and the subsequent adoption of the constitutional amendments in question have not affected the question, I am of the opinion that at the present time said section 7629, General Code, is in force and, subject to the implied limitations which I have discussed, may be looked to by a board of education as authority to issue bonds without a vote of the people.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1089.

PRIVATE EMPLOYMENT AGENCY—CONTRACT WITH RAILROAD COMPANIES TO FURNISH LABOR.

A firm contracting with railroad companies and others in Ohio to furnish laborers to such companies is within the purview of sections 886 and 893, General Code, and must therefore be construed as a private employment agency.

COLUMBUS, OHIO, August 10, 1914.

HON. KENT P. JOHNSON, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Under date of July 29, 1914, you request my opinion as follows:

"Does the following state of affairs bring a person or firm within the definition of section 893, General Code?

"The person or firm desires to contract with railway companies and others in Ohio to furnish laborers to such company. No registration fee is to be charged and no applications taken. The person or firm does not offer itself as an institution to secure positions or jobs for laborers, but solely as an institution to furnish laborers to such railway companies and others.

"In examining the sections relating to employment agencies, it has seemed to me that they were designed for the protection of laborers and not for any other purpose. The foregoing would indicate to me that the person or firm does not intend to exploit laborers in any way and therefore the business would not come within the purview of section 893."

Section 886, General Code, is as follows:

"No person, firm or corporation shall open, operate or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an *applicant for help* without obtaining a license from the commissioner of labor statistics and paying to him a fee according to the population of the municipality as shown by the last preceding federal census * * *."

Section 893, General Code, is as follows:

"Except an employment agency of a charitable organization, a person, firm or corporation, furnishing or agreeing to furnish employment or help * * * shall be deemed a private employment agency, and subject to the laws governing such agencies."

It will not be denied that the person, firm or corporation in question makes it a practice to agree to furnish help, and that while it does not charge what may possibly be properly regarded as a registration fee, it does contemplate making a charge and realizing a profit for the furnishing of help to the railroad companies in question. Such a charge may be regarded as the charging of a fee within the broad comprehension of that term, and within its meaning, as the word is employed in the statutes above quoted.

While perhaps no regulated form of receiving specific or actual applications is followed, nevertheless, I have no hesitancy in concluding that the co-contracting

parties, to wit, the railroads, may be deemed applicants for help without doing violence to that term as the same is employed in these statutes.

I am, therefore, of the opinion that the firm in question charges applicants for help, a fee for supplying such help, and that compliance by it must be made with the statutes relating to employment agencies.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

1090.

RIGHT TO TAKE EARNINGS OF PRISONERS CONFINED IN THE OHIO PENITENTIARY FOR COST OF CONVICTION—GARNISHEE PROCEEDINGS—EXEMPTION ALLOWED PRISONERS.

The earnings of prisoners at the Ohio penitentiary cannot be seized to satisfy a judgment for costs of conviction, but proceedings in aid of execution or garnishee proceedings against the warden may be had for such purpose, to take the money belonging to such prisoners and in the hands of the warden when such money has been brought to the penitentiary by such prisoners, or has been sent to them by others during the period of their imprisonment. When such proceedings are had, the prisoners are entitled to the same exemptions in each case as though they were free men.

COLUMBUS, OHIO, August 10, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 26, 1914, as follows:

> "Do homestead exemptions run against executions for costs of conviction in felonies?
>
> "Are the funds standing to the credit of convicts who are not heads of families subject to execution for the costs of conviction? (Some of this money comes with them to the penitentiary, some of it is sent to them by friends, and some of it is earnings.)
>
> "If these funds are subject to execution for such purposes, who should issue the writ, and what should the proceedings be to reimburse the state which has paid the costs?"

The first question presented by your inquiry is whether or not the state, after having paid the costs, may recover from the prisoner.

Sections 13726 and 13727 of the General Code read:

> "Section 13726. When the clerk certifies on the cost-bill that execution was issued according to the provisions of this chapter, and returned by the sheriff "No goods, chattels, lands or tenements, found whereon to levy," the warden of the penitentiary shall allow so much of the cost-bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state.
>
> "Section 13727. Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of the costs of conviction, and no additional property is found whereon to levy, the clerk shall so certify to the auditor of state, under his seal, with a statement of the

total amount of costs, the amount made and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

In the case of Libby vs. Nicola, 21 O. S., p. 414, one Hosea W. Libby was received by the penitentiary on March 13, '66, to serve eight months for manslaughter, and was later pardoned by the governor. Prior to the time he was received at the penitentiary, an effort was made to compel him to pay the costs of prosecution, but the sheriff made a return of "no property found" and the state paid the costs. After he was pardoned, he brought suit to restrain the collection of a judgment rendered against him for the cost of the prosecution, claiming that he was released from the judgment for costs by virtue of the pardon from the governor. In that case it was held that such pardon did not operate to release him from the judgment for costs.

In the case of Anglea vs. Commonwealth, 10 Gratton (Va.) 696, it was held that where a person convicted and sentenced for a felony and afterwards given a pardon by the governor, releasing him from all pains, penalties and forfeitures, incurred by the conviction of sentence, such pardon did not release such person from the costs where an execution for such costs had been issued previous to the pardon. The court said at page 201:

"The right to enforce payment of costs is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it, and it can make no substantial difference whether the money is going directly to the witness and others who are entitled to be paid for their services in the prosecution *or the commonwealth having paid them, stands by substitution in their place.*"

These cases, I think, make it clear that after the state has paid the costs in a felony case by virtue of the provisions of sections 13726 and 13727, it may recover such costs from the prisoner at a later date if property is found upon which levy may be made.

In your letter you state that the prisoners in the Ohio penitentiary have funds standing to their credit, some of which they bring with them to the penitentiary, some of which is sent to them by their friends, and some of which they earn by their labor while behind the prison walls. Some of these prisoners are the heads of families and others are not, and you ask in what cases, if any, the state may recover the costs.

House Bill No. 133, passed February 25, 1913 (103 O. L., p. 65) provides in part:

"That section 2183 of the General Code be amended and supplemented by additional sections 2183-1 and 2183-2 to read as follows:

"Section 2183. Under the direction of the state board of administration the warden may employ a portion of the convicts in the manufacture of articles used by the state in carrying on the penitentiary, procure machinery and prepare shop room for that purpose. He may also employ a portion of the convicts in the preparation and manufacture of any or all forms of road making material for use in the construction, improvement, maintenance and repair of the main market roads and highways within the state of Ohio. For such purposes the state board of administration is authorized with the approval of the governor to purchase the necessary land, quarries, buildings, machinery, and to erect buildings and shops for said purposes, and employ such persons as may be necessary to instruct the convicts in such manufacture. The terms and manner of employment of such persons shall be fixed and determined by the board.

"Section 2183-1. A strict account shall be kept of the labor of such convicts so employed or assigned to the manufacture of such articles, or road making material. Such convicts may receive credit for such portions of the amount of their labor as the board deems equitable and just, taking into account the character of the prisoners, the nature of the crime for which they are imprisoned, and their general deportment. Such amount so determined shall be credited to each prisoner as his earnings, and it may be paid to him or his family, or those dependent upon him, in such amounts, at such time, and in such manner, as such board deems best; but at least ten per cent. of such earnings shall be kept for and paid to such convict at the time of his discharge. The warden, with the approval of such board, for a violation of the rules, want of propriety, or other misconduct, may cancel a portion of such credit or credits."

House Bill No. 612, passed April 16, 1913, 103 O. L., 551, provides as follows:

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

"Section 1. That section 1866 of the General Code be amended to read as follows:

"Section 1866. For the purchase of material and machinery used in manufacturing industries, and for providing a fund out of which prisoners confined in penal institutions may be paid a portion of their earnings in the manner hereinafter provided, a special appropriation shall be made to be known as the manufacturing fund.. Receipts from the sales of manufactured articles shall not be turned into the state treasury, but shall be credited to said fund, to be used for the purchase of further materials, machinery and supplies for such industries, and for payments to convicts or their families as hereinafter provided and the board of administration shall make a full monthly report of the products, sales, receipts, disbursements and payments to and from said fund to the state auditor.

The board of administration may place to the credit of each prisoner such amount of his earnings as it deems equitable and just, taking into consideration the character of the prisoner, the nature of the crime for which he was imprisoned and his general deportment. Such credit shall not exceed the difference between the cost of maintaining such prisoner and the amount his labor, in the opinion of the board of administration, is reasonably worth. The earnings so credited to such prisoner shall be paid to him or his family out of said manufacturing fund at such time, in such manner and in such amounts as the board of administration directs. The board of administration may cancel all or any portion of the earnings credited to a prisoner, for violation of rules, want of propriety or any other reason which in its judgment justifies such action."

In the above acts are found the only provision in the Ohio statutes for the payment of earnings to prisoners. From a reading of them it will be seen that all such earnings, with the exception of the ten per cent. referred to in section 2183-1, supra, may be cancelled in whole or in part by the warden of the Ohio State penitentiary, at any time prior to the day upon which they are paid to the prisoner, which day under the rules of the penitentiary, is the day of the prisoner's discharge from the institution. The amount which the prisoner is to receive is not determined until it is paid to him upon that day and the prisoner is then a free man. If the state, after this time, believes the ex-prisoner has property out of which the cost of conviction can be recov-

ered, and desires to recover the same, it must locate the ex-prisoner and proceed against him in the same manner as it would had he never been imprisoned.

As to the ten per cent. referred to in Section 2183-1, supra, this is to be held for the prisoner until the day of his discharge and I am of the opinion that the legislature in making provision for such payment, intended to afford the prisoner an opportunity to equip himself to some extent financially, for a new start in the world upon his release. It would therefore be clearly contrary to the legislative intention to hold that this money could be seized by the state in satisfaction of the cost of conviction, and it is accordingly my opinion that this money is exempt from sequestration. The situation, however, is different as to the money which the prisoners bring with them to the penitentiary or which is sent to them by friends or relatives during the term of their imprisonment. This money is the property of the prisoner in the custody of the warden during the prisoner's confinement and it is my opinion that it can be reached by proceedings in aid of execution or by garnishee proceedings under section 11829 of the General Code, which reads:

> "The service of process of garnishment upon the sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation, or other officer having in his possession any money, claim or other property of the defendant, or in which the defendant has an interest, shall bind it from the time of service, and be a legal excuse to such officers, to the extent of the demand of the plaintiff, for not paying such money or delivering such claim or property to the defendant, as by law, or the terms of the process in his hands, he would otherwise be bound to do."

since the term "other officer" is broad enough to include the warden of the Ohio penitentiary.

No hard and fast rule can be laid down which would cover all cases where prisoners have such money to their credit on deposit at the penitentiary and inasmuch as the prisoners in the penitentiary are entitled to the same exemptions in such proceedings as they would have been entitled to before their imprisonment, the question of whether or not the state can recover from the different prisoners must depend upon the facts of each individual case.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1091.

RIGHT OF COMMON PLEAS COURT TO APPOINT ATTORNEY, A NON-RESIDENT OF THE COUNTY AS EXAMINER OF TITLES—RIGHT OF SUCH EXAMINER OF TITLES TO REPRESENT PARTIES IN PROCEEDINGS IN REFERENCE TO LAND TITLES.

The common pleas court has authority to appoint a competent attorney at law, with skill and experience in the examination of titles to real estate, as examiner of title, even though such an attorney be a non-resident of the county wherein he is appointed.

If more than one examiner of title has been appointed in a county, under the land registration act, none of such examiners is permitted, by law, to represent any of the interested parties in real estate proceedings wherein registration is involved, or in any suit relating to registered lands. This precludes any examiner from acting in any registration proceeding, or in any suit relating to registered land, even though title thereto has been referred to one of the other examiners for examination.

COLUMBUS, OHIO, August 10, 1914.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Under date of July 13, 1914, you presented the following inquiries:

> "1. If no attorney in a county will accept the position of examiner of titles under the land registration system, 103 Ohio Laws, 914, what can be done in regard to the matter?
>
> "2. Can the common pleas judge appoint two attorneys to act as examiners under the land registration act, with the understanding that if one acts as attorney in a land sale the other may act as examiner in such sale?"

Section 3 of an act to provide for the settlement, registration, transfer and assurance of land titles, 103 O. L., 914, provides that:

> "The common pleas court in each county shall appoint, subject to removal at any time by and at the will of said court, one or more examiners of title who shall be officers of the court, and who shall be competent attorneys-at-law, with skill and experience in the examination of titles to real estate, each of whom, before entering on the discharge of his duties, shall give a bond payable to the state of Ohio for the use of whom it may concern in an amount and with such sureties as shall be approved by a judge of said court * * *.
>
> "No examiner of titles shall in any way act as attorney for or represent any party or person in interest, in any matters in any way relating to proceedings to register title to land, or any interest or estate therein, or lien or charge thereon, or in any suit or proceeding relating to registered land."

It is apparent from an examination of the first sentence of the foregoing quotation that there is no requirement that the examiners of title shall be residents of the county wherein they are appointed, therefore, if the attorneys within the county decline to act as examiners of title I see no reason why the common pleas court may not appoint non-residents to act as such examiners, provided, of course, that they possess the statutory qualifications, viz.: that they "shall be competent attorneys-at-law with skill and experience in the examination of titles to real estate." The situation is akin to that arising upon the appointment of court stenographer.

2. The common pleas court may, under the foregoing quoted section, appoint as many examiners of title as it deems proper, but I do not think that any examiner of titles is permitted by law to represent any of the interested parties in real estate proceedings wherein registration is involved, or in any suit relating to registered land. The language seems to be extremely plain that no examiner of titles shall *in any way* act as attorney for or represent any party or person in interest, in any matters in any way relating to proceedings to register title to land or any suit or proceeding relating to registered land. There has been no narrowing, in any other provision of the law, of the broad exclusion contained in section 3. When it is stated that no examiner shall in any way act in any matter relating to proceedings to register title or to registered land it was intended to prohibit an examiner of titles from acting as an attorney in a case where his co-examiner would report upon the title.

The history of the law throws some light upon this question. From this it will be found that the clause in question was a compromise made to meet objections of those who were opposing the bill. Mr. Jones, who drafted amended house bill No. 17, states that following the last word "land" of the present section 3, he had inserted in said bill the following language:

> "in which he may be called upon to in any way act in his capacity as examiner of titles."

This provision would have permitted an examiner to act as attorney in all cases where he was not called upon to serve as examiner. The opponents of the bill insisted that an examiner should not engage in the practice of law involving registration, claiming that it would give him an undue advantage over other attorneys. As a compromise the quoted clause was omitted, leaving the matter as it now stands, viz.: that an examiner of titles is prohibited from acting as attorney in that class of cases in which he might or could be called upon to act officially.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1092.

SANITARY POLICE PENSION FUND INCLUDED WITHIN WORKMEN'S COMPENSATION ACT.

Sanitary policemen in cities maintaining a sanitary police pension fund are included within the workmen's compensation act, and are not within the statutory proviso excluding from the operation of said act policemen and firemen in cities having established policemen's and firemen's pension funds.

COLUMBUS, OHIO, August 10, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of July 16, 1914, you presented the following statement and inquiry:

> "A member of the sanitary police force of an Ohio city, which maintains a pension fund for sanitary policemen, was killed while in the course of his employment.
>
> "Should compensation be paid to the dependents of the deceased sanitary policeman out of the state insurance fund, the county in which said city is situated having paid its contribution into the fund as required by law?"

When you state that the county paid its contribution into the state insurance fund, I assume that you mean that the amount of premium turned over by the county treasurer upon the warrant of the county auditor to the state insurance fund included the sum due from the municipality wherein the sanitary policeman was employed and consequently shall render the opinion upon this basis.

Section 14 of the workmen's compensation act, 103 O. L. 72, defines "employe," "workman" and "operative" as:

> "Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular *members of lawfully constituted police and fire departments* of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. *Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.*"

The sole question here to be determined is whether the proviso excluding policemen and firemen in cities where policemen's and firemen's pension funds are established includes sanitary policemen. Sections 4600 et seq. provide for the creation of a firemen's pension fund and sections 4616 et seq. authorize the establishment of a police relief fund, which, no doubt, the general assembly had in mind when it referred to a police pension fund. Sections 4632 et seq. are authority for the maintenance of a sanitary police pension fund. The fact that these funds are authorized by separate enactments shows that the general assembly recognized the distinction between them, and was under the impression that sanitary policemen were not to be included within the term "police department," as, otherwise, there would have been no necessity for providing by separate statute for the creation of a sanitary police pension fund. This is true because if sanitary policemen were members of the police department they would be entitled to the benefits of the police relief fund, and there would be no necessity for the establishment of a separate pension for them.

Having recognized the distinction between policemen and sanitary policemen, in other provisions of the law, it would seem that the general assembly must be regarded as having had in mind this distinction, and when it referred to a police pension fund it did not intend to include, within that term, a sanitary police pension fund. Force is added to this reasoning by the first sentence of section 14, as herein quoted. It will be observed that it contains the language "including regular members of lawfully constituted police and fire departments." Here again sanitary police are omitted. The use of the word "department," in this connection, is of some importance when we remember that under the law there is no such thing as sanitary police *department.*

Section 4411, authorizing the appointment of persons for sanitary duty, expressly states that these persons shall "be known as the sanitary police." Now, the fact that reference is made in one section of the law to what must be regarded as the regular police department indicates that this was the character of policemen which it had in mind in the proviso. In other words, construing this section as a whole, it seems reasonably clear that the legislature was considering regular policemen and did not have in mind sanitary policemen.

While, perhaps, every reason that would justify the exemption of regular policemen, who are paid through a pension fund, from the operation of the workmen's compensation act would be applicable to sanitary policemen where a fund of this character is maintained, nevertheless, the rule of reason cannot be applied to statutes which are plain upon their face. Rules of construction are only to be applied when the language of the law is ambiguous or indefinite and uncertain of character. With the wisdom

or policy of laws, courts are not concerned, and when a statute is plain upon its face, no resort should be had to subtilty or refinement of reasoning in order to add to or detract from its scope.

It has been suggested that if the legislature intended to exclude any particular kind of policemen, the exclusion should have been expressed, and that in as much as no exception was made after the word "policemen" in the compensation act, this was meant to include all kinds of policemen, the distinguishing characteristic being whether or not pension funds were established. This reasoning does not strike me as being especially forcible as it seems to me that the word "policemen" was intended by the statute to include members of a regularly constituted police department, sanitary policemen being definitely known to the law and recognized as a body of men separate and distinct from the regular policemen. The modifying adjective "sanitary" is used wherever these policemen are referred to in the statute, and the omission of such adjective in the law here under consideration would indicate such character of policemen were to be excluded rather than included. In other words, inclusion rather than exclusion should be expressed if the general assembly desired to accomplish the result of bringing sanitary policemen within the proviso. The exemption in the proviso is specific in its terms and should not be extended beyond its letter. As the statute in question is remedial in its nature and should be given broad inclusive scope, it seems to me that there should be a clear expression of intention to exempt from its operation any class of public employes before there is justification for holding to that effect. The proviso should not be extended by implication.

With these considerations in mind, I am of the opinion that sanitary policemen are included within the expression "every person in the service of," etc., and consequently compensation should be paid to the dependents of such sanitary policemen as are killed in the course of their employment.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1093.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS IS THE PROPER AUTHORITY TO ENTER INTO CONTRACTS FOR THE VILLAGE ELECTRIC LIGHT PLANT--SUBJECT TO STATUTORY PROVISIONS WITH REFERENCE TO COMPETITIVE BIDDING.

The board of trustees of public affairs is the proper authority to enter into contracts for the purchase of machinery and equipment for the village electric light plant, or for the repair thereof. This is true where the expense of such machinery and equipment and the repair of such plant is to be paid out of the proceeds of a bond issue made by the village.

Contracts for such purposes calling for an expenditure of more than $500 are subject to the statutory provisions with reference to competitive bidding.

COLUMBUS, OHIO, August 10, 1914.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—As previously acknowledged I have your favor of July 24, 1914, asking opinion of me in which you say:

> "The village of Spencerville in this county recently voted on and now are about to issue bonds in the sum of $10,000.00, the money from said bond issue to be used for the purpose of repairing the village electric light plant.

Should the contracts for the purchase of the necessary machinery, etc., be entered into by the board of public affairs of said village, or by the common council? A dispute has arisen, I am informed by the mayor of the village, between these two bodies as to which has the authority to spend the money raised by the bond issue."

By the provisions of section 3618, General Code, municipal corporations have power to establish, maintain and operate light, heating and power plants, and to furnish the municipality and the inhabitants thereof with light, heat and power.

Section 4357, General Code, provides among other things that in each village in which an electric light plant is situated, or when council orders an electric light plant, it (council) shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be elected for a term of two years.

Section 4361, General Code, as amended (103 O. L., 561), provides as follows:

"The board of trustees of public affairs shall manage, conduct and control the waterworks, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations, when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such waterworks, plants and public utilities of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid such trustees may certify the same over to the auditor of the county, in which such village is located, to be placed on the duplicate, and collect as other village taxes, or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service, as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4332, 4333, 4334 of the General Code, and all powers and duties relating to waterworks in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

I recently held in the case of a village owning an electric light plant which desired to purchase electric current for furnishing light to the village and its inhabitants, rather than to generate the same at its own plant, that the contract for the purchase of such electric current should be entered into on behalf of the village by the council, and not by the board of trustees of public affairs. This conclusion followed on the consideration that prior to the enactment of the amendatory provisions of section 3809, General Code, 103 O. L., 526, no authority was vested in municipal corporations to purchase electric current for such purposes, and, on the further consideration, that the amendatory provisions of section 3809 expressly authorize the contract for purchase of electric current to be made by the council of a village purchasing the same.

The question here presented, however, is one with respect to the purchase of

machinery and equipment for the electric light plant itself, a utility which is under the sole control and management of the board of trustees of public affairs.

Section 4361, General Code, above quoted in full, confers on the board of trustees of public affairs of villages all powers and duties with respect to both waterworks and electric light plants which have been conferred upon the director of public service in cities relating to waterworks by the particular sections of the General Code therein designated. One of the sections so designated in this connection is section 4361, General Code, as amended, is section 3961, which provides as follows:

> "*Subject to the provisions of this title,* the director of public service may make contracts for the building of machinery, waterworks buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, *and for all other purposes necessary to the full and efficient management and construction of waterworks.*"

It is entirely clear, therefore, that the board of trustees of public affairs in villages is vested with all the powers and subject to all the duties with respect to the management and control of utilities of this kind as fully as is the director of public service in cities, and that the contracts for the purchase of necessary machinery and equipment for the electric light plant of this village are to be entered into by the board of trustees of public affairs rather than by the council of the village. In making contracts for the purchase of machinery or other equipment, calling for an expenditure exceeding $500.00, such contracts can be entered into only after competitive bidding in a manner provided by the statute in such cases.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1094.

RIGHT OF COUNTY COMMISSIONERS TO CONTRACT WITH THE OHIO SANITORIUM FOR THE CARE OF TUBERCULOSIS PATIENTS.

The county commissioners are without authority in law to contract with the Ohio Sanitorium for the care and treatment of tuberculosis patients.

COLUMBUS, OHIO, August 10, 1914.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your letter of June 1, 1914, as follows:

> "Can the board of county commissioners, of any Ohio county, legally pay the cost of maintaining and supporting a patient in the Ohio state sanitorium, located near Mt. Vernon, Knox county, Ohio, unless such patient is or has been until removal to said sanitorium, an inmate of the county infirmary? In other words, can any resident of Knox county suffering from pulmonary tuberculosis, although not an inmate of the county infirmary, compel the board of county commissioners of the said Knox county to pay the expense of his or her maintenance at the above sanitorium, where there is no county, municipal or district hospital located in said Knox county?"

On September 6, 1911, this department rendered an opinion in which it was held

that "the county commissioners have been granted no statutory authority to provide for expenses of tubercular patients from the county, at the Ohio state sanitorium."

On April 17, 1913, an act was passed to amend sections 3139, 3140, etc., General Code of Ohio, relating to county and district tuberculosis hospitals (103 O. L., p. 492). Below will be found four of the sections as amended by this act.

"Section 3139. On and after January 1st, nineteen hundred and fourteen, no person suffering from pulmonary tubersulosis, commonly known as consumption, shall be kept in any county infirmary.

"Section 3140. Whenever complaint is made to the state board of health that a person is being kept or maintained in any county infirmary in violation of section 3139 of this act, such state board of health may make arrangements for the maintenance of such person in some hospital or other institution in this state, devoted to the care and treatment of cases of tuberculosis, and the cost of removal to, and the cost of maintenance of, such person in such hospital or institution shall become a legal charge against, and be paid by the county in which such person has a legal residence. If such person is not a legal resident of this state, then such expense shall be paid by the county maintaining the infirmary from which removal is made.

"Section 3143. Instead of joining in the erection of a district hospital for tuberculosis, as hereinafter provided for, the county commissioners may contract with the board of trustees, as hereinafter provided for, of a district hospital, the county commissioners of a county now maintaining a county hospital for tuberculosis or with the proper officer of a municipality where such hospital has been constructed, for the care and treatment of the inmates of such infirmary or other residents of the county who are suffering from pulmonary tuberculosis. The commissioners of the county in which such patients reside shall pay to the board of trustees of the district hospital or into the proper funds of the county maintaining a hospital for tuberculosis, or into the proper fund of the city receiving such patients, the actual cost incurred in their care and treatment, and other necessaries, and they shall also pay for their transportation. Provided, that the county commissioners of any county may contract for the care and treatment of the inmates of the county infirmary or other residents of the county suffering from pulmonary tuberculosis with an association or corporation, incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis; but no such contract shall be made until the institution has been inspected and approved by the state board of health, and such approval may be withdrawn and such contracts shall be canceled if, in the judgment of the state board of health, the institution is not managed in a proper manner. Provided, however, that if such approval is withdrawn, the board of trustees of such institution may have the right of appeal to the governor and attorney general and their decision shall be final.

"Section 3144. In any county which has not provided for a county hospital for tuberculosis, or which has not joined in the erection of a district hospital for tuberculosis, the state board of health, upon proper presentation of the facts, may order any inmate of the infirmary who is suffering from pulmonary tuberculosis removed to a municipal county or district hospital for tuberculosis, but such removal shall not be made without the consent of the inmate, if a suitable place outside of the infirmary, approved by the state board of health, is provided for his or her care and treatment. The state board of health upon a proper presentation of facts, shall also have authority to order removed to a municipal, county, or district hospital for pulmonary tuberculosis, any person suffering from pulmonary tuberculosis, when in the opinion

of the state or a local board of health, such person is a menace to the public and cannot receive suitable care or treatment at home; provided, however, that such person shall have the right to remove from the state."

Under these sections, when there is no county tuberculosis hospital the county commissioners may contract for the care and treatment of inmates of the county infirmary or other residents of the county who are suffering from pulmonary tuberculosis, with the board of trustees of a district hospital, the county commissioners of the county maintaining a county hospital for tuberculosis, with the proper officer of a municipality where such hospital has been constructed and with an association or corporation incorporated under the laws of Ohio, for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis.

There is nothing in these or any other sections of the General Code conferring authority upon the county commissioners to contract for the maintenance of patients at the Ohio sanitorium and I am therefore of the opinion, in direct answer to your question, that a resident of your county suffering from pulmonary tuberculosis, not an inmate of the county infirmary, cannot ccmpel the county commissioners to pay the expense of his or her maintenance at the Ohio state sanitorium, when there is no county, municipal or district hospital in the county.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1095.

VILLAGE SCHOOL DISTRICT BONDS NOT CLASSED AS MUNICIPAL BONDS NOR COUNTY BONDS.

Bonds issued by a village school district are not to be classed as municipal bonds nor county bonds, and therefore, are not within section 9778, General Code. Township road improvement bonds are not proper bonds for deposit under said section.

COLUMBUS, OHIO, August 10, 1914.

HON. JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—With reference to the bonds deposited with you by The People's Savings & Trust Company, of Akron, Ohio, as security for the faithful performance of the trusts assumed by such corporation under sections 9778 and 9779 of the General Code, you ask whether the bonds included in said deposit issued by Chagrin Falls and classed as school bonds, and also Madison township road improvement bonds, are proper bonds for deposit under section 9778.

Section 9778, General Code, is as follows:

"No such corporation, either foreign or domestic, shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or

county therein, or in any other state, or in the first mortgage bonds of a railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

Under this section the only bonds which can be received by you, are bonds of the United States, or of this state or any municipality or county in this state, or in any other state or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock.

As to the Chagrin Falls, Ohio, school building bonds, I take it that these bonds were issued by a school district as neither the village of Chagrin Falls or Chagrin Falls township would have authority to issue bonds for the purpose of erecting or improving a school building, and the only question which would arise would be whether a school district can be considered for the purpose of section 9778 as a municipality. To determine this it is necessary to ascertain what was meant by the legislature by the use of the word "municipality" in section 9778.

This word "municipality," as well as the term "municipal corporation" has received many and various definitions by the courts in different states and, if it is sought to ascertain its strict meaning by simply consulting the different decisions in the different states, the task will be found most confusing and entirely unsatisfactory owing to the difference in the political organization of the different states and in the constitutions and statutes.

It seems to me, therefore, that in construing this statute of Ohio as to the meaning of a word used in it we must necessarily give that word the meaning which it has in Ohio, and which, as I view it, is really the correct use of this word generally.

My opinion is that the correct definition of the word "municipality" is that it means a "municipal corporation" which is defined by Judge Dillon (Municipal Corporations, volume 1, section 31) as follows:

"A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes or local government thereof. * * *"

The same author says (volume 1, section 34):

"Corporations intended to assist in the conduct of local civil government are sometimes styled *political*, sometimes *public*, sometimes *civil*, and sometimes *municipal*, and certain kinds of them with very restricted powers, *quasi* corporations—all these by way of distinction from *private* corporations. All corporations intended as agencies in the administration of civil government are *public*, as distinguished from *private* corporations. Thus an incorporated school district, or county, as well as city, is a public corporation; but the school district or county, properly speaking, is not, while the city is a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations. The phrase "municipal corporations," in the contemplation of this treatise, has reference to *incorporated villages, towns and cities*, with power of local administration, as distinguished from other public corporations, such as counties and *quasi* corporations."

Aside from the citations above given, and from the general view that the term "municipality" means an incorporated city or village in this state; in my view the matter is settled by section 9778 taken in connection with the constitution of Ohio; in the list of bonds which may be accepted under section 9778 the legislature says

such bonds shall be, among others, bonds "of any municipality or county" in this state or any other state; so that the legislature had in mind the fact that the word municipality did not embrace county. The distinction between counties and municipal corporations is pointed out in the case of commissioners of Hamilton county vs. Mighels, 7 O. S., p. 106 as follows:

> "As before remarked, municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compass them.
>
> "Counties are local subdivisions of a state, created by the sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority."

The legislature has provided for county and township organization by article X of the constitution, and both the constitution and laws of Ohio treat of counties and townships as entirely separate from municipal corporations. Therefore, as in section 9778 the legislature has used the word "county," and omitted the word "township," we must adopt the view that township bonds are excluded.

As stated before, it further seems to me that the constitution of Ohio would be determinative of the meaning of the word "municipality," in the absence of the authority of Judge Dillon which I have cited above. Article XIII of the constitution provides for municipal corporations. Section 1 states, "municipal corporations are hereby classified into cities and villages * * *." Section 2, "general laws shall be passed for the incorporation and government of cities and villages; and additional laws may also be passed for the government of *municipalities* adopting the same, * * *."

Sections 3 to 7, inclusive, of this article, referring to municipal corporations, do not use the words "municipal corporations" or the words "cities" or "villages," but in each section the word used is "municipality" or "municipalities," and in every section of this article the word "municipality" is used to mean "municipal corporation."

It seems to me, therefore, that the only view that can be taken of the meaning of this word as used in section 9778 is that it means incorporated villages or cities in Ohio, and must have the same meaning when applied to bonds which have been issued in other states.

As above stated many definitions have been given to the word "municipality." In some states it has been held to include a school district and other subdivisions of a state or county; in other states it has been held that the word does not embrace a district of division analogous thereto, and, therefore, as the word in this state has a well understood meaning, which meaning is carried into the constitution and into the laws of the state, and which meaning coincides with what is considered to be the proper definition of the word by Judge Dillon, it seems to me that in construing a statute of the character of section 9778 there would be no possible justification for adopting any other definition of this word than that which I have given, viz.: that it means an incorporated city or village.

Therefore, the bonds to which you have referred as "Chagrin Falls, Ohio, school bonds" may not be received for deposit by you under section 9778, as they are not issued by a municipality in this state.

The Madison township road improvement bonds are not proper bonds for deposit under this section, as townships are not included within the catalogue, only the United States, state, counties and municipalities being named.

I return herewith the correspondence which you submitted to this office.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1096.

PROCEDURE TO BE FOLLOWED IN SUSPENDING A SCHOOL.

Under the provisions of section 7730, General Code, the board of education is required to give sixty days' notice provided for therein; in order to suspend a school the procedure set forth in said section should be carried out.

COLUMBUS, OHIO, August 10, 1914.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Under date of June 18, 1914, you submitted to this department for an official opinion thereon, the following request:

> "Section 7730 of the General Code as amended in Ohio Laws 104, at pages 139 and 140 provides as follows:
>
> " 'The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide and in such rural school districts shall provide for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district.'
>
> "Said section says, 'when the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct.' And it also says, 'no school of any rural district shall be suspended or abolished until after sixty days notice has been given by the school board of such district. And such notice shall be posted in five conspicuous places within such village or rural school district.'
>
> "Why should the board of education be required to give the notice as required by said section, if it is mandatory upon it to suspend a school where the average daily attendance for the preceding year has been below twelve?"

Section 7730 of the General Code, as amended 104 Ohio Laws, at page 139, thereof, contains a provision to the effect that when the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. This provision, by virtue of the use of the word "shall" is mandatory, and it is apparent that it was the intent of the legislature that schools should be suspended when the average daily attendance thereof for the preceding year falls below twelve, and that thereupon the pupils should be transferred to such other school or schools as the local board may direct. The provision that "no school of any rural district shall be suspended or abolished until after sixty days notice has been given by the school board of such district" is merely a part of the procedure to accomplish such suspension. Also the provision that "such notice shall be posted in five conspicuous places within such village or rural school district" is part of the procedure to accomplish the suspension provided for in said section 7730, supra.

When a school is suspended because its average daily attendance falls below

twelve for the preceding year, such suspension shall not go into effect or take place until after sixty days notice has been given thereof, in the manner provided in said section, to wit, by posting notice in five conspicuous places within such village or rural school district. As before stated, it is mandatory upon the board of education, in such situation, to suspend such schools, and it is also mandatory to give the notice required by said section, in the manner therein provided. I know of no reason why this notice should be given, such as the notice required in said section, except that the legislature has seen fit to carry this proviso into the statute as a part of the proceeding in accomplishing the suspension when the same is required by virtue of said section 7730 of the General Code, above quoted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1097.

POWER OF THE BOARD OF ADMINISTRATION TO PAROLE A PRISONER CONFINED IN THE OHIO PENITENTIARY, WHO HAS BEEN PREVIOUSLY CONVICTED OF A FELONY.

A prisoner of the Ohio penitentiary who has been previously convicted of a felony, and is serving a term in a penal institution, can be paroled by the Ohio board of administration, if such prisoner has been granted a full pardon for the crimes of which he was previously convicted, and for which he was previously sentenced.

COLUMBUS, OHIO, August 10, 1914.

HON. P. E. THOMAS, *Warden, Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 18, 1914, as follows:

> "Is a prisoner who has been sentenced to a term of imprisonment in this state or any other state, and confined as provided for in said sentence, after having been convicted of a felony, and who was later released from such confinement by reason of an absolute pardon granted by the chief executive of this or any other state in which he was convicted and confined under said sentence, a second termer within the provisions of the parole law of this state."

Section 2169 of the General Code reads in part as follows:

> The board of managers (now the Ohio board of administration), shall establish rules and regulations by which a prisoner * * * having served the minimum term provided by law for the crime of which he was convicted, *and not previously convicted of felony or not having served a term in a penal institution* * * * may be allowed to go upon parole outside the buildings and enclosures of the penitentiary * * *."

In 29 Cyc., page 1566, the following doctrine is stated:

> "When a full and absolute pardon is granted it exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the crime which he has committed. The crime is forgiven and remitted, and the individual is released from all of its legal consequences. The effect of a full pardon is to make the offender a new man. It blots out of existence

the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

In the case of ex parte Garland, 4 Wall. (U. S. 333), 18 L. E., 366, Mr. Justice Field, delivering the opinion of the court said:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon convinction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

In the case of Edwards vs. The Commonwealth, 78 Va., page 39, it was held:

"The governor's pardon relieves the offender not only of the punishment annexed to the offense whereof he was convicted, but of all penalties and consequences, including the additional punishment imposable, not by reason of the sentence for the second offense alone, but in consequence of that sentence *and* the sentence in the former case."

The court after quoting the opinion of Field, J., in the matter of ex parte Garland, supra, said at page 44:

"By the pardon in question, therefore, the plaintiff in error was not only relieved of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences, except political disabilities, growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the additional punishment prescribed by the statute, in case he should be afterwards sentenced to the penitentiary in this state. And that additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence *and* the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offense was in legal contemplation blotted out, and its consequences removed, by the pardon of the governor, *it must be regarded for the purpose of this case, as though it had never been committed.*"

The supreme court of this state in the case of State vs. Martin, 59 O. S., page 212, held, following the above cases:

"If imprisonment for a felony is terminated by an unconditional pardon it is not to be regarded as one of the two former imprisonments for felony required by section 7388-11, Revised Statutes, to place the accused in the category of habitual criminals."

The court cited the case of Edwards vs. Commonwealth, supra, and adopted the view taken in that case in the following language:

"The question presented by the exception is whether a former conviction and imprisonment for a felony, on account of which the governor has granted

an unconditional pardon, may be regarded as one of the former convictions necessary to place the accused in the category of habitual criminals as defined by the act. It may be that the criminal habit is as certainly indicated by the commission of felonies for which unconditional pardons have been granted as by those whose penalties have been suffered to the end. But we must presume that the legislature enacted this section intending that the language should be construed according to the commonly received view as to the effect of a pardon. That view with reference to legislation of this character is that 'If a second offense is made by statute more heavily punishable than the first, then if the first is pardoned, it is obliterated. The consequence of which is that a like offense afterward committed is not a second, and is punishable only as a first.' Bishop New Cr. L., section 9191. Edwards vs. Commonwealth, 78 Va., 39."

From a consideration of these cases, it is my opinion that a prisoner in the Ohio penitentiary, who has been previously convicted of a felony, or has served a term in a penal institution, can be paroled by the Ohio board of administration, under section 2169 of the General Code, if such prisoner has been granted a full pardon for the crime of which he was previously convicted, or for which he was previously sentenced.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1098.

LIFE INSURANCE COMPANIES ORGANIZED UNDER THE LAWS OF OHIO ASSUMING THE BUSINESS OF A COMPANY ORGANIZED UNDER THE LAWS OF ANOTHER STATE—PROCEDURE TO BE FOLLOWED.

A life insurance company, organized under the laws of Ohio and authorized to do business therein, must, when it enters into the contract to assume the business of another life insurance company, organized under the laws of another state, observe the procedure provided by sections 9352 et seq., General Code, with reference to petition therefor to the superintendent of insurance, notice to its policy-holders and hearing before the commission consisting of the governor, or some one appointed to act in his place, the attorney general and the superintendent of insurance, as provided for in section 9354, General Code.

COLUMBUS, OHIO, August 10, 1914.

HON. R. M. SMALL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your favor of June 11, 1914, in which you ask opinion of me as follows:

"Is it required of a life insurance company organized under the laws of Ohio and authorized to do business therein, to follow the procedure as provided by sections 9351, 9352, 9353, 9354, 9355 and 9356, General Code, when such company enters into a contract to reinsure the business of another life insurance company organized under the laws of another state of the United States and not admitted to Ohio?"

The section referred to in your inquiry reads as follows:

"Section 9351. No company organized under the laws of this state to do the business of life, accident or health insurance, either on stock, mutual,

stipulated premium or assessment plan, shall consolidate with any other company or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of or any portion of the risks of any other company, except as hereinafter provided. Nothing herein contained shall prevent any such company from reinsuring a fractional part of any individual risk, not exceeding four-fifths thereof, in a company duly authorized to transact business in this state, or, with the permission of the superintendent of insurance, the whole of such risk; but no company, except as hereinafter provided, shall reinsure any part of any of its risks when the aggregate amount of its risks reinsured shall equal fifty per cent. of its total insurance in force.

"Section 9352. When any such company purposes to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of insurance, setting forth the terms and conditions of the proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve.

"Section 9353. The superintendent thereupon shall issue an order of notice, requiring notice to be given by mail to the policy-holders of such company, of the pendency of such petition, and the time and place at which it will be heard, and the publication of the order of notice and petition, in five daily newspapers to be designated by him, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing on the petition.

"Section 9354. The governor, or in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney general, and the superintendent of insurance, shall constitute a commission to hear and determine upon such petition. At the time and place fixed in such notice, or at such time and place as is fixed by adjournment, the commission shall proceed with the hearing, and may make such examination into the affairs and condition of the company as it may deem proper. The superintendent of insurance may summon and compel the attendance and testimony of witnesses and the production of books and papers before the commission. Any policy-holder or stockholder of the above named company or companies may appear and be heard in reference to such petition.

"Section 9355. If satisfied that the interests of the policy-holders of such company or companies are properly protected, and that no reasonable objection exists thereto, the commission may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as seems to it best for the interests of the policy-holders, and make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission whose duty it will be to guard the interests of the policy-holders of any such company or companies proposition to consolidate or reinsure.

"Section 9356. All expenses and costs incident to such proceedings shall be paid by the company or companies bringing such petition."

In addition to the sections above quoted, I note the provisions of section 13416 General Code, which provide as follows:

"Whoever, being an officer, director or stockholder of a company organized under the laws of this state, to do the business of life, accident or health insurance, either on the stock, mutual, stipulated premiums, assessment or fraternal plan, violating or consenting to a violation of any provision of law

governing or forbidding the reinsurance of the risks, or any part thereof, or the consolidation of such company with any other company or association, or the assumption or reinsurance of the whole or any portion of the risks of another company by such company, shall be fined not less than ten thousand dollars and imprisoned in a county or city jail not less than one year."

It is a cardinal rule in the construction of statutes that the intent of the law makers is to be sought first of all in the language employed, and the question always is not what did the legislature intend to enact, but what is the meaning of that which it did enact.

Slinghuff vs. Weaver 66 O. S. 621.
Woodbury vs. Berry 18 O. S. 456.

Without restating the provisions of sections 9351 and 13416, General Code, it is clear that with respect to insurance companies of the kind therein mentioned, organized under the laws of this state, the provisions of these sections require the observance of the procedure outlined in the other sections quoted in cases where such companies reinsure or assume the risks of any other company, as well as where the risks of such Ohio insurance companies are reinsured or assumed by another company, whether the other company in either case be organized under the laws of the state of Ohio or not. In keeping with a manifest purpose to secure and protect the rights of policy-holders in Ohio insurance companies of the kind mentioned, the reason for the observance of the procedure provided for in the sections above quoted is apparent in a case where the risks of an Ohio company are assumed or reinsured by another company organized under the laws of this or another state. In cases where an Ohio insurance company desires to assume or reinsure the risks of another insurance company, whether such company be organized under the laws of this state or elsewhere, it is not easy to perceive, aside from the specific requirements of sections 9351 and 13416, why the insurance company which seeks to assume or reinsure the risk of each other company should be required to give notice of its intention to do so to its own stockholders, or otherwise observe and comply with the procedure outlined in the sections above noted. However, I am of the opinion that the express terms of sections 9351 and 13416 require an Ohio insurance company of the above mentioned kind, which desire to assume or reinsure the risks of another company to notify its own policy-holders of its intended action and get permission to do so by observance of the procedure provided for in sections 9352 to 9356 inclusive, whether the company whose risks are being assumed or reinsured is organized under the laws of this or some other state.

Answering your inquiry, therefore, I am of the opinion that the life insurance company mentioned in your communication must follow the procedure provided for by the sections mentioned by you, and above quoted, when such company enters into a contract to reinsure or assume the business of another life insurance company organized under the laws of another state, and which has not been admitted to do business in this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1099.

ARTICLES OF INCORPORATION OF THE LOVELAND LIGHT AND WATER COMPANY DISAPPROVED—FORMING A CORPORATION FOR FURNISHING NATURAL AND ARTIFICIAL GAS AND ELECTRICITY, HEAT AND POWER—RIGHT OF SUCH CORPORATION TO MANUFACTURE AND DEAL IN NATURAL AND ARTIFICIAL ICE—ARTICLES OF INCORPORATION.

Under the provisions of section 10212, General Code, a corporation may be formed for the purpose of furnishing natural and artificial gas and electricity, heat and power, and also supply water for public and private consumption. Such a corporation must not join with such purposes that of manufacturing and dealing in natural and artificial ice and conducting a general refrigerating and cold storage business, either as incidental to the principal purpose or otherwise.

COLUMBUS, OHIO, August 10, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 30th, requesting my opinion as to the legality of the purpose clause of The Loveland Light and Water Company, a corporation which is proposed to be located at the village of Loveland, in Clermont, Warren and Hamilton counties. Said purpose clause is as follows:

> "Said corporation is formed for the purpose of manufacturing, purchasing, selling and supplying artificial and natural gas and electricity for light, heat and power purposes, and both for public and private consumption, and also for the purpose of producing, pumping, purchasing, selling and supplying water for both public and private consumption and purposes. And also for the purpose of manufacturing, buying, selling and dealing in natural and artificial ice, and of doing a general refrigerating and cold storage business, and of acquiring by purchase, lease or otherwise, and of owning, constructing and maintaining such real estate, buildings and other real and personal property as will assist in the successful operation of the business and purposes of said company as above provided, and of doing all things requisite and necessary for the prosecution and carrying out of the same."

The familiar general rule is, of course, that a corporation may be formed under the laws of Ohio for the pursuit of a single principal purpose only. State ex rel. vs. Taylor, 55 O. S., 57. However, in determining what constitutes a single purpose a somewhat liberal rule seems to have been adopted, viz.: If the end is single the means may be various. Picard vs. Hughey, 58 O. S., 577.

The rule laid down in the case last cited, of itself justifies the language of the first clause of the general purpose clause above quoted, down to the words "and also" where they first occur. That is to say, Picard vs. Hughey, *supra*, is distinct authority for the conclusion that in the absence of any special statute, a corporation may be formed for the purpose of supplying light, heat and power by means of natural gas, artificial gas and electricity.

Whether or not it is proper to join with the purpose already discussed, which may be regarded as a "single one" within the meaning of the well-understood rule above referred to, that of supplying water for public and private consumption and use, depends upon the proper interpretation of section 10212, General Code, which provides as follows:

"Any two or more electric lighting companies, natural or artificial gas companies, gas light or coke companies, companies for supplying water for public or private consumption; or any electric light and power company and any water company; or any heating company and any incline, movable or rolling road company; 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 manner and with the same effect as is provided for the consolidation of railroad companies."

It is clear, of course, that if this section authorizes the *consolidation* of a corporation, the powers of which are limited within the discription of the first part of the first sentence of the purpose clause under discussion, with another corporation, the powers of which are limited within the language of the last part of said sentence, then it must be held that a single corporation could be originally formed for both purposes; because it would be idle to deny the power to incorporate a single company if the same result could be obtained by the original incorporation of two companies and their subsequent consolidation.

In a liberal view of section 10212 the second phrase thereof would justify the joinder of purposes made in the first sentence of the articles of incorporation. It is clear that the company is an electric light and power company and that it is also a water company. But if a stricter view be taken, this part of section 10212 would not suffice; for although the company is to be an electric light and power company it is also to be an artificial and natural gas company; and if the right to consolidate under the second phrase of section 10212 is to be limited to those electric light companies which are purely such, then the Loveland Light and Water Company would fall outside of the pale of this part of the statute.

Looking now at the first clause of section 10212, it appears to be possible to read it in two ways, one of which will justify the first sentence of the articles of incorporation and the other of which will leave the question in the condition on which consideration of the meaning of the second clause of the section leaves it. These two interpretations are as follows:

1. Any two companies mentioned in the first clause of the section may consolidate; that is an electric lighting company may consolidate with a natural gas company and water supply company, etc., if located in the same municipality.

2. Consolidation under this part of the section can only be between or among two or more companies of the same kind therein mentioned. Thus an electric light company under this part of the section can consolidate only with an electric light company.

Viewed from any angle whatever, the whole section is very ambiguous. I find help, however, in resolving its ambiguity by tracing its legislative history.

Section 10212 was section 2485a, Revised Statutes, as last amended 97 O. L., 281, that section read as follows:

"Any two or more 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 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 section."

Said section 2478 at that time read as follows:

"The council of any city or village in which electric light companies, natural or artificial gas companies, or gas light or coke companies, or companies for supplying water for public or private consumption, may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate from time to time, the price which said electric lighting, natural or artificial gas, gas and coke companies, may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places. or for fire protection; and such electric lighting, natural or artificial gas, gas light or coke companies, or companies for furnishing water for public or private consumption, shall in no event charge more for any electric light, or natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent for their meters."

The legislative history makes the intent and meaning of that part of section 10212, particularly now under discussion, clear. The first of the two interpretations above suggested must be selected and it must be held that by virtue of the first clause of section 10212, a natural gas company, an artificial gas company, an electric light company and a company for supplying water, etc., might be consolidated, and, therefore, that a single company might be formed to conduct all these activities in the first place.

But this conclusion does not necessarily establish the validity of the first sentence of the purpose clause under consideration. The electric business of the Loveland Light and Water Company is to be the supplying of that current, not for light only, but for purposes of heat and power also. Apparently an electric lighting company is distinguished in the section from an electric light and power company, and both are alike distinguished from a "heating company."

That is to say, it appears from a cursory reading of the section that at least in the mind of the legislature, an "electric lighting company" would be such a company as might be engaged exclusively in furnishing electricity for lighting purposes, eliminating the activity of supplying the same commodity for power and heat purposes.

But the legislative history, as I view it, rebuts what is perhaps a natural, yet not not the only possible inference, which might be drawn from the language of present section 10212.

The phrase, "or any electric light and power company and any water company," gives rise to all the trouble here, for it must be acknowledged that the subsequent mention of a heating company does not effect the question of legislative intent inasmuch as such companies are coupled with inclined movable or rolling road companies, and these companies are not mentioned in the first clause of section 10212 nor in original section 2478 Revised Statutes.

I find that the troublesome clause in question was introduced in section 2485a by the amendment of 1904, above cited. As originally enacted, this section of the Revised Statutes was as follows:

"Any two or more of the companies mentioned in section 2478, 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."

Reading this section in connection with section 2478, I am clearly of the opinion that during the time when they were both in force that was an "electric lighting company" within the meaning of section 2478, which was in the business of furnishing electric light to consumers; and that it could not have been interposed by such a company, as an objection to the exercise of the regulatory power vested in the council of the municipality by section 2478, R. S., that it was also engaged in the sale of electricity for power or heat purposes. In other words, within the purview of section 2478 a corporation engaged in the business of furnishing electricity for light, heat and power purposes, was an "electric lighting company." Therefore, it was a "company mentioned in section 2478" within the meaning of original section 2485a, and when subsequently section 2485a was amended by inserting specific authority for an "electric light and power company" to consolidate with a "water company," such amendment to the extent just described was quite superfluous and added nothing whatever to the law as it had previously existed.

I am aware that an amendment may be said to amount to a legislative interpretation of the law as it finds it. However, a succeeding legislature may conceivably misinterpret the intention of an earlier session, and where a more trustworthy criterion of the meaning of the pre-existing law than the amendment itself may be found, it should be allowed to govern. And if it appears that the legislature amended the section, and in course of amending it, caused it to be re-enacted in full, in compliance with the constitutional mandate, the mere fact that the legislature *supposed* the amendment to be necessary in order to accomplish a given purpose, cannot be used as evidence of intention to narrow the remainder of the law to the scope indicated by the amendment. That is to say, because apparently the legislature in 1904 thought it was necessary to so amend section 2485a as to grant specific authority to an electric light *and power* company to consolidate with a water company, such action is not to be taken as evidence that that legislature *intended* that the phrase "Any two or more of the companies mentioned in section 2478," should have a meaning more restricted than the same phrase had had when originally enacted.

I am of the opinion, therefore, that section 10012 interpreted (if it requires interpretation) in the light of its legislative history, authorizes the formation of a *consolidated* corporation, having all the powers mentioned in the first sentence of the articles of incorporation submitted to me by you; and being of that opinion, I am also of the opinion that a single corporation may be originally formed for such purposes.

Therefore, I advise you that the first sentence of the articles of incorporation of the Loveland Light and Water Company does not offend against the law.

But I regret that I cannot advise you similarly with respect to the second sentence of the purpose clause of the articles of incorporation submitted by you. This part of the purpose clause undertakes to confer upon the corporation the authority to manufacture, buy, sell and deal in natural and artificial ice and to do a general refrigerating and cold storage business. Manifestly, these powers cannot be combined with the others already discussed. Section 10212 does not authorize such combination, directly or indirectly, and the general rule above referred to forbids it.

The correspondence enclosed with your letter shows that there are on file and of record in your office articles of incorporation purporting to authorize a certain corporation, formed for the principal purposes of manufacturing and furnishing electric current for lighting, heating and power, and supplying the town of Loveland with water, "as incident thereto" to manufacture and store ice and to use and sell the same for all purposes, and to maintain and operate a refrigerating plant.

Counsel who present the articles of incorporation of the Loveland Light and

Water Company call attention to the articles now of record in your office, and rely upon their issuance in the past as a precedent justifying the filing of the present articles.

Obviously there is a distinction between the old and the new articles. The words "buying," "dealing in" and "natural" would have to be eliminated from the present articles and the entire second sentence qualified by the phrase "and as incidental thereto" before the present articles would be like those already recorded in your office.

But I do not wish to mislead the parties interested in the articles of incorporation, and in order to make my position clear, I wish to state that, in my opinion, if the changes just described were made in the second sentence of the articles of incorporation of the Loveland Light and Water Company the articles would still have to be rejected. In short, I am of the opinion, without discussing the matter elaborately, that in law and in fact the activity of manufacturing and selling artificial ice and doing a general refrigerating and cold storage business is not, and under no circumstances could it be incidental to the business of operating a combined light, heat, power and water plant.

I am verbally informed by counsel, in addition to the facts set forth in the correspondence enclosed in your letter, that the present company is one which is designed to take over the property and business of a pre-existing company, that the pre-existing company owns, or did own, a combined electric light and water plant in which, as a matter of course, are installed and operated boilers for the generation of steam. Near by this plant is an ice manufacturing plant, fully equipped with the different appliances which are necessary to carry on that business. However, it seems that the exhaust steam from the light and water plant has been, and doubtless will continue to be, used in carrying on some essential process in the manufacture of ice, and for that purpose such exhaust steam has been conducted by pipes to the ice plant, and sold by the company operating the light and water plant to the company operating the ice plant.

It is anticipated that because of the relatively small population to be served, the two plants, i. e., the light and water plant and the ice plant can never be economically operated under separate management, and, therefore, it is desired that a single company be formed for the purpose of taking over all these activities, related in the way which I have designated; and it is urged, as a proposition of law, that under these circumstances the manufacture of ice is properly incidental to the operation of the light and water plant.

I am unable to bring myself to the conclusion just stated. Two principles would seem to be involved, and may be stated alternatively thus:

1. Either the fact that exhaust steam is used in the manufacture of ice of itself constitutes the manufacture of ice, an activity incidental to any activity that requires or justifies the production of exhaust steam; or,

2. Where the public to be served is so restricted in number that the two kinds of business cannot be profitably carried on except under one management, the manufacture of ice, though under other circumstances not incidental to the operation of a light and water plant, becomes so by reason of this fact alone.

Neither one of these principles is, in my mind, tenable. As to the first, it is a sufficient answer to say that it does not appear that a light and water company, as such, is capable of producing exhaust steam suitable for use in the manufacture of ice to an extent peculiar to itself and greater than that to which any other company generating steam would be capable of furnishing such exhaust steam. So that if the power to manufacture ice becomes an incidental power because of the generating of exhaust steam, then it is a power incidental to the principal power of any corporation which finds it necessary or convenient in the accomplishment of such principal purpose to generate steam. That is to say, if this principle is correct, then any corporation using steam for power purposes on any considerable scale, would have the incidental power to manufacture ice. To state such a proposition, is to refute it. It is, I take it, well known that while exhaust steam may be a necessary, and even a principal material or factor, in the manufacture of ice, the business of manufacturing ice cannot

be carried on without special and peculiar equipment. Indeed, there is required in what is known as a "refrigerating plant," a manufactory quite separate and distinct from any other type of factory which might be imagined. There are required, also, if the business of selling artificial ice is to be engaged in, means of delivery, such as horses, wagons, etc., which constitute a species of equipment quite separate and distinct from anything required in such a business as the operation of a light and water plant.

Therefore, I conclude that the mere fact that exhaust steam from the boilers of the one plant has been, and will be, used in the manufacture of ice in the other plant, does not make the whole business of manufacturing ice incidental to the business conducted at the light and water plant nor in any way related to that business.

In this connection, of course, two collateral points may be mentioned, viz.: in the first place, the power to sell the exhaust steam, as such, clearly exists; but this is quite a different thing from utilizing the exhaust steam in a separate and distinct business. In the second place, the business of manufacturing ice may be properly incidental to another business, such as the meat packing business, the hotel business and any business of manufacturing perishable goods requiring refrigeration, but this merely suggests the true test which is to be applied in all cases, viz.: the relation between the end sought to be accomplished by the incidental activity, and the end sought to be promoted by the principal business of the company. In the cases which I have mentioned refrigeration is probably incidental to the principal purpose, because the refrigeration itself is necessary or convenient to promote such principal purpose; in the case under discussion refrigeration, or manufactured ice as a finished product, or either of them or in any way necessary, convenient or useful in carrying on the business of operating a light and water plant.

The second alternative principle above stated, must be rejected for the sufficient reason that the relation of one power to another power is an abstraction and is to be determined by the application of general rules. Specific cases and varying circumstances of the kind mentioned will not change such general rule. If the ice business is not incidental to the electric and water business in one place, it is not incidental in another. Again, the mere fact that the promoters of the new company may deem it impossible to furnish the inhabitants of the village of Loveland with water, gas, electricity and ice economically, save under a single corporate management would not be sufficient to justify the formation of a single corporation to conduct these various and unrelated activities; or if such considerations were allowed to control, then, in a given case, it might be contended that the coal business of the village (which is of a character similar to the ice business) should also be carried on by the lighting and water company; in short, any number of activities, otherwise unrelated, could be joined together on the plea that economy of management dictated such a joinder. Such considerations cannot be entertained under the rule of singleness of purpose, which governs the formation of corporations in Ohio. Perhaps the general rule which applies here is that it will be found stated in the text books to the effect that simply because a given activity may be deemed profitable or actually would be profitable to a given corporation, it does not follow that such activity constitutes the doing of the thing "necessary or convenient" for the accomplishment of the corporate purpose, within the rule of law applicable in Ohio, as well as elsewhere to the effect that a corporation has, as incidental, the implied power to do such things as are necessary or convenient to the accomplishment of its declared principal purpose and object.

For the reasons stated, then, I am clearly of the opinion that under no circumstances may a corporation formed for the principal purpose of supplying gas and electricity for light, heat and power purposes, together with supplying water for public and private consumption, join with such purposes in its articles of incorporation the additional purpose, whether formally characterized as incidental or not, of manufacturing or dealing in ice and doing a general refrigerating and cold storage business.

I, therefore, return to you the articles of incorporation of the Loveland Light and Water Company, with the advice that so much of the second sentence of the purpose clause thereof as relates to the purpose of manufacturing, buying, selling, etc., natural and artificial ice, and doing a general refrigerating and cold storage business, be eliminated therefrom, before they are filed and recorded by you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1100.

WOMEN MAY WORK FOR TWO DIFFERENT EMPLOYERS SO LONG AS THEY DO NOT WORK MORE THAN FIFTY-FOUR HOURS PER WEEK.

It is not a violation of the law limiting the hours of labor for women, for two different employers to suffer or permit women to work in the respective establishments of such employers, ten hours a day, or in excess of fifty-four hours a week, even though the aggregate number of hours worked in both establishments is greater than allowed by said limitations.

COLUMBUS, OHIO, August 12, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of June 24, 1914, you submitted the following which has been presented by the chief deputy of your department of inspection:

> "Some of the deputies of this division report to me that they frequently find women over eighteen years of age being employed in two different establishments and by two different employers, the number of hours worked in either of these establishments not being in excess of the ten hours per day or fifty-four per week, but the aggregate number of hours worked in both establishments is in excess of both of these limitations in many cases.
>
> "Would you please advise me whether or not in your judgment this kind of employment constitutes a violation of the law limiting the hours of labor for females over eighteen years of age, and if so, which of the employers is guilty of the violation?"

The statutory language which you have in mind in submitting this question is taken from section 1008 of the General Code, as amended 103 Ohio Laws 555, and reads thus:

> "* * * Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods."

The foregoing quoted language was intended to prevent continuous employment of women over eighteen years of age in designated establishments, beyond the pre-

scribed number of hours. It seems to be aimed at the employment in a single establishment, as is manifest from the fact that it distinctly states that women over eighteen years of age shall not be employed, permitted or suffered to work in or in connection with *any* factory, etc. The only construction that can be placed upon such language is that those persons referred to in the statute may not work more than ten hours a day or more than fifty-four hours a week in any one of the establishments designated in the statute. Had the legislature intended to limit the time of employment absolutely, and without reference to the particular place of employment, I feel confident that a different form of expression would have been adopted.

As the sanction of this statute is penal it necessarily follows that it must be strictly construed and cannot be extended, by implication, beyond its plain letter. Therefore, it is my judgment that in order to come within the inhibition of the statute it is necessary that it be shown that the woman employe works more than ten hours a day or more than fifty-four hours a week in a particular establishment, and if the employment was in two different establishments, in neither of which such employe works in excess of the prescribed statutory time, there has been no violation of the law. There being no such violation under the circumstances set out in your letter, it follows that neither of the employers can be prosecuted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1101.

TOLEDO STATE HOSPITAL—CHANGE IN PLANS AND SPECIFICATIONS OF BUILDING.

In the construction of a laundry building at the Toledo State Hospital, it is found necessary on account of quick sand to make changes in the plans and specifications. Such change can be made under authority of sections 2320, et seq., General Code, to meet the new conditions, increasing the cost of the building; the same can be done with the consent of the governor, auditor and secretary of state.

COLUMBUS, OHIO, August 17, 1914.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—A few days ago you asked my opinion as to what could be done by your board in meeting an unexpected situation which has arisen in the matter of the construction of a laundry at the Toledo State Hospital, a contract for which building has been let by your board pursuant to the state building regulations.

The original estimate as to the cost of this building upon which bids were received was $50,533.70. The contract was let at a figure slightly lower than the estimate, to wit: $50,260.00. It seems that the nature of the ground upon which the buildings at this institution have been erected, is such as to require piling in order to support the foundations of such buildings. While uniformly heretofore in putting the piling for other buildings at this institution the piles after passing through the top soil and subsoil have penetrated about eighteen inches of quicksand before reaching clay upon which the column could rest, in putting down the first pile for the laundry building it was discovered that the quicksand encountered in placing the same was of a depth of forty-seven inches instead of eighteen inches as expected. After this condition was revealed in placing the first piling, they were put down at two other divergent places, the result being the same with respect to the depth of the quicksand en-

countered, so that it seems that there is reason for the assumption that the same condition as to the amount of quicksand prevails under the whole of the projected building.

This condition of affairs as represented by you and the architect in charge, calls for an increased expenditure in the matter of piling to support this building, the same being occasioned both by an increase in the length of the piling to be used and also possibly in the number of the piling that will have to be placed. The present contract as I understand it, calls for 12-ft. bulb piling, as it was contemplated that piling of this character and length were amply sufficient to meet the requirements. The new conditions which have developed in this matter will probably make it necessary to use 15-ft. piling instead of the 12-ft. length, and this change in the specifications will call for an increased cost in the matter of piling of $1,500.00. The contract price is only $273.70 less than the estimate, and the question you propound with respect to this situation is whether or not the law affords any means whereby the necessary increased cost of piling for this building can be made.

By force of the provisions of section 2314 and following sections of the General Code, contracts for the erection, alteration or improvement of a state institution or building, or addition thereto, excepting the penitentiary, the aggregate cost of which exceeds $3,000.00, can only be let after competitive bidding on plans, specifications and estimates of the cost thereof previously made. After the contract is awarded and entered into with the successful bidder, and the contract has been approved by the attorney general, it, together with the plans, specifications, etc., is required to be filed with the auditor of state.

As pertinent to the question presented by you, sections 2320 to 2323, General Code, inclusive, provide as follows:

> "Section 2320. After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans.
>
> "Section 2321. No allowance shall be made for work performed or materials furnished under the changed plans, descriptions, specifications or bills of material unless a contract therefor is made in writing before the labor is performed or material furnished, showing distinctly the change. Such contract shall be subject to the conditions and provisions imposed upon original contracts, and approved by the attorney general.
>
> "Section 2322. All changes in a contract of less than one thousand dollars shall be in writing with full specifications and estimates, become part of the original contract, and be filed with the auditor of state. The aggregate of such changes in the contract, plans, descriptions, bills of material or specifications shall not increase the cost of the construction more than two and one-half per cent. of the original contract price.
>
> "Section 2323. No contract shall be made for labor or materials at a price in excess of the entire estimate thereof. The entire contract or contracts, including estimates of expenses for architects and otherwise, shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof."

As the increased cost to meet the situation presented will exceed one thousand dollars, the approval and consent of the governor, auditor and secretary of state will be necessary before a change can be made in the plans and specifications to meet the

situation presented, and the work to be performed and material to be furnished under the changed plans and specifications must be covered by contract in writing, which contract shall be subject to the conditions and provisions imposed by law upon the original contract, and must be approved by the attorney general. It is likewise necessary that the whole of the contract price for the construction of this building must not be in excess of the entire estimate thereof, that is, it must be within the original estimate, and the statute made covering the matter of the increased cost.

Section 2322, General Code, provides "the aggregate of such changes in the contract, plans, descriptions, bills of material or specifications, shall not increase the cost of the construction more than two and one-half per cent. of the original contract price." It is clear, however, from a consideration of section 2322, General Code, as a whole, as well as of section 786 R. S., from which this section was codified, that the provisions just quoted have reference to changes in the original contract of less than $1,000.00, and that they have no application to changes increasing or decreasing the cost to exceed $1,000.00, when made with the consent of the governor, auditor and secretary of state. The only limitation on the changes so made is that the contract for the construction of the building according to the changed plans and specifications must not call for a cost price for the construction of the same exceeding the entire estimate, that is, the estimate made covering the matter of the estimated cost of the building according to the changed plans and specifications.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1102.

ABSTRACT OF TITLE—PROPERTY SITUATED IN BUTLER COUNTY, LEMON TOWNSHIP, OHIO.

Abstract of title of property situated in Butler county, Lemon township, Ohio, shows the S. & M. Margolis Realty Company, of Dayton, Ohio, to have a fee simple title to said real estate; the deed to the state of Ohio is sufficient in form to convey to the state a fee simple title.

COLUMBUS, OHIO, August 18, 1914.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 16th, requesting my opinion as to the sufficiency of the title disclosed by the abstract and deed from the S. & M. Margolis Realty Company of Dayton, Ohio, accompanying your letter, which real estate is described as follows, to wit:

> "Situated in the county of Butler in the state of Ohio, and in the township of Lemon, and bounded and described as follows:
>
> "Being a tract of land in section 18, Lemon township, Butler county, Ohio, lying north of the foot of the slope of the original levee embankment on the west side of the Middletown feeder to the Miami and Erie Canal and the Middletown Hydraulic.
>
> "Commencing at the center of a concrete monument that bears S. 16 deg. 30' W. 99 feet from a cross on the first or lower step of the northerly buttress wall at the north end of the head gates of the Middletown feeder to the Miami and Erie Canal, which monument also bears S. 66 deg. 45' W. From a cross on the abutment wall at the south end of the head gates across the

Middletown feeder; thence along the west line of the original levee embankment by the following courses and distances; N. 17 deg. 20′ E. 152.45 feet to the center of a concrete monument; thence N. 27 deg. 54′ E. 152.2 feet; thence N. 35 deg. 30′ E. 586.1 feet to the center of a concrete monument at the foot of the original embankment of the canal feeder and in the center of the old farm levee that originally formed the line between lands owned by the Middletown Hydraulic Company and the lands formerly owned by J. S. Stoutenborough; thence N. 3 deg. 53′ E. along the center line of this farm levee 435.1 feet the center of a concrete monument at the north end of the tract herein conveyed; thence S. 45 deg. 22′ W. 410 feet; thence S. 30 deg. 16′ W. 780 feet to the center of a concrete monument; thence S. 40 deg. 48′ E. 304.7 feet to the place of beginning, and containing 6.48 acres, more or less."

The abstractor's certificate is deficient in that it fails to state whether his examination disclosed any pending suits, living judgments, executions, foreign or domestic, or tax sales against the above described land or the owner thereof. No examination appears to have been made of the records of the United States court to determine the existence of liens, judgments or bankruptcy proceedings therein against the owner of said real estate, and I suggest that in lieu of such examination a certificate of the clerk of said court covering these matters, be attached to the abstract. The abstract does not disclose the existence of any liens except a mortgage on 15-100 of an acre of the land; the taxes for the last half of the year 1913, due June 20, 1914, amounting to $45.33; and the undetermined taxes for the year 1914.

Subject only to the foregoing, I am of the opinion that the abstract shows the present owner, the S. & M. Margolis Company, to have a fee simple title to said real estate. The deed to the state of Ohio is duly signed, acknowledged and witnessed, and is sufficient in form to convey to the state a fee simple title.

The abstract, deed, etc., are enclosed herewith.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1103.

RIGHT OF A DEPUTY CLERK TO BE APPOINTED PROBATION OFFICER IN PROBATE OFFICE.

A deputy clerk in the probate office may also be appointed a probation officer in the probate office.

COLUMBUS, OHIO, August 18, 1914.

HON. E. C. PECK, *Probate Judge, Bryan, Ohio.*

DEAR SIR:—I have your letter of June 17, 1914, asking the following questions:

"*First.* Can the deputy clerk in the probate office be also appointed a probation officer and draw the emoluments, or fees, for both positions lawfully?

"*Second.* What, if any, fees are allowed to the probate judge for his fee fund, and by whom payable, in the matter of applications and investigations for mothers' pensions under the mothers' pension law, so-called, of Ohio?

"*Third.* What fees, if any, can be allowed to a person or committee,

other than the probation officer, for making an investigation and report of the applicant, as required by law?"

Section 1584, General Code, reads:

"Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

By virtue of section 2980-1, General Code, the salary of the deputy clerks is fixed by the probate judge from the amount allowed him by the county commissioners for clerk hire.

Section 1662, General Code, as amended 103 O. L., page 874, reads:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be women, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be first, second and third assistants. Such chief probation officer and the first, second and third assistants, shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed twenty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum, each payable monthly. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

The rule of incompatibility is stated by Judge Dillon, at page 727 of volume 1, of his work on municipal corporations, as follows:

"Incompatibility in offices exists when the nature and duties of the two offices are such as to render it improper from the considerations of public policy, for one incumbent to retain both."

From a consideration of the duties of the deputy clerk of the probate court and probation officer, I can see nothing that would make the two offices incompatible under the above rule, and it is my opinion that they may be held by one and the same

person, providing, of course, that it is physically possible for one person to properly attend to the work of both offices.

Your second and third questions are answered by an opinion of this department under date of July 20, 1914, in which it was held that no fees or costs of any character whatever are to be charged or collected from any source on account of proceedings of the mothers' pension act, prior to the filing of a motion to set aside or vacate or modify a judgment or allowance, and no compensation by way of fees is to be charged or collected from any source by the probation officer, associated charities organization, humane society or any other competent person or agent directed by the court to prepare and file the written report of preliminary examination, as provided by section 6383-3. I am enclosing a copy of this opinion for your information.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1105.

TAXES ON MONEY BELONGING TO THE WOOD, WIRE AND METAL LATHERS' INTERNATIONAL UNION

Money in bank belonging to the Wood, Wire and Metal Lathers' International Union is taxable, the union not being an institution of purely public charity.

COLUMBUS, OHIO, August 18, 1914.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of March 13, 1914, you requested my opinion as to whether or not money in bank belonging to the Wood, Wire & Metal Lathers' International Union is taxable. With your letter you submit correspondence with the general secretary-treasurer of the union, and a copy of its constitution in effect December 1, 1912.

In an opinion heretofore rendered to you I advised the commission that insofar as sections 5364, 5365 and 5365-1 of the General Code were invalid, under the constitution of 1851 they are to be regarded as now unconstitutional and of no effect, the verbal change made in article XII, section 2, of the constitution, not having the effect of validating them to the extent that they might be regarded as consistent with the amended section. In that opinion I did not attempt to pass upon the extent to which, if at all, any of these sections might be regarded as valid, under the constitution of 1851. I may say, however, that in my opinion, insofar as section 5364 provides for the exemption of moneys and other property belonging to secret benevolent organizations maintaining a lodge system, etc., it was unconstitutional and void, at least to the extent that exemption was thereby attempted to be afforded to the property of organizations which do not constitute "institutions of purely public charity" within the rule laid down in Morning Star Lodge vs. Hayslip, 23 O. S., 144.

At the same time, there was in effect under the constitution of 1851, a statute authorizing the exemption of property of "institutions of public charity only" (section 5353, General Code), which statute, for obvious reasons, so long as article XII, section 2, as adopted in 1851, was in effect, could have no exempting effect beyond the limits prescribed by the constitution, viz.: "institutions of purely public charity;" for which reason it seems reasonably clear that the phrase "public charity only" (a substitute for "purely public charity" introduced in process of codification), means exactly the same thing as the constitutional phrase itself.

It so happens that section 5353 of the General Code, of all the tax exemption statutes, is the only one which has been amended since January 1, 1913, when the

amended constitution became effective (see 103 O. L., 548). In its amended form, however, it still limits its force to "institutions of public charity only," the amendment being, in respects, immaterial to the present inquiry. And because this portion of the section was unchanged, I am clearly of the opinion that though passed under a constitution permitting the exemption of the property of charitable institutions, without regard to the public nature of the charity, this statute is still limited to institutions of purely public charity, within the meaning of that term as defined by the courts. In other words, though, when section 5353 was amended, the legislature might, constitutionally, have made it extend to all exclusively charitable institutions, it did not do so, but left if as it had been before, viz.: limited to institutions of *purely public charity.*

From what has been said it follows that the property of the organization in question, if exempt from taxation, must be brought within the scope of section 5353 of the General Code, as amended.

There is an interesting question now pending in the supreme court in the case of Benjamin F. Rose Institute vs. The Treasurer of Cuyahoga county, on rehearing, respecting the exemption, under section 5353, of moneys and credits appropriated solely to sustain an institution of purely public charity. That is, the question is as to whether such property, as distinguished from real and tangible personal property directly used in the administration of the charity, is exempt under the section; but this question, which may be regarded as an open one, is not reached in the case you submit until it has been decided that the Wood, Wire & Metal Lathers' International Union is "an institution of purely public charity."

The object of the institution, as stated in the constitution, is as follows:

> "To encourage and formulate local unions of the craft, the closer amalgamation of locals under one head, to establish the eight-hour day, to effect an equitable adjustment of all differences arising from time to time between our members and their employers, to the end that trade quarrels, strikes and lockouts, may be reduced to a minimum, to more thoroughly inculcate the principles of unionism, and secure an improvement of the conditions under which we labor."

So far as this statement is concerned, the general benefits of the organization, as a whole, are mutual in character; i. e., restricted to the membership of the local unions, under the jurisdiction of the International Union.

The membership of the local unions is regulated by the constitution of the International Union, as follows:

> "The qualifications necessary to entitle an applicant to membership shall be left entirely to the will of each local; but in no case shall any person be admitted to membership in any local union of this organization as a member who has not previously worked two years at the trade of lathing. And that no one shall be discriminated against for race or color."

There are numerous other provisions respecting membership, which I need not quote. Suffice it to state that membership is not open to all lathers on the same terms, but that, apparently, members are chosen such by action of those who are already members.

The revenue provisions of the constitution authorize the collection of a certain per capita tax and initiation fees and assessments, and include the following:

> "All revenue collected shall be placed in one general fund, from which all expenses, death benefits and outlays of any nature shall be paid."

The matter of the disbursement of these funds by the following:

"On the death of a member who is in good standing, both with the International and with his local union, a funeral benefit will be paid, subject to the conditions hereinafter set forth."

Here follow certain conditions:

"On the death of a member whose record conforms to the foregoing conditions, the funeral benefit, to which the deceased brother is entitled, will be paid to the person who has assumed the obligations of the interment, subject to receipted bills for the expense, forwarded to headquarters, and if there be a wife, mother, father or sister, who has been dependent on the deceased brother, any balance over the funeral expenses will go to such parties in the order named. * * *"

The foregoing are indicative of the nature of all the material provisions which I find in the constitution and laws of the union. I am informed by the correspondence, however, that this organization is affiliated with and a member of the American Federation of Labor. The statement is made that the American Federation of Labor is engaged in public effort for better social conditions of the people of the country, in general, and the inference is that some of the funds of the Wood, Wire & Metal Lathers' International Union are contributed, either voluntarily or otherwise, to the support of the American Federation of Labor.

In my opinion, the facts, as I understand them from the papers submitted to me, are not sufficient to constitute the union an "institution of purely public charity." So far as the organization itself is concerned, it is clearly and admittedly a mutual affair and the question, thus far, is certainly governed by Morning Star Lodge vs. Hayslip, supra.

The mere fact that the union is affiliated with the American Federation of Labor does not change the aspect of the case. The American Federation of Labor may be and doubtless is an institution of purely public charity. Its property located within the state of Ohio might be exempt from taxation, but its affiliated unions, which contribute to its fund, cannot, for that reason, be held to absorb its characteristics. It would be as logical to hold that a manufacturing corporation would become an institution of purely charity by reason of membership in an associated charities organization.

For all the foregoing reasons I am of the opinion that none of the property of the Wood, Wire & Metal Lathers' International Union is exempt from taxation.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1106.

IMPROVEMENT OF ROADS OF A TOWNSHIP BY GRAVELING WITHOUT A VOTE OF THE PEOPLE—INCREASING TAX LEVY.

Inasmuch as no bonds can be issued under section 7033, et seq., General Code, to improve roads of a township by graveling without a vote of the people, tax levies for the retirement of such bonds are outside of the ten mill limitation, and an election under section 5649-5, General Code, to increase the tax levy will be necessary.

COLUMBUS, OHIO, August 18, 1914.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your letter of July 7th, you request my opinion as to whether or not it is practicable for a certain township in Geauga county to proceed under sections 7033 et seq. of the General Code to improve the roads of the township, by graveling, at the expense of the general tax duplicate, when it is certain that the taxes necessary to be levied, if within the limitations of the Smith law, together with other taxes, as to which it is now certain that levies must be made, will cause the ten-mill limit of the Smith law to be exceeded.

In so far as your question involves purely legal consideration, I would answer it by saying that it does not follow that the ten-mill limitation of the Smith law is an obstacle, under the circumstances mentioned. That limitation which is provided for by section 5649-2, as amended 103 O. L., 552, is exclusive of the levies "for sinking fund and interest purposes * * * necessary to provide for any indebtedness * * * incurred by a vote of the people." Sections 7033 et seq. contain authority to issue bonds upon a vote of the people for the purpose of making the improvement. In fact, section 7037, General Code, seems to require the submission to the electors the question of issuing bonds as a condition precedent to all other actions. It reads as follows:

> "Before the improvement of any of the public ways shall be undertaken, and before bonds shall be issued to pay for such improvements, the question of improving the public ways and of issuing bonds shall be submitted to the qualified electors of the road district, at a general or special election. The trustees shall cause not less than ten days' notice to be given in the manner provided by law for other general or special elections of the purpose, time and place of holding the election and the aggregate amount of the bonds."

The question to be submitted is specified in section 7039, as follows:

> "The clerk of the township shall file a certified copy of such resolution with the deputy state supervisors of elections of the county in which the road district is located, not less than fifteen days before the time therein fixed for the election. The deputy state supervisors of elections shall cause to be prepared and furnished, at the expense of the township, ballots for the election, on which shall appear the words 'Road improvement bonds—yes,' 'Road improvement bonds—no.' "

Section 7051 providing for the tax levy, is as follows:

> "The trustees shall provide means to pay the expense and cost of such improvements, and to pay the principal and interest of such bonds, by a general tax levied upon the taxable property of the respective road districts. The

levies for such tax shall be certified to the county auditor as provided by law in the case of other levies of township trustees."

So that it appears that indebtedness incurred for the purpose of graveling roads, as provided for by section 7033, General Code, as amended 103 O. L., 475, would be an indebtedness provided for by a vote of the people, within the meaning of the Smith law; and, therefore, the levies authorized in section 7051, General Code, would be exempt from the one per cent. limitation.

Such levies would have to be made, however, within the fifteen-mill limitation of section 5649-5b, as amended 103 O. L., 57. I take it, however, from your reference to section 5649-5 et seq., that there is, so to speak, room between the ten-mill limit and the fifteen-mill limit within which the expenses of such a road improvement might be cared for. Therefore, I assume that the conclusion at which I have arrived, namely, that if the vote of the electors, required in the related sections, is taken, the levies provided therein are outside of the ten-mill limitation, is sufficient for your purposes.

I may add that under section 5649-3a, General Code, levies in road districts, while apparently subject to the inclusive limitations of the act, are not subject to the control of the budget commission, so that it is possible, under the law as it stands, for a road district to be created and for levies, in that district, to take precedence over levies for current expenses of the various governmental subdivisions. However, that question does not seem to be involved in your inquiry.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1107.

RIGHT OF MUNICIPAL CIVIL SERVICE COMMISSION TO FIX SALARIES OF ITS EMPLOYES—POWERS OF COUNCIL.

Section 19 of the civil service act, section 586-19, General Code, does not confer upon the municipal civil service commission the power to fix the salaries of its employes; these salaries are to be fixed by council.

COLUMBUS, OHIO, August 18, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—The bureau of inspection and supervision of public offices, under date of July 28, 1914, submit the following inquiry:

> "Has the municipal civil service commission of a city the authority to fix salaries of examiners, physicians and clerks in their department, or is such authority lodged in the city council?"

Section 19 of the civil service act, section 486-19, General Code, provides among other things:

> "Such municipal civil service commission shall prescribe, amend and enforce rules not inconsistent with the provisions of this act for the classification of positions in the civil service of such city and city school district, for examinations and registrations therefor, and for appointments, promotions, transfers, layoffs, suspensions, reductions and reinstatements therein, for standardizing positions and maintaining efficiency therein. Said municipal commission shall have and exercise all other powers and perform all other

duties with respect to the civil service of such city and city school district, as herein prescribed and conferred upon the state civil service commission with respect to the civil service of the state; and all authority granted to the state commission with respect to the service under its jurisdiction shall be held to grant the same authority to the municipal commission with respect to the service under its jurisdiction. The expense and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city."

By virtue of this section the "expense and salaries of any such municipal commission" are to be determined by council.

As to the clerks and employes of the state civil service commission, that commission is specifically given power to fix the salaries of such clerks and employes.

In section 5 of civil service act, section 486-5, General Code, it is provided in part:

"* * * The salary of the chief examiner shall be fixed by the commission, subject to the approval of the governor. * * *

"The commission may also appoint such examiners, inspectors, clerks and other assistants as may be necessary to carry out the provisions of this act, and fix their salaries. * * *"

Section 4214, General Code, provides:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Under section 19 of the civil service act, supra, the municipal civil service commission, as to the service under its jurisdiction, is granted the same power and authority as the state civil service commission has as to the state civil service. This provision has reference to the power and authority over the positions in the classified service, and those making appointments to the classified service. It does not grant to the municipal civil service commission the power to fix the salaries of the examiners, physicians and clerks of such municipal civil service commission.

The council has the power to fix the salaries of the employes of the municipal civil service commission.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1108.

FORMATION OF A CORPORATION FOR THE PURPOSE OF EDUCATION, AMUSEMENT AND INSTRUCTION—RIGHT TO ACQUIRE AND OWN PROPERTY.

A corporation formed for social purposes, education, amusement and instruction of singing may acquire and hold real property for the purpose of erecting a club house or headquarters.

COLUMBUS, OHIO, August 18, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging receipt of your letter of July 21st, with its enclosure, a communication addressed to you by Mr. I. B. Miller, of Youngstown, and submitting the general question as to whether a corporation formed for "social purposes, education, amusement and instruction in singing" may acquire and hold real property, I beg to state that in my opinion such a corporation may exercise the franchise in question.

Section 8627, General Code, provides as follows:

> "Upon filing articles of incorporation, the persons who subscribed them, their associates, successors and assigns, by the name and style provided therein shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization."

As is apparent, the office of this section is to define statutory powers incidental to a corporation organized under the laws of Ohio. It is general in its terms, and its force is not limited to corporations for profit.

In the specific case submitted, then, the question is as to what real property is "necessary to effect the objects for which it (the particular corporation) is created."

In my opinion such real estate as may be necessary to effect the object of promoting social activities, and particularly education, amusement and instruction in singing, may be acquired, held and conveyed by this corporation.

I note from the letter of Mr. Miller that the realty which it is desired to acquire is for the purpose of erecting a club house or headquarters. Undoubtedly the corporation has power to acquire such property, there being no purpose to deal in real estate commercially or to promote any business or other purpose aside from the objects of the corporation itself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1109.

CONSTRUCTION OF A SEWAGE DISPOSAL PLANT—UNDER THE BENSE ACT, CITY AUDITOR'S CERTIFICATE, THAT THE MONEY IS IN THE TREASURY MAY BE ISSUED AFTER THE BONDS HAVE BEEN AUTHORIZED.

If a sewage disposal plant is being constructed upon the order of the state board of health under the Bense act, the city auditor's certificate that the money necessary for the contract is in the treasury, etc., may be issued after the bonds have been authorized and before they are sold; contra, if the plant is not being constructed under the act mentioned.

COLUMBUS, OHIO, August 18, 1914.

HON. WALTER S. RUFF, *City Solicitor, Canton, Ohio.*

DEAR SIR:—In your letter of July 30th, receipt whereof has been acknowledged, you request my opinion upon the following question:

> "May the city auditor lawfully certify that the money necessary for a contract for the construction of a sewage disposal plant is in the treasury and appropriated for the purpose, as required in section 3806, General Code, if bonds for the purpose of providing the necessary funds have been duly authorized but have not been issued and sold?

This question invites consideration of the following sections of the General Code:

> "Section 3806. No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement, or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force.
>
> "Section 3807. All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order.
>
> "Section 3810. Money to be derived from lawfully authorized bonds or notes sold and in process of delivery, shall for the purpose of the certificate that the money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund."

Standing by themselves these provisions furnish a complete answer to your question nor is their application affected by the decision of the supreme court in Emmert vs.

Elyria, 74 O. S., 185, and Akron vs. Dobson, 81 O. S., 66, as both of these decisions were predicated upon the fact that the money necessary for the improvement was at the time of entering into the contract actually in the treasury. Therefore, if these statutes govern the case which you have in mind, it is clear that the certificate of the auditor cannot lawfully be made under the circumstances mentioned; and that further, without such certificate the contract is invalid.

But I note that you mention section 1259, General Code, which provides as follows:

> "Each municipal council, department, or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. When so secured, or the bonds thereof have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose, or purposes, and shall not be used for any other purpose * * *."

This section is a part of the so-called "Bense Act," relative to the securing of a proper water supply, and a proper means of purifying or disposing of sewage of a municipal corporation. The scheme embodied in the related sections may be described as follows:

Provision is made for a complaint to the state board of health relative to the source of water supply of a municipal corporation, or the method by which it is disposing of its sewage. The state board of health conducts a hearing, and, with the approval of the governor and attorney general, may issue such orders as when complied with will result in the installation of works or means sufficient to obviate the existing evil and to safeguard the public health.

In my opinion the provisions of section 1259 are applicable only to the construction of such works as are ordered by the state board of health. Your letter does not disclose whether or not the sewage disposal plant of which you speak is one, the construction of which has been so ordered.

If the proceedings are being undertaken under the Bense act, then, in my opinion, section 1259 controls and must be read in connection with section 3806. Such a construction would permit the auditor to issue a certificate as soon as the bonds have been *authorized* without waiting for them to be sold and in process of delivery.

On the other hand, if the proceedings are not under the Bense act, I am of the opinion that section 1259 has no application, and that section 3806 and related sections standing by themselves control.

In a word, then, I am of the opinion that if the sewage disposal plant, of which you speak, is being constructed under the Bense act, the auditor's certificate relative to the existence of funds, etc., may be issued after the bonds are authorized, but before they are sold and in process of delivery; but that if the plant is being constructed, otherwise than under the Bense act, a contrary result will follow as already indicated.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1110.

BOARD OF EDUCATION—SECURING NEW SITE IN ORDER TO REPLACE SCHOOL HOUSE CONDEMNED OR DESTROYED—FIXING LEVIES.

If a board of education deems it necessary to secure a new site in order to replace a school house condemned or destroyed, the tax levies necessary for the purposes of such site are not within the exemption of section 7630-1 and 7630-2, General Code, but must be made within all the limitations of the Smith one per cent. law.

COLUMBUS, OHIO, August 18, 1914.

HON. H. F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—In your letter of July 2nd, you request my opinion upon the following question:

> "I am somewhat in doubt as to the construction to be placed upon section 7630-1 as amended in volume 103, page 527, Ohio Laws, the same being an act with relation to the replacement of a school house condemned or destroyed, as to whether this enactment confers upon a board of education the right to issue bonds for the purpose of purchasing a new site."

The section to which you direct my attention is as follows:

> "Section 7630-1. If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accomodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

It is clear that this section confers authority to issue bonds only for the purpose of rebuilding, repairing and constructing school houses. The authority to issue bonds for the purpose of acquiring a site for a school house is to be found in section 7625, General Code. Interest and sinking fund levies for the retirement of bonds issued for the purpose of securing a site for a school house must be made within the limitations of the Smith law.

Upon the approval of the electors, as provided in section 7625, then, to the extent that they involve the acquisition of a site, at least, they are subject to the fifteen mill limitation as imposed by section 5649-5b, as amended 103 O. L. 57; and this limitation cannot be exceeded, as you suggest, by a vote of the people taken under authority of sections 5649-5b and 5649-5a, General Code.

In short, then, I am of the opinion that in no way can bonds be issued for the

acquisition of a school house site so as to take out of the fifteen mill limitation of the Smith law the interest and sinking fund levies necessary to retire such bonds; but that under the circumstances mentioned by you a separate issue of bonds for the construction of a new school house on a new site, when the necessity for having a new school house arises from the condemnation of the old one by the state authorities, and the other conditions of section 7631 have been satisfied, the interest and sinking fund levies to retire such bonds are outside of the fifteen mill limitation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1111.

AUTOMOBILE DISPLAY—DISTINCTIVE NUMBER NOT REQUIRED IN CERTAIN CASES.

The provisions of the General Code in reference to the display of a distinctive number on each automobile does not apply to vehicles in sales rooms, show rooms, etc., but those alone that are in operation on a public highway.

COLUMBUS, OHIO, August 15, 1914.

HON. W. A. RHULMAN, *Member of the General Assembly, Hamden, Vinton County, Ohio.*

DEAR SIR:—I have your communication of July 23, 1914, wherein you say:

> "Referring to my conversation with you concering the automobile law, I want to call your attention to the fact that section 6301 provides: a manufacturer or dealer in motor vehicles shall make application, and the distinctive number, which must be carried and displayed by each motor vehicle while it is operated on a public highway, until it is sold or let for hire. Now, if it is necessary to describe in section 6301 that the placard must be displayed while driven upon a public highway, why is it not necessary for section 12613 to provide when the placard shall be displayed?"

In reply thereto I beg to say that I have examined the sections to which you refer, namely, sections 6301 and 12613 of the General Code, and to me they seem quite clear in reference to the point you call my attention to. Section 6301 provides, in part as follows:

> "A manufacturer or dealer in motor vehicles shall make application for registration for each make of motor vehicles * * * and the secretary of state shall assign * * * a distinctive number, which must be carried and displayed by each motor vehicle * * * *while it is operated on a public highway.* * * *."

Section 12613 provides, in part, as follows:

> "Whoever * * * fails to have the distinctive number and registration mark furnished by the secretary of state for *such* motor vehicle, displayed on the front and rear thereof * * * shall be fined * * *."

As I understand your question, you desire to know if the words underscored in

quoted section 6301 above, namely: "While it is operated on a public highway" should not be likewise inserted in penal section 12613 so as to make section 12613 clear. I do not think that is necessary, as penal section 12613 refers to all that which precedes it, and moreover, in reading section 12613 wherein it says: "Whoever * * * fails to have the distinctive number * * * for *such* motor vehicle" the word "such" refers to such motor vehicle as *is operated on a public highway,* and could not be taken to mean all vehicles including those in sales rooms, show rooms, etc., but those alone that are in operation on the public highway.

I am of the opinion therefore, that section 12613 read in conjunction with sections to which it refers is perfectly clear and unambiguous without the insertion of the words incorporated in section 6301 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1112.

BOARD OF COMPLAINTS HOLDING OFFICE ILLEGALLY—DE FACTO OFFICERS—DE JURE OFFICER—APPOINTMENTS INVALID WHERE ALL ARE MADE FROM A CITY OF THE COUNTY.

1. Where the three members of the board of complaints for the district of Lucas connty are residents of the city of Toledo, the board of complaints is not a legally organized body; the appointments are invalid and no member of the board is a de jure officer, that is to say in a direct proceeding brought for that purpose all of them as individuals could be ousted from the positions which they hold.

2. If the members of the board of complaints of Lucas county act as de facto officers their acts as such would be valid and binding as those of de jure officers.

COLUMBUS, OHIO, August 24, 1914.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter of August 10th, previously acknowledged, states that all three of the members of the board of complaints for the district of Lucas county are residents of the city of Toledo, and requests my advice on the following questions growing out of this situation:

"1. Is the board of complaints as organized a lawful body?
"2. Would any action that might be taken by the board be valid?"

I interpret your letter as meaning that at the time the three members of the board were appointed they were all residents of the city; not that one of them when appointed resided elsewhere and subsequently moved into the city.

The provision of law which under the facts stated gives rise to the questions which you have in mind is section 13 of the Warnes law, so-called, 130 O. L., 786-790, therein designated as section 5591, General Code. The pertinent language is as follows:

> "Not more than two members of the district board of complaints shall be of the same political party; and no more than two members thereof shall be residents of the same township, city or village; provided, however, that if the amount of taxable property in any city within an assessment district exceeds the amount of taxable property outside of such city and within the assessment district, two members of the district board of complaints in any

such assessment district may be residents of such city. Whenever any member of the district board of complaints by reason of removal from one township, city or village, or otherwise ceases to possess any of the qualifications required in this section his office shall be vacant."

The facts stated by you and interpreted in the manner already described seem to be such as to eliminate consideration of the last sentence above quoted. This is not a case of one or more members ceasing to possess the qualifications required by the section. That one may cease to have a qualification implies that he has at one time had it and lost it. Furthermore, it would be impossible to determine which one of the three members is, as an individual member disqualified, and in whose position there is a vacancy within the meaning of this sentence. All three are residents of Toledo, and were at the time of their appointment. A vacancy in one position would serve to qualify the other two members of the board; but it cannot be said that any particular position is vacant.

I am of the opinion, however, that the last sentence of the section, as I have quoted it, does serve to show the interpretation which is to be put upon the remaining provisions of the section, and I agree with you that in the light of all the related provisions it is mandatory upon the tax commission, which is the appointing authority, to have regard to the qualification of location in making the appointment. Failing to do this, its appointments would be void. The commission has failed to make its appointments so as to comply with the statute, and in my opinion none of the appointments is valid.

I take it that, in asking whether or not the board is a lawfully constituted body you mean to inquire whether the appointments are valid, and the members of the board are *de jure* officers. For the reasons already stated I am of the opinion that the appointments are invalid and that none of the members of the board is a *de jure* officer that is to say in a direct proceeding brought for the purpose all of them as individuals could be ousted from the positions which they hold.

This answer to your first question does not carry with it a negative answer to your second question. While the persons who are holding the office of members of the board of complaints for Lucas county have no right to hold their positions, the board of complaints of the district as such, has legal existence, that is to say, there is such an office or tribunal, which it is the duty of the tax commission of Ohio to fill in a legal manner, but which if not so filled may, nevertheless, be discharged with respect to its powers and duties by any persons of the requisite number holding their positions under such color of authority as to constitute them *de facto* officers.

I take it that there can be no serious question as to the rule that the acts of *de facto* officers are valid and are not subject to collateral attack. There are many decisions in this state upon the general rule, and I need not cite numerous decisions to that effect. This rule as to the validity of the acts of *de facto* officers applies in matters of taxation as well as elsewhere.

Smith vs. Lynch, treasurer, 29 O. S., 261.

Indeed, I am clearly of the opinion that *if* the members of the board of complaints for Lucas county act as *de facto* officers, their acts as such would be as valid and binding as those of *de jure* officers.

As to what is necessary in order to constitute one a *de facto* officer the authorities usually hold that the prime requisite is the existence of a *de jure* office. There can be no doubt on that score in the case submitted by you. As a matter of law, there is, or should be, a tribunal known as the district board of complaints.

The second requisite constituting a person an officer *de facto* is actual possession of the office. In the present case no one, other than the three appointees, is assuming

to act as member of the district board of complaints. Your letter fails to disclose whether or not any acts have been done by the members of the board of a nature sufficient to constitute the assumption of the possession of their several offices. The board "has as yet conducted no business," but I assume that the members of the board may have met and organized as required by law (section 16 of the Warnes law), and perhaps have acted insofar as they could without the assistance of the county auditor, so as to assert possession of the office.

The next criterion of a *de facto* officer is found in the rule that his possession must be under color of title. It seems to me that there can be no question about the existence of this requisite, the tax commission's certificate of appointment is sufficient color of title.

It will thus be seen that all the prime requisites of *de facto* officers are possessed by the incumbents of positions of members of the board of complaints for Lucas county. The mere fact that they are ineligible to the office, or rather that one of them is ineligible to the office, does not defeat the operation of the rule.

See Constantineau on the De Facto Doctrine, chapter 12.

There is but one circumstance which might affect the case and impair the validity of the acts or attempted acts of the persons in question. The board of complaints certainly could not act without the concurrence of the auditor. He must be their secretary. (Section 16 of the Warnes law); complaints to the board must be filed with him (Section 24 of the Warnes law), and can come before the board only through his action. (Section 25 of the Warnes law.)

Your question, however, seems to put all such considerations out of the case; for if the board can only act with the concurrence of the auditor, then it would appear that you have in mind, in inquiring with respect to the validity of their acts, the supposition that the auditor, if advised that these persons might so act as to render their official determination valid and binding, would recognize them as members of the board of complaints.

Answering your second question in full, then, I am of the opinion that if the county auditor should lay the complaints which have been filed before the board of complaints, as it is now constituted, and the persons composing it in fact should act upon such complaints, their action would be valid and binding.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1113.

BOARD OF EDUCATION MUST DISPENSE WITH OFFICE OF TREASURER OF SCHOOL MONEYS WHEN A DEPOSITORY HAS BEEN PROVIDED.

Under the provisions of section 4782, General Code, it is mandatory upon the board of education to dispense with the office of treasurer of school moneys when a depository has been provided therefor.

COLUMBUS, OHIO, August 26, 1914.

HON. CLARE CALDWELL, *City Solicitor, Niles, Ohio.*

DEAR SIR:—Under date of June 3, 1914, you submitted to this department a request for an opinion construing section 4782 of the General Code, as amended (104 O. L., p. 159). You state in your communication:

> "The amended section is identical with the original except that one word is changed. The word 'shall' has replaced the word 'may' in the fourth line. It was apparently the intention to dispense with the office of treasurer of school moneys absolutely, or else this section has not been changed from its former meaning. However, a vote of the board is still required to accomplish this."

You then inquire as follows:

> "Is there not such an inconsistency therefore, that it is still optional with the board as to whether or not it shall dispense with the office in question?"

Section 4782 of the General Code, as amended (104 O. L., p. 159), provides as follows:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, *shall* dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

In amending said section the only change that the legislature made was to change the word "may" to the word "shall" which latter word is italicized in the above quoted section. Prior to its amendment, this section by the use of the word "may" in place of the word "shall" was merely directory and it was optional with the board of education as to whether or not it should dispense with the treasurer of the school moneys belonging to such school district, when a depository had been provided for such school moneys of the district, as authorized by law. By virtue of the change made by the legislature in amending said section, it is apparent that it was the intention of the legislature to make it mandatory upon boards of education to dispense with the treasurer of the school moneys belonging to such district, when a depository for school moneys of such district has been provided as authorized by law. In other words, the section, I take it, now means that when a depository has been provided for school moneys of a district, as authorized by law, then the board of education of such district shall dispense with the treasurer of the school moneys belonging to such school district. The clause "by resolution adopted by a vote of a majority of its members',

merely points out or directs the manner or method by which this mandatory duty of so dispensing with the treasurer of school moneys shall be carried out. That is to say, in other words, said section is mandatory in requiring the board of education to dispense with the treasurer of its school moneys when a depository has been provided for the same, as authorized by law, by the adoption of a resolution to that effect by a majority vote of the members of such board.

For the foregoing reasons, I am of the opinion that there is not such inconsistency in said section as to make it still optional with the board as to whether or not it shall dispense with the office of the treasurer of the school moneys, but on the contrary, the provision of dispensing with such treasurer upon the creation of such depository, is now made mandatory.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1114.

COUNTY COMMISSIONERS, UNDER THE LAND REGISTRATION ACT ARE ONLY REQUIRED TO FURNISH SUPPLIES AS THEY IN DISCRETION DEEM NECESSARY FOR THE USE OF THE EXAMINER OF TITLES.

The county commissioners are under no absolute duty to furnish an examiner of titles, under the land registration act, furniture, office, clerical hire and telephone. They are to furnish at the expense of the county only such supplies as they in the exercise of sound discretion deem necessary for the purpose of carrying out the provisions of the act, and only such supplies as the county commissioners deem necessary can be furnished at the present time by the county.

COLUMBUS, OHIO, August 26, 1914.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Under date of July 6, 1914, you write as follows:

> "Kindly refer to Ohio Sessions Laws 103, section 8572-1, with particular reference to section 8572-91, of what is commonly called the "Torrens act." The question now arises as to the construction of section 8572-91. Under this section it is contended by the incumbent to this office that it is the duty of the county commissioners to not only furnish all books, blanks and papers, but also to furnish an office in the county court house, together with all office supplies, including telephone, office furniture and clerical hire necessary in carrying out the provisions of this act. This section is so broad that we are anxious to have your office give us a ruling as to just how far our county commissioners shall go in complying with its terms."

Section 91 of the land registration act of this state (103 O. L., 953) reads thus:

> "All books, blanks, papers and other things necessary for the purpose of carrying out the provisions of this act shall be furnished by the county commissioners at the expense of the county."

This section, as you suggest, confers broad discretionary powers on the county

commissioners. The question of what is necessary for carrying out the provisions of the act being a question which rests largely within the judgment of the county commissioners.

In arriving at a conclusion upon this question they should take into consideration all of the conditions surrounding the operation of the act in their county, giving especial thought to the number of applications for registration filed. There is nothing in the law which, in express terms, requires the furnishing and equipment of an office for examiners, and if this allowance is to be made at all it must be under the implied power conferred by the section just quoted. It would perhaps, in a county wherein the examiner was required to do a great amount of work, be convenient to have the office of the examiner located in the court house, and this might be said to be something necessary under such circumstances, but ordinarily I do not see the propriety of furnishing such examiner with an office, furniture and clerical hire. The fact that the law authorizes the appointment of more than one examiner seems to carry with it the implication that each examiner should do his own work rather than for him to hire an office force to do it for him. If there were only one examiner, and he had a large amount of work to do under the provisions of the act, it might also be said that a telephone would be a proper means of assisting him in the carrying out of the provisions of the act. This would be a convenience to the clerk of courts in notifying the examiner, under section 13, that the court had entered an order referring the application to him.

As I have stated above, these are matters which, to a certain extent, rest within the discretion of the commissioners, who should be very careful not to abuse that discretion, as it would be much better for them to err on the economical rather than on the extravagant side of the matter.

The contention that it is the duty of the county commissioners to furnish an office, with office supplies, etc., is certainly not sound, because the statute does not, in express terms, require this, but seems to leave the matter to the judgment of the commissioners, which judgment would be reviewable if there was a gross abuse of discretion. In view of the fact that this law is in its infancy, and as it is extremely difficult to tell to what extent advantage will be taken of it, it seems to me that the commissioners would be, at the present time, perfectly justified in declining to provide any supplies excepting books, blanks, papers and such other things as they regard as absolutely necessary for the purpose of carrying out the provisions of the act. I cannot see how a telephone, office furniture, clerical hire and an office can be regarded as "absolutely necessary" at present.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1115.

STREET IMPROVEMENTS—IMPROVEMENT MAY BE DIVIDED INTO TWO OR MORE SECTIONS OR DIVISIONS IN CONFORMITY TO THE VARYING WIDTH OF THE STREET—ASSESSMENTS OF THE COST OF A STREET IMPROVEMENT WHERE NO DIVISION HAS BEEN MADE MAY BE APPORTIONED AT A UNIFORM RATE FOR THE ENTIRE LENGTH OF THE STREET.

1. In the making of a street improvement the same may be divided into two or more sections or divisions in conformity to the varying width of the street or the improvement thereon, in the assessment ordinance, provided the same does not conflict with any of the preceding ordinances relating to such improvements.

2. Assessments of the cost of a street improvement, where no division into sections has or can be made, may be apportioned at a uniform rate for the entire length of the improvement. The assessment ordinance fixing the amounts chargeable to the several lots abutting on an improvement is not an ordinance of a general nature and therefore need not be published, but the requirements of section 3895, General Code, as to the notice of assessments are mandatory and must be followed.

COLUMBUS, OHIO, August 26, 1914.

HON. PAUL BAINTER, *City Solicitor, Dresden, Ohio.*

DEAR SIR:—I have your letter of July 15, 1914, in which you state and inquire:

> "Where a municipality of this state improves a street under the general laws of this state by grading, curbing and paving same, which is provided for by one resolution of necessity, one ordinance to proceed, one set of plans, specifications, estimates and profiles, which do nothing in the way of dividing the said street or improvement into different sections than to provide that a portion of the street through the middle part of the improvement shall be forty (40) feet wide as to the improvement, and that the portion of the street improved in either direction from the portion shall be improved to a width of thirty (30) feet, which provisions appear only in the plans, specifications, estimates and profiles, all of which are approved by the resolution and ordinance in the usual way, and the method of assessment provided for is the third provided in General Code, section 3812, to wit: 'By the foot frontage of the property bounding and abutting upon the improvement,' and which improvement is let in one single contract on one advertisement of same, according to law, may it be divided by council into sections for assessment purposes at the time of the passage of the assessing ordinance, so that the part that as been improved to the width of forty feet shall have one uniform assessment of so much per foot assessed against it, and the part that has been improved to the width of thirty feet shall have a uniform assessment of so much per front foot assessed against it, but differing from the assessment per foot on the forty foot improvement, and being less than that?
>
> "*Second.* If so, may it also be assessed at a uniform rate for the entire distance without regard to the width of the improvement?
>
> "*Third.* Is it required to publish the assessing ordinance, and if so, what sections so provide, and by what section or sections are such publications controlled?"

In the case of Findlay vs. Frey, 51 O. S., 390, the third paragraph of the syllabus reads:

"Where a street is of different widths, it may, in a proceeding to improve it, be divided into as many sections as there are different widths; and the property on each section assessed for the cost of the same."

Minshall, J., says:

"It is also objected that the assessment on Sandusky street is not uniform. The street was improved in sections, because not of uniform width. Each section is, however, of uniform width, and the assessment thereon the same. The method adopted was a just one. Each section pays for the improvement on it. The same result could have been attained by separate proceedings. This, however, would have added to the expense, without any compensation to the property holders. No good reason is shown why it could not all be done in one, as well as in many, different proceedings."

This, I think, conclusively answers you that the street may divide into sections in the assessment ordinance, provided the same does not conflict with prior ordinances, and each section assessed for the cost of the street per foot front for the section.

In the case of Jaeger vs. Burr, 36 O. S., 164, the council by ordinance assessed the sum of $3.21 upon all lots abutting upon the improvement, except certain described lots which were credited with 2.1621 for the cost of grading and paving the sidewalks, gutters and crossings by the owners. This the court held to be in violation of the statute and the ordinance under which the improvement was made. This, I think answers your first query.

Your second question is answered, as it seems to me, by the cases of Smith vs. Cincinnati, 6 N. P., 175, which is based on the case of Cincinnati vs. Wilder, 26 O. S., 284. In the former case it is said by Jackson, J.:

"We think, a question substantially similar to the one here involved, was decided in the case of Wilder vs. the city of Cincinnati, 26 Ohio St., 284. In the Wilder case it appears that West Eighth street was improved, by grading, from McLean avenue westward to a plank road. The work in question was done in sections; i. e., one section from McLean avenue to Mill Creek bridge; the other from the bridge to the plank road. In the trial of that case the jury made special findings of fact, from which it was apparent that the cost of the improvement per foot was much greater east than west of Mill Creek bridge, and Wilder's property abutted upon that section which was west of Mill Creek bridge. It was, therefore, contended that it was inequitable to have a uniform rate of assessment for the whole street, but that different assessments should be made for the two different sections, so that the assessment would be proportioned to the cost applicable to each particular section. But the supreme court denied the contention, and held that the uniform method of assessment adopted was proper, notwithstanding the affirmative finding that there was a great difference of cost in the improvement of the two sections of the street. In so doing the court said: 'The law seeks to make assessments for improvements of this kind uniform. In this case the object was to ascertain the amount properly chargeable upon Wilder's property. This we suppose was to be done by a rule that would operate uniformly upon all abutters within the assessment district. If it was intended to charge each abutter with the actual cost of the improvement in front of his property, the legislature would have so provided in express terms.' "

In Wilder vs. Cincinnati, 26 O. S., 290, Gilmore, J., says:

"The first special finding fixes the fair and reasonable cost of this portion per front foot, by averaging the more with the less expensive portions of the work. The thirteenth finding is general, having been obtained by multiplying the number of front feet by the average cost per front foot of this portion of the improvement.

"This was right. The law seeks to make assessments for improvements of this kind uniform. In this case, the object was to ascertain the amount *'properly chargeable'* upon Wilder's property. This we suppose was to be done by a rule that would operate uniformly on all abutters within the assessment district.

"If it was intended to charge each abutter with the actual cost of the improvement in front of his property, the legislature could have so provided in express terms. Taking into view the general result of the findings of the jury on this subject, we are satisfied that no injustice was done to Wilder by the verdict. His property was assessed with the average cost per front foot of the entire cost of the improvement from Mill Creek bridge to the plank road; no other rule would have been either uniform or equitable."

These cases, without comment, clearly answer your second question in the affirmative. That an assessment ordinance *as such* need not be published is answered by the opinion already sent you. However, section 3895, General Code, reads:

"Before adopting an assessment made as provided in this chapter, the council shall publish notice for three weeks consecutively, in a newspaper of general circulation in the corporation, that such assessment has been made, and that it is on file in the office of the clerk for the inspection and examination of persons interested therein."

It will be observed that this section does not provide for the publication of an assessment ordinance, but does provide for notice of the making of an assessment before its adoption by council, and inasmuch as you have a paper, published and of general circulation in your municipality, there need be no difficulty in complying with the provisions of this section which I hold to be mandatory.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1116.

PURCHASES OF LAND FOR CEMETERY PURPOSES—AMOUNT OF LAND THAT MAY BE PURCHASED.

Sections 3441 and 3455, General Code, must be considered and construed together and in so doing the five acre limit found in section 3455, General Code, will not be held as a limitation upon the amount which may be purchased for cemetery purposes under favor of section 3441, General Code.

The limitation of ten acres in section 3441 and five acres in section 3455 attach to the requirement of lands by appropriation proceedings only, the former as to an original acquisition and the latter to cases where it is sought to increase the area of existing cemeteries and circumstances compel the doing so by appropriation proceedings.

COLUMBUS, OHIO, August 26, 1914.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your letter of July 11th, in which you inquire:

> "I would like to have the opinion of your office as to whether or not, under section 3455 of the General Code, the trustees of a township owning a township cemetery can purchase at private sale an additional tract of land for cemetery purposes, which contains more than five acres, or does the clause contained in said section limiting the amount that may be appropriated to five acres also limit the amount that may be purchased at private sale to a like number of acres?
>
> "I think that section 3441 of the General Code should be read in connection with this section."

The sections of the General Code for consideration are:

> "Section 3441. Township trustees may accept a conveyance of, or purchase, and inclose, improve, and protect such lands in one or more places within the township as they deem necessary and proper for cemetery purposes. If suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with the provisions of law regulating the appropriation of private property by municipal corporations.
>
> "Section 3455. In any township in which there is a cemetery owned, or partly owned, by such township, if in the opinion of the trustees of the township it is desirable to add to the area of such cemetery by the purchase of additional grounds, and if suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not exceeding five acres, as provided for establishing a township cemetery, and subject to the same restrictions. For such purpose, they may levy a tax not to exceed one-half of one mill, on the taxable property of the township, for a period not exceeding five years, which shall be collected as other taxes, and appropriated for the purchase or appropriation of such additional cemetery grounds which shall become part of such township cemetery, and be governed in all respects as provided by law."

From a reading of these sections it is clear there is no specific limitation as to the acreage which may be purchased, other than the expression found in section 3441; "as they deem necessary and proper for cemetery purposes," yet there is a limitation

in that section as to the amount which may be secured by appropriation proceedings.

There is also a limitation in section 3455, and like the former section, it attaches to land acquired by appropriation proceedings.

Your specific question is whether:

> "* * * the trustees of a township, owning a township cemetery, can purchase at private sale an additional tract of land for cemetery purposes, which contains more than five acres, or does the clause contained in said section limiting the amount that may be appropriated to five acres also limit the amount that may be purchased at private sale to a like number of acres."

While you are correct in your statement that section 3441, General Code, and section 3455, General Code, are to be construed together, I cannot conceive that any construction should be given section 3455, which would operate as a limitation upon the amount that might be purchased under section 3441, and as no appropriation proceedings may be instituted until there is a failure to agree with the owner of the land, I am of the opinion that the limitation of five acres found in section 3455, General Code, attaches only where additional grounds for cemetery purposes are being acquied by appropriation proceedings where the same is being granted as an addition to the cemetery and not as an original acquisition of a cemetery.

Thinking that this answers your question, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1117.

SALE OF CUBEB CIGARETTES ILLEGAL IN CERTAIN CASES.

Under the provisions of section 12965, General Code, it is illegal to sell cubeb cigarettes to minors under eighteen years of age when such cigarettes are being sold as substitutes for cigarettes made from tobacco.

COLUMBUS, OHIO, August 26, 1914.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 10, 1914, wherein you state that several parties in your county have been arrested for furnishing minors cigarettes contrary to section 12965, General Code. You state that the cigarettes furnished were of tobacco, and that now dealers are selling minors cubeb cigarettes. You ask whether dealers making such sale are amenable to the above section.

Section 12965, General Code, provides as follows:

> "Whoever sells, gives or furnishes to a person under eighteen years of age a cigarette, cigarette wrapper or substitute for either, or a cigar or tobacco, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than two days nor more than thirty days, or both,

and for each subsequent offense, shall be fined not less than fifty dollars nor more than three hundred dollars and imprisoned not less than five days nor more than sixty days"

The new Standard dictionary defines a cigarette as follows:

"Cigar made of finely cut tobacco rolled usually in thin paper. 2 (Med.) A similar roll with medicinal filling; as, a cigarette or cubebs."

You state in your letter that cigarettes made of tobacco were formerly sold contrary to the above section, and that now, dealers are selling cubeb cigarettes to minors. No doubt the reason why these minors are buying cubeb cigarettes is because they cannot buy those made from tobacco, and the cubeb cigarettes are being purchased as a substitute for cigarettes made from tobacco.

There may be some question as to whether cubeb cigarettes are cigarettes within the meaning of the statute, but I do not believe that there is any doubt that the cigarettes sold under the above statement of facts are being sold as substitutes for tobacco cigarettes, and in any event, such sales are prohibited by law.

I am, therefore, of the opinion that under the circumstances mentioned in your letter, the sale of cubeb cigarettes is prohibited, and that such sale should be stopped immediately.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1118.

OHIO NATIONAL GUARD—RIGHT OF SHERIFFS, MAYORS AND JUDGES TO CALL OUT THE NATIONAL GUARD IN CERTAIN CASES—POWER OF THE GOVERNOR IN REFERENCE TO THE NATIONAL GUARD.

1. Under the provisions of section 5316, General Code, which empowers sheriffs mayors and judges to call out the National Guard in case of tumult, riot, etc., or apprehension thereof, is a valid and constitutional enactment, but such section must be read in connection with the constitutional provision making the governor, commander-in-chief, and with those provisions of the statutes which give the governor control of the National Guard and empower him to issue orders with reference thereto.

2. The power of the enumerated officers to call out the National Guard is subject to the superior discretion and control of the governor as commander-in-chief. The question as to the existence of a reasonable apprehension of tumult, riot, etc., rests with the officers in question, subject to the superiority of the commander-in-chief. The exercise of such discretion may be reviewed by the courts when there is evidence of an arbitrary and unreasonable exercise of the same.

COLUMBUS, OHIO, August 26, 1914.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of March 31st, you submitted the following communication:

"1. The question of use of the Ohio national guard to preserve order and in general do police duty at county fairs came up once or twice last summer, but no determination was ever made of the question.

"2. This morning the secretary of the Madison county fair called on me and requested that I arrange to have company "M," fourth Ohio infantry, stationed at Washington C. H., in Fayette county, go to London, Madison county, to serve during fair week, in the summer of 1914. I told the gentlemen that of course I would not bear the expense of such a movement, but they seemed willing to stand the expense, but just what the absolute legal status of members of the Ohio national guard acting under these circumstances would be is a question that I would like to have settled before I consent to any such arrangements.

"3. After the decision in the courts of Texas, in the case of sergeant Manley, it would seem that a member of the national guard acting as a quasi-policeman is a precarious matter, and I doubt very much whether it would be proper for this department to order troops from Fayette county to Madison county to act in this capacity when they are paid by the fair association.

"4. This has been done for several years in case of the Ohio state fair, where the troops were under orders, but the expense was paid by the Ohio state fair association. This, however, would seem to be a slight exception as the Ohio state fair is a state institution.

"5. The questions raised above are interesting, and some ruling from your department would be of great assistance to me in making up my mind as to my action as this would probably grow to extensive limits if it once starts."

The questions presented being very general in their nature, I am forced to resort to personal conversations and to a communication submitted by judge advocate-general, Hubert J. Turney, for a proper confinement of your questions to the situation directly at hand. The communication of the judge advocate-general is, in part, as follows:

"I herewith enclose communication from General Wood to yourself, upon the question of the use of the national guard at county fairs and in cases of like nature. In this matter is brought up one of the perplexing questions that has created doubt and uncertainty in the national guard for many years. You will note by the section referred to in the opinion that a large number of civil officers have the right, if the law be valid in all its provisions, to call out part or all of the national guard, by organizations whenever, in their judgment, they have reasonable apprehension of disorder. The result has been that in cases like the Wright's homecoming at Dayton, local officers sometime call upon an entire regiment to assemble and do police duty.

"Recently in Cleveland, troops have been repeatedly ordered out to guard the line of automobile races especially when the association is one where there is a large concourse of persons under the auspices of some fraternal society, if the adjutant general, as the representative of the governor, absolutely refuses to order out troops, some county official, who comes within the enumeration of the section referred to, can be found who will order them out, and there is absolutely no provision of law whereby the action of the county official who so orders out the troops, can be reviewed by any higher authority. Then, after the troops have done the duty for which they are ordered, the question of payment always comes up, and in the end a large bill of expense is thrown upon the state for services in which the state was little, if at all, interested.

"It has long been the opinion of the writer, and that opinion has been founded upon a careful examination of the similar laws in other states and otherwise gained, that all of the provisions of the statute referred to, vesting in any one other than the governor, as the constitutional commander-in-chief, such power to so order out the troops is absolutely unconstitutional, because, in contravention of the provisions of the state constitution making the governor commander-in-chief. A chief executive is no longer a commander-in-chief when part of his inherent powers are taken from him and shared by a large number of persons whose acts he is without power to control."

My understanding, from these conversations and the communication referred to is that the real question at issue is, primarily, the constitutionality of section 5316 of the General Code, permitting certain civil officers to call upon the national guard under circumstances of tumult, riot, etc. The correlative question relates to the nature of the circumstances which must exist as a condition precedent to the exercise of the authority conferred in section 5316, in the event that section is given credence as a valid and constitutional legislative enactment.

Section 5316 of the General Code is as follows:

"Where there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence to break or resist the laws of the state, or there is reasonable apprehension thereof, the commander-in-chief, the sheriff of the county, the mayor of a municipal corporation therein, or a judge of any court of the state or United States, may issue a call to the commanding officer of any regiment, battalion, company, troop or battery, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authority."

Article I, section 4, article IX, section 4 and article III, section 10 of the constitution of Ohio, are as follows:

"Article I, section 4. The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

"Article IX, section 4. The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.

"Article III, section 10. He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States."

Your inquiry calls for a consideration of possible conflict between the above quoted section of the constitution, creating the governor the commander-in-chief of the militia, and the statute, above quoted, which empowers the enumerated civil officers to call out companies of the national guard, under the circumstances prescribed.

Sections 5212 and 5240 of the General Code are as follows:

"Section 5212. The national guard may be ordered by the governor to aid the civil officers to suppress or prevent riot or insurrection, or to repel or

prevent invasion and shall be called into service in all cases before the reserve militia.

"Section 5240. The Ohio national guard shall be governed by the military laws of the state, the orders of the commander-in-chief and the code of regulations. Such government shall conform, as nearly as possible, to the system of discipline and administration prescribed for the army of the United States."

It will be noted, from a perusal of the above quoted provisions of law, that the governor is made commander-in-chief of the militia; that he is given power to execute the laws of the state, to call out the militia, if necessary. Under section 5240 of the General Code, the rules governing the militia are prescribed by the military statutes of the state, *the orders of the commander-in-chief,* and the code of regulations.

Under article I, section 4 of the constitution, above quoted, the military is required to be subordinated to the civil power. I do not deem it necessary to enter into a review of the many conflicting decisions with respect to the relation and the respective powers of the civil authorities and the militia, when the latter is called out to aid the civil authorities. These decisions are substantially harmonious upon the conclusions that when the militia is acting in aid of the civil authority, the governor, as commander-in-chief of said militia, is acting as a civil authority. There will be no question that the constitutional provision, making the governor commander-in-chief of the militia refers, with equal force, to that official, when the militia is acting in aid of the civil authorities, as when there exists a state of actual war and a consequent military rule.

The first and second paragraphs of the syllabus in Swain vs. U. S., 28 Ct. of Cl. Rep., page 173, are as follows:

"1. The constitutional power of the President to command the army and navy and of congress 'to make rules for the government and regulation of the land and naval forces' are distinct; the President cannot by military orders evade the legislative regulations; congress can not by rules and regulations impair the authority of the President as commander-in-chief.

"2. A power to appint courts-martial devolved by statute on any officer is shared by the President, though he be not named therein. Since the earliest legislation of our government it has been understood and intended that powers granted to general officers in regard to courts-martial are thereby granted to the President."

The opinion of the court, in this connection, on pages 221 and 222, is as follows:

"It seems evident, then, to the court, that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not be invested with greater authority by congress than the commander-in-chief, and a power of command devolved by statute on an officer of the army or navy is necessarily shared by the President. The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by congress, then congress, by the simple expedient of exclusively granting the authority to appoint courts-martial and approve *sentences to a few officers of the army and tacitly ignoring the President, could practically defeat the express declaration of the con-*

stitution and strip the office of commander-in-chief of all real powers of command.

"The court cannot ascribe any such purpose to the legislation of congress. Indeed, it seems evident to the court that if the seventy-second article was enacted with the intent that the President should exercise no authority except in the single instance where it is withheld from the commanding officers and exclusively devolved on him, it would be necessary to ascribe an absurd purpose to this legislative enactment, viz.: That the intent of the statute was that the general should be exempt from punishment. If, for illustration, in 1884, the lieutenant-general had stood in the place of the judge-advocate-general, how could he have been court-martialed? He certainly could not have appointed his own court-martial and ordered himself before it. A general commanding a military department could not have done so, because the lieutenant-general was not in his department or under his command. The President could not have appointed the court because the seventy-second article only requires, or, if it be preferred, authorizes him to do so in those cases where a 'general officer commanding the army of the United States, a separate army, or a separate department,' is 'the accuser or prosecutor of any officer under his command.' The lieutenant-general, therefore would have been exempt from punishment so long as punishment depended upon a trial by court-martial."

I am of the opinion that the reasoning of the court, in this case, has application to the question at hand. From the constitutional provision, making the President the commander-in-chief the court ascribed to the President, powers not expressly conferred, by statute, upon him, which were, however, expressly conferred upon subordinate officers. The statutes in question, therefore, conferring powers upon the governor and upon the enumerated civil officers, under the circumstances had in view, must be read as a whole.

It will not be disputed, upon a review of the law in its entirety, that the statutes make ample provision for clothing the governor, as commander-in-chief, with the supreme executive control of the militia, at all times and circumstances. With this view of the situation, I am of the opinion that section 5316 may not be construed with a view to giving the enumerated civil officers a supreme and executive control, as opposed to the governor, when they carry out the powers conferred upon them by this statute. This statute is of no more force and effect, in this connection, than is any other provision of law, conferring powers and imposing obligations upon any of the subordinate officers in the militia. These powers and duties must always be regarded as subject to the superior authority and direction of the commander-in-chief. In brief, therefore, section 5316 is a valid enactment which confers certain powers upon the enumerated officers, but when read in connection with the corresponding provisions of law, and of the constitution, must be construed as conferring these powers, subject to the power of direction and control by the commander-in-chief.

The concrete case presented by you, to wit, the calling out of troops for service during fair week, does not, as presented, show sufficient facts to warrant a decisive answer to your question. As a necessary foundation for the exercise of the authority conferred by section 5316, there must be a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force or violence to break or resist the laws of the state, or there must be reasonable apprehension of such states of circumstances. In the first instance, the question of the existence of such situations rests in the discretion of the officers in question, subject to the superior discretion, at all times, of the commander-in-chief. The exercise of such discretion is limited, only, by the rule that it must not be unreasonably or arbitrarily employed. Circumstances may exist, I assume, where the

holding of a county fair might justify a reasonable apprehension of the conditions referred to. Whether or not such is the case rests with the officers in question, subject to the control of the courts, only, on clear, manifest and flagrant evidence of abuse of discretion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1119.

FEES THAT SHOULD BE COLLECTED BY THE CLERK OF THE COURT FOR REGISTRATION OF TITLES TO REAL ESTATE.

The clerk of courts should collect from an applicant for registration of title to real estate, in addition to his own fees, a fee for recording and indexing the memorandum stating that the application has been filed. This fee goes to the recorder and should be delivered to him by the clerk when the memorandum is presented to him by the latter.

COLUMBUS, OHIO, August 26, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of July 10, 1914, you write as follows:

> "I beg to request your opinion in reference to a matter which has arisen in this county under the act of the last legislature entitled 'An act to provide for the settlement, registration, transfer and assurance of land titles and to simplify and facilitate transactions in real estate,' found on page 914, 103 Ohio Laws.
>
> "The question upon which I want an opinion arises under section 7, which provides that when an application to register the title to land is filed with the clerk of the court of common pleas, the court shall forthwith cause to be filed in the office of the county recorder of said county a copy of the application for registration, which said copy shall be recorded and indexed by the county recorder. As I construed the law the recorder would be entitled to his fee for indexing and recording this application, but the question then arises, who is to pay this fee, and when?"

The pertinent language of section 7, to which you refer, reads thus:

> "Application to register the title to land or to any estate or interest therein shall be made by petition, as in the commencement of a civil action, filed in the probate or common pleas court of the county in which the land is situate. Upon filing the application, the clerk shall forthwith cause to be filed in the office of the recorder of said county and in the recorder's office of each county in which any part of the land lies a memorandum stating that application for registration has been filed, the date and place of filing and a copy of the description of the land contained in the application. Such memorandum shall be recorded and indexed by the county recorder."

Section 112, which provides for a schedule of fees, requires the payment, by the applicant to the clerk of the court, of the sum of $3.00, which is to be in full of all clerk's fees and charges in such proceedings on behalf of the applicant.

After prescribing the fees of the recorder, for the doing of the work peculiarly

applicable to the act in question, the following language appears in the section just cited:

> "For filing, recording and indexing any papers or instruments other than those above provided, * * * the same fees as may be allowed by law for like services."

Section 2778 of the General Code contains the following language:

> "The fees in this section provided shall be paid upon the presentation of the respective instruments for record."

Section 2781 of the General Code, which authorizes suit on a recorder's bond, provides that if he "refuses to receive a deed *or other instrument of writing presented to him for record, the legal fee for recording it being pair or tendered*; * * * he shall be liable to a suit on his bond, at the instance and for the use of the party injured by such improper conduct."

Section 2778, General Code, prescribes fees for recording and indexing instruments of writing. From section 2781 it is apparent that the county recorder has the right to demand his fees in advance, and I can see nothing to conflict therewith in the land registration act. This being true, it must follow that they should be read together, and hence, before recording an instrument, such as that referred to in your question, the recorder would be entitled to his fee. The fact that section 112 makes $3.00 the total fee to be charged by the clerk does not alter this position, because the fee therein referred to has reference solely to the services of the clerk and not to those of the recorder.

A carful reading of section 7 will, I think, convince you that you have erred in your theory that the application to register title should be filed in the office of the recorder. Instead of this, it is the duty of the clerk, when the application is filed, to cause to be filed, in the office of the recorder, a memorandum stating that application for registration has been filed, the date and place of filing, and a copy of the description of the land described in the application. It is this memorandum which is to be recorded and indexed, and not the application. This was taken into consideration when forms for use under this law were prepared by this department, and you will find that form No. 2 was expressly designed for use by the clerk, under section 7. The fees of the recorder for filing this instrument have not been fixed in the land registration act, but the general provisions of section 112, above quoted, seem to cover the situation.

As the applicant does not present this memorandum to the recorder, of course the fee cannot be directly demanded of him by that official. In view of the fact that this instrument must be filed and recorded, the clerk being required to cause this to be done, it seems to me that the clerk of courts would have the right and should require this fee to be paid by the applicant, on the filing of the application. At least, this would be the simplest and most expeditious way of arranging the matter. It could, of course, be covered by a rule or order of the court, but I do not think that it is necessary so to provide for it. If the application were shown to the recorder, he could immediately tell what charge should be made for the filing of the memorandum, because it will always be in the same form with the exception of the description of the land. As this latter appears in the application, the recorder could tell the clerk what charge to make for the filing and recording of the memorandum. The clerk should then collect this amount from the applicant and deliver it to the recorder with the memorandum.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1120.

LAND REGISTRATION—GUARDIAN FILING SUIT TO SELL AN UNDIVIDED INTEREST IN REALTY SHOULD NOT ASK FOR REGISTRATION OF SUCH UNDIVIDED INTEREST.

It is neither necessary nor proper for a guardian filing a suit to sell an undivided interest in realty, to include in such suit a cause of action praying for registration of such undivided interest. It is only an estate in fee in the whole of unregistered land that may be registered.

COLUMBUS, OHIO, August 26, 1914.

HON. WILLIAM H. LUEDERS, *Judge of the Probate Court, Cincinnati, Ohio.*

DEAR SIR:—Under date of August 10, 1914, you state that a partition was filed in your court for the purpose of selling an undivided one-seventh interest in real estate for the payment of debts, and ask whether or not it is mandatory to register title to this real estate.

Section 64 of the land registration act, 103 O. L., 914, provides:

> "In all suits to sell an estate in fee in the whole of unregistered land brought by an assignee or trustee for the benefit of creditors, commissioners of insolvents, receiver, master commissioner, administrator, executor or other person appointed by a court * * * proper allegations and parties necessary to a decree for original registration of the title to said estate shall be made in the petition, the said allegations to be included in a separate cause of action, and said title, before any order of sale * * * shall be made or entered in the case, shall be registered as provided in this act. * * *"

Section 4 of the act in question contains the following language:

> "The person or persons who, singly, or collectively, claim to own and be seized of or to have the power of appointing or disposing of the legal or equitable estate *in fee in and to the whole of any parcel* of land, may personally or through an attorney in fact duly authorized by an instrument signed, witnessed, acknowledged and recorded as a deed, have his or their title to said estate in said land, or the whole title to said land, registered as hereinafter provided in the county where the land is situate. * * *"

The foregoing quotations seem clearly to indicate that the theory of the land title registration law is that it is only the title in fee to the whole of a tract of land that can be registered. The reason for this is that if part of the title were to be registered and part remaining unregistered, the same piece of land would be partly under the registration system and partly without, which would lead to confusion. If a title to the whole fee is registered, then each co-tenant may have a saparate certificate of title for his undivided interest in the land, as is provided by section 24 of the act. The sections referred to indicate that it must be a fee in the whole that may be registered, and consequently a fee in an undivided portion could not be brought within the registration act in a separate application by a guardian, or in a suit by such guardian to sell the undivided portion.

Therefore, it is my opinion there can be no registration, in the first instance, of an undivided interest, and that, under the facts stated by you, it is neither mandatory

nor permissible for the guardian to embody in his suit a cause of action containing all legations calling for the registering of an undivided one-seventh interest which he holds in the real estate.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1121.

REDUCTION OF FEES TO CERTAIN OWNERS OF MOTOR VEHICLES FILED FOR REGISTRATION AFTER SEPTEMBER 1, 1914.

The provisions of section 6295, General Code, whereby owners of motor vehicles applying for registration after September 1st, 1914a, re entitled to a reduction of the fees prescribed by section 6294, General Code, are not applicable to automobile dealers, manufacturers or motorcycle chauffeurs.

COLUMBUS, OHIO, August 26, 1914.

HON. J. A. SHEARER, *Registrar of Automobiles, Columbus, Ohio.*

DEAR SIR:—Under date of July 23rd you inquired of me as follows:

"Section 6295 of the automobile law provides that every owner of a motor vehicle, making application after September 1st of any year, shall be required to pay but one-half of the annual fees provided in section 6294.

"We desire your opinion as to whether or not this applies to automobile dealers, chauffeurs, motorcycle chauffeurs, and whether or not any of the classes enumerated in the law are covered by the provisions of section 6295."

Section 6295, General Code, as amended, 103 O. L., 764, and as now in force, reads:

"Every owner of a motor vehicle acquired during any year, before operating or driving such motor vehicle upon the public roads or highways of this state, or permitting the same to be done, shall file a like application, but if said application be made after September first of any year, the fee for such registration shall be one-half the annual fees provided herein."

Section 6294, General Code, as amended, 104 O. L., 248, reads:

"Every owner of a motor vehicle which shall be operated or driven upon the public roads or highways of this state shall, before the first day of March, 1914, and thereafter annually, before the first day of January of each year, except as herein otherwise expressly provided, caused to be filed, by mail or otherwise, in the office of the secretary of state, a written application for registration for the following year, beginning the first day of January of such year, on a blank to be furnished by the secretary of state for that purpose, containing a brief description of the motor vehicle to be registered, including the name of the manufacturer, the factory number of such vehicle, if it has such number, the amount of motive power, in figures or horse power and the name, residence and address of the owner of such motor vehicle. Upon the filing of such application each such owner shall pay, or cause to be paid, to the secretary of state, a registration fee of two dollars for each motor bicycle,

motorcycle or motor tricycle; three dollars for each electric motor vehicle; and five dollars for each gasoline or steam motor vehicle."

It will be noted that section 6294 provides for the application prior to January 1st of each year by the owners of motor vehicles, for the registration thereof, and contains a schedule of fees for such registration.

Section 6295 provides for the registration of motor vehicles acquired after January 1st of any year and if application for the registration of such vehicles is made after September 1st, the fee therefor is to be one-half of the annual fee for such registration.

Section 6296, General Code, provides:

"Applications of chauffeurs shall be made at such times and for such periods as are provided in the next two preceding sections for applications of owners."

The first paragraph of section 6301, General Code, as amended, 103 O. L., 765, provides for the application by manufacturers and dealers for registration of each make of motor vehicles manufactured or dealt in, and reads as follows:

"A manufacturer or dealer in motor vehicles shall make application for the registration, in a like manner, as hereinbefore provided, of each gasoline, steam, electric or other make of motor vehicles, so manufactured or dealt in, and pay a registration fee of twenty dollars for each make of motor vehicles named therein, to be determined by the motive power of such vehicles. Thereupon, the secretary of state shall assign to each make of motor vehicles therein described a distinctive number which must be carried and displayed by each motor vehicle of such make in like manner as provided in this chapter while it is operated on the public highway until it is sold or let for hire. Such manufacturer or dealer so registering a make of motor vehicle, may procure certified copies of such registration certificates upon the payment of a fee of three dollars for each such copy. With each of such certified copies, the secretary of state shall furnish two placards with the same numbering provided in the original registration certificate."

The application by chauffeurs for license to operate motor vehicles and the fee to be paid for such license, are governed by the second paragraph of section 6301, General Code, as amended, reads:

"A person operating a motor vehicle as a chauffeur shall file, by mail or otherwise, with the secretary of state, or his duly authorized agent upon blanks prepared under the authority of the secretary of state, an application for registration. The secretary of state shall appoint examiners and cause examinations to be held at convenient points throughout the state as often as may be necessary. Before any certificate of registration is granted, the applicant shall pass such examination as to his qualifications as the secretary of state shall require. No chauffeur's certificate of registration shall be issued to any person under sixteen years of age. Every application for a certificate of registration as a chauffeur shall be sworn to before some officer authorized to administer oaths, and must contain the name and address of the applicant, together with a statement that he is of sound mind and memory and physically competent to operate a motor vehicle, together with a description of the vehicle, the trade name and kind or kinds of motor vehicle he is

competent to operate and whether or not such applicant has been convicted of violating a provision of this chapter or the penal statutes relating thereto, giving the date or place of such conviction and the provision of law so violated and must be accompanied with a registration fee of three ($3.00) dollars."

It is manifest from the most cursory reading of these several statutes that the reduction in the fee for registration after September 1st, prescribed by section 6295, applies solely to motor vehicles registered by the owners thereof and not to motor vehicles registered by manufacturers or dealers.

The fee to be paid by the latter is prescribed by section 6301 above quoted and neither in that section nor elsewhere in the law is there any express provision for a reduction in the fee for the registration of such vehicles if they are registered after September 1st, nor is the provision of section 6295, providing for a reduction in the registration fee, adopted or made applicable by reference to registration by dealers or manufacturers. All that has been said concerning the fee for registration by manufacturers and dealers is equally applicable to chauffeurs. The language of section 6296, whereby applications of chauffeurs for registration are required to be made at such *times* and for such *periods* as are provided in sections 6294 and 6295 for applications of owners, certainly cannot be construed as having any reference whatever to the fees to be paid by chauffeurs, because the subject of fees to be paid by the latter for registration is not mentioned in said section.

I am very clearly of the opinion that the provision of section 6295, whereby owners of motor vehicles applying for registration after September 1st are entitled to a reduction in the fees prescribed by section 6294, are not applicable to automobile dealers, manufacturers, chauffeurs or motorcycle chauffeurs.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1122.

RIGHT OF PERSONS TO OFFER TO DISPOSE OF STOCK OR STOCK CERTIFICATES WITHOUT LICENSE—RIGHT OF PERSONS RESIDING IN FOREIGN STATES TO DISPOSE OF STOCKS AND STOCK CERTIFICATES OR OFFER SAME FOR SALE IN OHIO.

Section 6373-1, General Code, which among other things prohibits to persons within its terms, the right to "offer to dispose of" stocks or stock certificates without the license provided for in the act of which the section is a part, and section 6373-14, General Code, prohibiting to persons within its terms the right to "attempt to dispose of" stock or stock certificates without the certification therein provided for, apply to advertisements published in this state, offering to sell such stock or stock certificates, though the person procuring the publication of the advertisement or mailing the circular or trade letter, may be a resident of a state other than Ohio, and the stock or stock certificates so offered for sale may be issued, owned and held in such other state.

COLUMBUS, OHIO, August 26, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of March 31, 1914, I received a letter from the securities department of your office, advising that that department had received several complaints about The Colonial Motion Picture Corporation of New York City, which has been persistent in offering its stock for sale in Ohio through advertisements in news-

papers and periodicals, and by means of circular letters addressed to residents of Ohio and forwarded through the mails. You ask my opinion with respect to the acts and conduct of this concern in view of our statutes regulating the sale of stocks, bonds and other securities and whether any means are available to prevent said corporation from offering its securities for sale in this state without the license provided for by said statutes.

Section 6373-1, General Code, the same being section 1 of an act passed February 6, 1914 (104 O. L., p. 110), amending an act to regulate the sale of stocks, bonds and other securities, provides as follows:

> "Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit) or by any taxing sub-division of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

Section 6373-2 in terms excepts from the meaning of the term "securities" certain instruments therein designated, and further excepting conditionally certain persons, both natural and artificial, from the meaning of the term "dealer," defines that term as follows:

> "The term 'dealer' as used in this act, shall be deemed to include any person or company except national banks, disposing or offering to dispose of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities, either directly or through agents or underwriters, or any stock promotion scheme whatsoever."

Sections 6373-3 to 6373-8, inclusive, make full provision for granting licenses to such "dealers" on application therefor, whether such applicant be a resident or non-resident of the state, and for revocation of such licenses for cause.

Section 6373-11, General Code, provides as follows:

> "Every dealer, before or at the time of circulating the same, shall furnish to the 'commissioner' one copy of such prospectus, circular or other document of like nature, and of each advertisement, circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of sections 6373-9 and 6373-10 of the General Code."

With respect to the questions here presented, it will be observed that the act in question does not in specific terms forbid an unlicensed person or "dealer" to publish or circulate, or use any advertisement in regard to stock, bonds or other securities which such person or "dealer" may have for sale or other disposition. The inhibition in this act is to be found, if at all, in the provisions of section 6373-1, General Code providing that no dealer shall, within this state, dispose or "offer to dispose of" any stock, stock certificates, bonds, or other instruments therein designated, all of which are therein termed "securities."

With respect to the questions here made, it may be observed that ordinarily, newspaper (and magazine) advertisements and circulars are not considered offers within the law, pertaining to the formation of contracts, in the sense that an accep-

tance by one to whose attention such advertisement or circular might come, would constitute a contract with respect to the things presented in such advertisement whether such things be stock, bonds or other securities, or any other thing or commodity. In this view, advertisements and circulars are ordinarily considered to be but invitations to the persons to whom they are addressed or to whose attention they may come, to make offers or to open negotiations with respect to the things therein presented or advertised.

Zeltner vs. Irwin, 25 App. Div. (N. Y.) 228.
Moulton vs. Kershaw, 59 Wis., 316.
Anderson vs. Board, etc., 122 Mo. 61.

However, even considering the word "offer" as it pertains to the law governing the formation of contracts, it is likewise true that at its first promulgation, an offer need not necessarily be made to any particular or ascertained person; and an advertisement addressed to the public generally, or a circular, if it shows an intent to assume legal liability, may be accepted by one so as to complete a contract.

Elliot on Contracts, Vol. 1, sec. 32.
Bank vs. Griffin, 66 Ill. App., 577.

The question arises here, however, on the construction and application of the terms of a statute which in keeping with a well considered and declared purpose, forbids any person or dealer to "dispose of" or "offer to dispose of" certain things therein enumerated and found, without being licensed so to do. In this view, the words "offer to dispose of" should be taken in their ordinary and natural import and be given such meaning as comport with the common sense of the community and which will effectuate the manifest purpose of the act.

Allen vs. Little, 5 Ohio, 65, 71.
State vs. Peck, 25 O. S., 26, 28.

In the case of United States vs. Dodge, Deady 186, decided by the United States district court of Oregon, a liquor case where this question was involved, the court in its opinion says:

> "The liquor may be offered for sale without a special or personal solicitation of any particular person to become a purchaser. It may be done by general advertisement in the press or by exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article of sale with intent to dispose of it to any one offering to purchase."

State vs. Dunbar, 13 Ore., 591, 594.
Willis vs. Standard Oil Co., 50 Minn., 290, 296.

The word "offer" in statutes of this kind is manifestly broader and more general, inclusive and comprehensive than the word "solicit" and I note that a circular or trade letter has been held to be a solicitation within the terms of a statute forbidding the same with reference to the sale of intoxicants in prohibited territory.

Hayner vs. State, 83 O. S., 178.
Rose Co. vs. Georgia, 4 Ga. App., 588.

The case last cited was reversed by the supreme court of that state on the inter-

state commerce question there involved, but the case remains unaffected with reference to the proposition above noted.

In the case of Carter vs. State, 81 Ark., 37, it was held that a newspaper advertisement was not a solicitation within the terms of a statute, making it unlawful for any person, firm, partnership or corporation engaged in the sale of liquors, to solicit orders for sale of liquors in any place where the same is prohibited by law. To my mind, however, this case is not, to say the least, conclusive on the questions here presented for the reason that the term "solicit" as above noted, is so much more restricted in its meaning than is the word "offer." The same observation may be made in the case of State vs. Wheat, 48 W. Va., 259; a case involving the mailing of circulars with reference to liquors in a territory where their sale was prohibited. Moreover, this case is opposed by the decision of the supreme court of our own state in Hayner vs. State, above cited.

With respect to the legislative intention on the questions under consideration, it will be noted that this act, in section 11 thereof (section 6373-11) contemplates that advertisements and circulars may be used by dealers in connection with the sale of "securities," and this section provides in legal and constructive effect, that even before a licensed dealer can make use of advertisements and circulars in connection with the sale of securities, he must file copies of the same with the "commissioner" who by the terms of the act is the superintendent of banks. The inference from the provisions of section 11 is quite conclusive that without the license provided for by the act, the use of advertisements or circulars in connection with the sale of securities is wholly prohibited.

Of course this act has no extra-territorial effect and is limited in its operation to acts done and transactions had within the state of Ohio. In this view I am of the opinion that the act in question is not effective to prohibit advertisements with respect to securities held by non-residents of this state, in newspapers or magazines published outside of the state, notwithstanding such publications may have circulation within the state. On the other hand, if as is here determined, this statute in forbidding persons or dealers to "offer to dispose of" stocks, bonds, or other securities without license, is effective to inhibit the use of advertisements in newspapers or magazines, offering to sell such securities, I see no reason why the inhibition of the statute does not apply to such advertisements in newspapers or magazines published in this state, although such advertisements may be those of non-residents with respect to securities outside of the state.

State vs. Bass Publishing Co., 104 Me., 288.
State vs. State Capitol Co., 24 Okla., 252.

In this connection, inasmuch as the statute is effective only as to acts and transactions within this state, it is important to note that with respect to circulars or letters, they have been held to be effective as offers or solicitations within the state where they are received, though mailed by non-residents outside of the state where they are received.

In re. Palliser, 136 U. S., 257.
United States vs. Thayer, 209 U. S., 39.
Rose vs. State, 4 Ga. App., 588.
See Hayner vs. State, 83 O. S., 178, 191.

In the consideration of the questions presented by your inquiry, I am not unmindful of the rule that statutes should be construed, if possible, so as not to conflict with constitutional provisions, nor of the fact that the inquiry here made brings to view not only a question of legislative intention, but of legislative power as well; for

if the varous things enumerated in section 6373-1 and by it denominated as "securities" are to be considered articles, or commodities, or things, which as against state legislation are within the operation and protection of paragraph 3 of section 8 of article 1 of the United States constitution, a question is here presented whether this statute is effective to make any regulation with respect to the sale in this state of "securities" owned or held outside of the state, or with respect to negotiations for the sale of the same. The constitutional provision above noted is as follows:

> "The congress shall have power * * * to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Under this provision a state has not power to enact legislation effective as a regulation of interstate commerce, nor to restrict the power of congress with respect to any matter which may properly constitute interstate commerce.

Arnold vs. Yanders, 56 O. S., 417.
In re. Julius, 4 C. C. (n. s.) 604.
Brennan vs. Titusville, 153 U. S., 269.
Robbins vs. Shelby Co., 120 U. S., 489.

In the case of In re. Julius, supra, it was held that the negotiations in this state of sales of goods which are in another state, for the purpose of introducing them into this state, is interstate commerce, and that an ordinance of a municipality of this state under which a license fee for the privilege of selling within the municipality picture enlargements, or for canvassing orders for the same, unless the work be done within the limits of the municipality, was void insofar as affected orders taken for goods in another state to be sold under the order in the municipality.

In the case of Arnold vs. Yanders, supra, it was held that a statute requiring the payment of a license fee by one desiring to deal in convict made goods, other than the products of prisons in this state, was in conflict with the commerce clause of the federal constitution and void.

With respect to stock and stock certificates, however, I seriously doubt whether these things are to be classed as property, the interstate sale, transfer and exchange of which constitutes interstate commerce within the meaning of the particular section of the federal constitution under consideration. To illustrate a point in mind, I note that a bill of lading, for instance, upon an interstate or foreign shipment, has been held to represent the tangible property shipped and in the case of an interstate shipment, is beyond the taxing power of a state; and in the case of a foreign shipment, a tax upon a bill of lading is a tax upon exports and therefore beyond the taxing power of either the state or federal government.

Allmy vs. Calif., 24 How., 169.
Woodruff vs. Parham, 8 Wall, 123.
Fairbanks vs. United States, 181 U. S., 283.

On the other hand, it has been held that a bill of exchange, whether drawn on an interstate shipment or a foreign shipment, is an incident of such commerce and not a part of it, and that a broker dealing in foreign bills of exchange, is not engaged in commerce, but is supplying the instrumentalities of commerce, and a state tax upon money and exchange brokers, is not void as a regulation of commerce.

Nathan vs. La., 8 How., 73.

Shares of stock in a corporation are intangible ideas or things representing frac-

tional interests in the corporate property, while certificates of stock are mere muniments of title to the shares represented by them, and "are no more actual property than a man's deed is his farm."

State vs. Davis, 85 O. S., 43, 56.
Ball vs. Towle Mfg. Co., 67 O. S., 306, 314.

Certificates of stock are not things which have any value independent of the parties to them, and it is largely on this consideration that it has been held that the issuing of insurance policies is not a transaction of commerce within the meaning of the provisions of the federal constitution under consideration.

Paul vs. Virginia, 75 U. S., 168.
Hooper vs. Calif., 155 U. S., 648.
N. Y. Life Ins. Co. vs. Cravens, 178 U. S., 383.
Nutting vs. Mass., 183 U. S., 553.
New York Life Insurance Co. vs. Deerlodge County, 231 U. S., 495.

Even assuming that certificates of stock are property, the interstate commerce in which is beyond the regulatory power of the state, it is to be borne in mind that the commerce clause of the federal constitution was not intended to hamper all state legislation, the indirect or incidental result of which might effect interstate commerce.

People ex rel. vs. Reardon, 184 N. Y., 432, 454.

In this case it was held that a tax on transfers of stock within the state was not as to a transfer by a non-resident of stock issued by a foreign corporation, affected or rendered invalid by the interstate commerce clause of the federal constitution.

With respect to the application of this constitutional provision, to the act in question here, or any part thereof, it is to be observed that this act is not a revenue, or tax measure or even primarily a license measure; it does not either directly or indirectly lay any absolute prohibition on the sale in this state of securities held by non-residents. It is, as I see it, nothing more than a regulatory measure, looking to the protection of the people of this state in the sale of securities, whether the same be effected by residents of this state or by non-residents. The license requirement is but a means of effecting the regulation, which is the primary purpose of the act, and the fees required therefor are but such as have proper relation to the cost and expense of providing for and maintaining such regulation. The act in my opinion, is a legitimate exercise of the police power of the state for the protection of its people in respect to the objects sought to be attained by it; and its affect on interstate commerce in the sale or disposition in this state of securities owned or held in other states, being but incidental and remote, it does not, in my opinion, infringe on the constitutional provision above noted.

"Subject to the constitutional limitations, the legislature of a state may pass measures for the protection of the people in the exercise of the police power and is the judge of their necessity and expediency.

"Silz vs. Hesterberg, 211 U. S., 31.

"A police measure otherwise within the constitutional power of the state, will not be held unconstitutional under the commerce clause of the federal constitution, because it incidentally and remotely affects interstate commerce.

"Silz. vs. Hesterberg, supra.

"While the state may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with the congressional legislation on the subject involved, is not necessarily unconstitutional, because it may have an indirect effect upon interstate commerce.

"Asbell vs. Kansas, 209 U. S., 251.
"Patapsco Guano Co. vs. Board, 107 U. S. 345.

"When the local police regulation has relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by congress, pursuant to its constitutional authority.

"Savage vs. Jones, 225 U. S., 501, 525.
"Standard Stock Food Co. vs. Wright, 225 U. S., 540."

By force of the foregoing principles, applicable to the question, I am constrained to the opinion that the act in question is valid with respect to the point under discussion and that effect is to be given to it according to legislative intention.

In the consideration of the question here presented, it is to be borne in mind that this act does not seek to prohibit a citizen of this state from making a contract for the purchase of stock in another state, nor conformable to constitutional guarantee could it do so.

(Allgeyer vs. La., 165 U. S., 578.)

While this is true, and the legislature of this state cannot impair the freedom of a citizen of the state to elect with whom he will contract, it can prevent persons or concerns having stock to sell, from sheltering themselves under his freedom in order to solicit contracts for the sale of the same, which otherwise he would not have thought of making.

Nutting vs. Massachusetts, 183 U. S., 553.

Of course, as before noted, the act is effective only to prohibit acts done in the state contrary to its provisions; but physical presence in this state is not necessary in order that a person or corporation may be guilty of a violation of its provisions. So that, if a person or concern, non-resident of this state, should procure the publication in this state of an advertisement offering for disposal stock or the other things denominated in the statutes as securities or should mail to persons in this state circulars or trade letters offering to dispose of such securities, such person or concern would, without the license (or certification) provided for in the act, be as guilty of a violation of its provisions as though such person or concern were a resident of this state and physically present therein.

Burton vs. U. S., 202 U. S., 344, 389.
Horner vs. U. S., 143 U. S., 207.
Linsey vs. State, 38 O. S., 507, 512.
Sanner vs. State, 81 O. S., 393.
State vs. Paul, 114 N. C., 909.

This is true, even though in case of an individual non-resident so violating the

provisions of the act as a felony, his constructive presence in the state in doing the acts constituting violations of the statute, would not support extradition proceedings for the purpose of bringing him into this state for punishment.

State vs. Hall, 115 N. C., 811.
Wilcox vs. Nolze, 34 O. S., 520.
In re. Mohr, 73 Ala., 503.

With reference to your inquiry, as to what means, if any, are available to prevent the corporation which is the subject of your inquiry, from offering its securities for sale in this state without license so to do, I note the penal provisions of the act (section 6373-20, General Code) which reads as follows:

"Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the 'commissioner,' or in any advertisement, prospectus, letter, circular or other document containing an offer to dispose or solicitation to purchase, or commendatory matter concerning, such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both."

It will be noted from the provisions of this section, that a violation of the provisions of either sections 12, 14 or 15 of the act is made a felony, while a violation of any other of the provisions of the act is made a misdemeanor only. Section 12 (section 6373-12, General Code) has reference only to the promoting of insurance companies and the flotation of the stock of such companies; while section 15 (section 6373-15, General Code) relates to acts of dealing in this state in real estate not located in Ohio. Section 14 of the act (section 6373-14, General Code) provides as follows:

"For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company, after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code which shall not be done until, together with a filing fee of five dollars there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of section 6373-9 of the General Code, the following:

"(a) A certified copy of the articles of incorporation or association of the issuer, its regulation and by-laws;

"(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

"(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good

will and any other consideration for which such securities have been or are to be issued in payment;

"(d) Like certified copies of all contracts or agreements between the issuer and any underwriter of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof; and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

"(e) All contracts made between such underwriters and any salesman, agent or broker.

* * * * * * * * * * * * *"

Looking to the provisions of section 6373-20, General Code, it will be noted that not only do they support the conclusion reached herein—that within the contemplation of the act an "offer to dispose of" securities may be made by advertisements or circular letters, as well as otherwise, but they prescribe a penalty for false statements made knowingly therein on the part of even a licensed person or "dealer."

As to the corporation in question, I am of the opinion that in selling or offering to sell its stock in this state without the license provided for in the act, it is incurring a liability to the penalty as for a misdemeanor provided for in the section, while in selling and attempting to sell such stock without the certification provided for in section 6373-14, it is incurring the penalty of the fine provided for therein; and any individual selling or attempting to sell such stock on behalf of such corporation as the issuer thereof, is made guilty of a felony. I know of no way in which the corporation in question can be brought into this state to answer for its acts and conduct in selling or offering and attempting to sell its stock without the license and certification provided for in the act. In a measure the same situation is presented with reference to the case of an individual selling or offering and attempting to sell the stock of this corporation as the issuer thereof; for, although the physical presence of such person in this state is not necessary in order that his acts may constitute a violation of the provisions of the act, yet even in the case of a felony, the physical presence of the person doing the act constituting the offense, would be necessary for the purpose of extraditing such person from another state as one fleeing from justice, though, of course, such individual if at any time found within the state, could be arrested, tried, and, if found guilty, punished for his acts.

One of the chief sanctions to the observance of regulatory provisions of the kind embodied in this act, lies in the consideration that the power of the state is withheld from the enforcement of contracts entered into in violation of such provision. Another sanction to the observance of regulatory provisions of this kind lies in the disposition of men in general to observe the law of sovereign states with whose citizens they may deal, and in the dislike of being classed as violators of law, even though in fact there may be obstacles in the way of inflicting punishment for such violations.

As to the corporation in question, I do not understand that it has evinced any disposition to disregard the provisions of this act further than is evidenced by its contention that by reason of the interstate commerce clause of the Federal constitution. the act does not apply to transactions between it and citizens of this state. I have no reason to question the good faith of the contention made by this corporation, although as hereinbefore noted, I am clearly of the opinion that its position in this regard is wholly untenable. Assuming the good faith of the corporation, it is reasonable to suppose that upon being advised of the ruling herein made, as to the construction of and operation this act, its compliance therewith may be expected.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1123.

PROSECUTING ATTORNEY MAY APPOINT SUCH ASSISTANTS AS HE DEEMS NECESSARY FOR THE PROPER PERFORMANCE OF HIS DUTIES.

Sections 2914 and 2915, General Code, provide for the appointment by the prosecuting attorney for such assistants as he deems necessary for the proper performance of his duties, and for a fund out of which such assistants are to be compensated.

Where it is necessary for some other attorney to perform duties connected with the prosecuting attorney's office, such assistants should be provided and paid under sections 2914 and 2915; the fund provided by section 3004, General Code, cannot be used for this purpose.

COLUMBUS, OHIO, August 26, 1914.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion County, Marion, Ohio.*

DEAR SIR:—Your favor of August 5th asking construction of section 3004 of the General Code, received. As you state the question it is as follows:

> "In the county of Marion the work is not so great in the office of the prosecutor as in my judgment requires an assistant as the term assistant is understood in the Code. On the other hand, in our judgment we have always been able to conduct all special cases, with one exception, without a special assistant, but there have been days in which the prosecutor himself has been engaged in the conduct of a trial during which, of course, he could not attend to something else and during which time if the commissioners or the auditor or other county official desired a consultation or something else to be done they called some other attorney and by reason of the fact that Mr. Conley is a partner with me in the civil practice of law, he was usually called upon. Now, for the days when I was so actually employed and when Mr. Conley was actually called and performed the work aforesaid he was paid by me out of the fund provided for by section 3004. As I considered it an expense incurred by me in the performance of my official duties and it was not otherwise appointed in this county nor was there a special appointment for any special case and there was no other way provided for this contingency."

From the above statement I am of the opinion that the services mentioned are such as should be performed by an assistant to the prosecutor. The sections of the Code providing for the appointment of an assistant and his compensation are sections 2914 and 2915.

> "Section 2914. On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office.
>
> "Section 2915. The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

A reading of these sections will show that it is not necessary that the assistant devote all his time to county work and that any situation which may arise can be met under these sections.

> "Section 3004. There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county."

Section 3004 provides for expenditures "not otherwise provided for." As I have just stated that the situation you mention is provided for by sections 2914 and 2915, I do not believe that the fund mentioned in section 3004 can be expended for such services.

I trust this answers your inquiry.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1124.

REFERENDUM PETITION—SUBMISSION AT GENERAL ELECTION—INITIATIVE PETITION—SUBMISSION AT GENERAL ELECTION.

Where a resolution passed by a city council is declared to be an emergency resolution and litigation in which it is sought to enjoin its enforcement because of the filing of an initiative petition for a similar resolution, and a petition for a referendum on the same has failed of its object, the referendum petition may not be submitted to the voters, but the initiative petition may be so submitted at the proper election.

COLUMBUS, OHIO, August 27, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 24th, enclosing letter from Charles F. Ribble, prosecuting attorney, Zanesville, Ohio, a letter from the board of elections, Zanesville, Ohio, copy of resolution 1031, Zanesville council, copy of referendum petition on same and a copy of the initiative petition on the same subject. The question propounded grows out of the following state of facts:

The state board of health, about October, 1912, ordered the city council of Zanesville to provide an adequate supply of pure water for the use of the inhabitants of said city. On March 2, 1914, the council, with a view of complying with said order, it not having been done prior to said date, passed resolution 1031, of which you send me a copy. This resolution was declared an emergency measure. A petition for a referendum thereon was duly filed. A petition initiating a measure on the same subject was also filed. Proceedings to enjoin the enforcement of resolution No. 1031 were brought in the common pleas court and a temporary restraining order was asked largely, if not altogether, upon the ground that it would not be carried into effect while the referendum and iniative petitions were pending. The case was lost in the common pleas

court, affirmed on error by the court of appeals, and an application for a restraining order was refused by the supreme court.

This, to my mind, answers the question of submitting the referendum petition in the negative. Section 4227, General Code, exempts emergency ordinances and measures necessary for the preservation of the public peace, health or safety of the municipal corporation, from the operation of the referendum (103 O. L., 112), and it is only fair to assume that the courts in refusing the injunction asked, based their judgment upon the fact that this resolution was an emergency measure and properly so declared. I am, therefore, of the opinion that the referendum petition may not be submitted to the voters at the coming election.

The question as to the submission of the initiated petition is entirely different, the decision of the courts in the injunction case not having the same effect upon it as upon the referendum petition. Without, therefore, going into a discussion of the resolution that may follow and adoption or rejection of this initiated resolution. I feel it is sufficient to generally answer your question by saying that the initiated petition should be submitted to the voters, while the referendum should not be so submitted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1125.

TAXATION AND REVALUATION OF SECTIONS 16 AND 29, WHEN SUCH SECTIONS ARE LEASED FOR MORE THAN FIFTEEN YEARS—POWER OF TAX COMMISSION TO REMIT TAXES.

1. Under section 5330, General Code, sections 16 and 29 or parts thereof when leased for more than fifteen years and subject to revaluation, are not subject to taxation in the name of the lessees.

2. The power to remit taxes erroneously assessed is now vested in the tax commission under section 80 of the act of May 10, 1910, 101 O. L., 420.

COLUMBUS, OHIO, August 27, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 3, 1914, in which you inquire:

> "*First.* Are school and ministerial lands, held under lease, subject to taxation, and if so for what purposes may they be taxed?
>
> "*Second.* If they are taxable should the county treasurer proceed in the ordinary way to enforce the tax lien or is there some special precedure provided by law for this purpose?"

This question was before our supreme court in 1884, when it was held:

> "Where the United States appropriated section number sixteen in every township * * * for the use of schools in such township, and vested the same in the legislature of the state 'in trust for the use aforesaid, and for no other use, intent, or purpose whatever,' in an action by a county treasurer against a lessee of such lands, who held a lease for ninety-nine years, renewable

forever, whose lands were taxed under section 2733, Revised Statutes, as the property of the lessee, to enforce the payment of the taxes so assessed.

"*Held:* That section 2733, Revised Statutes, provided for the taxation of such lands, held under such lease as the property of the lessee."

Barton vs. Bentley, 41 O. S., 410.

At that time the law, in reference to taxation of schools and ministerial lands, was as follows:

"Lands held under a lease for a term exceeding fourteen years, belonging to the state or to any religious, scientific, or benevolent society, or institution, whether incorporated or unincorporated, and school and ministerial lands, shall be considered, for all purposes of taxation, as the property of the persons so holding the same, and shall be assessed in their names."

After the passage of section 2733, it was amended on February 17, 1881, so that it read as follows:

"All lands held under lease for any term exceeding fourteen years, and not subject to revaluation, belonging to the state or any municipal corporation, or to any religious, scientific or benevolent society, or institution, whether incorporated or unincorporated, or to trustees for free education only, and school and ministerial lands, 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."

The real amendment here made was to insert after the words "fourteen years" the words "and not subject to revaluation." Subsequent to this amendment, taxes were charged against a portion of section 29 (ministerial land) in Vinton county, Ohio, and not being paid, a suit was brought to enforce the same. This suit was defended upon the ground that the amendment above mentioned changed the rule and that inasmuch as the land in question was subject to revaluation under the statutes, and the terms of the lease which was made on November 2, 1852, the same was not subject to taxation. The matter was heard before Judge Coultrap, one of the judges of the second subdivision of the seventh judicial district, and was decided by him on August 20, 1901. See 8th N. P., page 549.

The case was very fully considered by Judge Coultrap in all its aspects, including the character of title under which these lands were held in that portion of the state, and he concluded, correctly I think, as follows:

"Where ministerial section number twenty-nine in the Ohio company's purchase was held under a lease for ninety-nine years, renewable forever, but subject to revaluation every fifteen years, and against which taxes assessed upon the fee stood charged on the duplicate in the name of the widow and heirs at law of the lessee, in an action brought by the county treasurer against said widow and heirs at law to recover judgment for the taxes so assessed and subject said lands to the payment thereof,

HELD:

"1. That said lands are not subject to taxation and said assessment was unauthorized.

"2. That section 2733, Revised Statutes, only imposes a tax on the lessee's interest in the lands described therein and it does not apply to a lease of such lands, although for a term of more than fourteen years, if by the stipu-

lations of the lease the lands, as between the lessor and lessee, are subject to revaluation.

"3. That if section 2733 was applicable to such case, the lands being subject to revaluation every fifteen years, the lessee's interest is not regarded as of substantial value and there is nothing to tax."

Of course, the rule applicable to ministerial lands is the same as that necessarily to be applied to school lands and I am of the opinion that since the amendment of section 2733 as above quoted, and because of the fact that it is now to be found as section 5330 of the General Code, and in the same language found in amended section 2733, supra, that these lands are not subject to taxation when held under leases for more than fourteen years and subject to revaluation. This, of course, necessitates an examination to ascertain the length of the term of the lease. If for less than fourteen years, it is not subject to taxation; if for more than fourteen years, and not subject to revaluation, it is taxable; but if for more than fourteen years and subject to revaluation, the same is not taxable for the reason, as stated by Shaub, J., in 54 O. S., 272, that the lessees interest is not of substantial value. It must not be understood that this holding exempts a lessee from paying taxes upon the improvements which he places upon a lease, but this opinion must be construed as applicable only to the taxability of the fee of these lands as against persons holding leases for terms shorter than fourteen years or longer than fourteen years, and subject to revaluation. This, I believe, eliminates the necessity of answering your second question, but at the same time I desire to call your attention to section 5329, General Code, wherein it is provided that "school or ministerial lands shall not be sold for taxes until the purchase money therefor is fully paid," from which it may readily be seen that if after these lands are sold, they may be placed on a duplicate for taxation, but cannot be sold for delinquent taxes, it can hardly be conceived that authority could be found for selling any of these unsold lands at any time. I suggest that before taking any action as to the remission of taxes upon any of these lands, that the matter may be carefully investigated and it be determined, if possible, how much of the delinquent taxes is charged against the fee of the lands, and how much against the improvements placed thereon by the lessee, as I am of the opinion that the taxes upon the latter may be collected while upon the former may not.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

1126.

ABATEMENT OF A NUISANCE BY THE STATE BOARD OF HEALTH—WHERE THE CITY BOARD OF HEALTH NEGLECTS OR REFUSES TO DO SO—MIAMI AND ERIE CANAL AT CINCINNATI.

A nuisance existing in the Miami and Erie canal at Cincinnati in that particular section or reach of the canal, which was transferred by the state to the city of Cincinnati, pursuant to the authority of an act of the legislature passed May 15, 1911, is a local one, subject to abatement by the health authorities of the city of Cincinnati, but in case of failure or neglect by the city board of health to abate this nuisance, the state board of health, by virtue of section 1237, General Code, has jurisdiction to abate the same at the expense of the city of Cincinnati.

COLUMBUS, OHIO, August 29, 1914.

DR. E. F. MCCAMPBELL, *Secretary and Executive Officer, State Board of Health, Columbus, Ohio.*

DEAR DOCTOR:—I have your communication of July 28th, 1914, asking an opinion of me, in which you say:

> "Numerous complaints have been made to the state board of health with reference to unsanitary conditions in the Miami and Erie Canal at Cincinnati. The state board of health has been asked to take some action to relieve these conditions. The only way that it occurs to me that the state board of health could act in this matter would be under authority granted in section 1249 of the General Code, and there is some doubt in my mind as to the application of this and succeeding sections to the case in question. To better explain the matter, I attach hereto a copy of a letter from Mr. John W. Hill, president of the state board of health, a copy of a letter from Honorable Frederick S. Spiegel, mayor of Cincinnati, and a copy of a report on an investigation made by one of our assistant engineers. I would also call your attention to the provisions of an act passed by the general assembly, O. L., 102, page 168, transferring this part of the canal system to the city of Cincinnati."

From your communication, as well as from attached correspondence therein referred to, I am advised that the condition complained of in the Miami and Erie Canal is not only one at Cincinnati, but is in that particular section or reach of the canal which was transferred by the state to the city of Cincinnati by ninety-nine year lease, renewable forever, pursuant to the authority of an act of the legislature passed May 15, 1911 (102 O. L., 168). Likewise, from the correspondence attached to your communication, and therein referred to, I learn that the condition in this canal, complained of, which amounts to a pronounced nuisance, is due, in part, to the diminished flow of water in this reach of the canal, owing to the breaking of the dam near Middletown, which dam served the purpose of impounding the water as a feeder for the lower reaches of the canal in question. This nuisance is also caused, in part, by rubbish of different kinds which has been thrown into the canal by persons living along the same, and, in part, by the action of the Cincinnati Gas Company pumping polluted water from Mill creek into the canal in order to supply water for its condensers, which water, having been heated in the operation is returned to the canal.

Inasmuch as the dam at Middletown, above referred to, was washed out during the flood of March, 1913, no legal responsibility attaches to any one for the diminished flow of water in this canal at Cincinnati. This circumstance does not, however, excuse the other conditions which enter as elements in the nuisance complained of.

Your precise inquiry is one with reference to the authority of the state board of health to meet this condition. In the first place, I am inclined to the view that sections 1249 et seq., of the General Code, referred to by you, do not confer upon the state board of health adequate power to cope with the peculiar conditions here presented. Without quoting at length, these sections which form a part of the so-called "Bense Act" (99 O. L., 74), I note that with respect to the question at hand, they provide that the state board of health, upon proper written complaint that a municipal corporation or person is permitting sewage or other waste matter to be discharged into a stream or water course to the detriment of health and comfort, or in such manner as to pollute the source of any public water supply, may investigate the conditions complained of, and after hearing, it may order the person responsible for the discharge of such sewage or other waste matter to install works for purifying or otherwise disposing of the same.

In the condition here presented it does not appear that any sewage or other waste, as the terms are used in these sections, are being discharged into the canal, and for this, as well as other reasons that might be suggested, I am of the opinion that these sections have no application to the situation at hand.

The condition presented is one of local nuisance, as to the abatement of which the state board of health has no primary duty or jurisdiction.

Sections 4404 et seq., General Code, provide for the organization and powers of municipal boards of health, and as pertinent to the question at hand section 4420, General Code, provides that the board of health of a municipality shall abate and remove all nuisances within its jurisdiction.

In this connection it is manifest, that the fact that this particular part of the canal where this nuisance exists, is, in a sense, the property of the city of Cincinnati, does not in any wise limit or otherwise affect the jurisdiction of the board of health of that city to abate this nuisance or the conditions which cause it.

> "Duties relating to the preservation of the public health devolve primarily upon the state as the sovereign power. This power the state may delegate to public corporations, such as municipalities, townships, etc. Local health officers in the exercise of the power thus delegated are plainly engaged in a purely public service, in the performance of strictly governmental duties. They cannot, in any sense, be considered as the servants or agents of the corporation.
>
> "Marion Township vs. Columbus, 12 O. D. 553-557."

It is quite clear, therefore, that the duty of the board of health of the city of Cincinnati is governmental in its character, and is not affected by the interest of the municipality in the property in and upon which this nuisance exists. Though no primary duty rests upon the state board of health with reference to the abatement of this nuisance, yet for the purpose of meeting conditions such as may exist in this case, section 1237, General Code, provides, with reference to the jurisdiction and power of the state board of health as follows:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people * * *. It may make and enforce orders in local matters when an emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such case the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

There may be some question as to whether the conditions presented with reference to this nuisance constitute an emergency, as that term is used in the section above

quoted, but it is clear that the neglect and refusal of the local board of health to abate this nuisance, and the conditions which have brought it about, would confer both jurisdiction and duty upon the state board of health to act in the premises in the abatement of the conditions complained of.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1127.

NECESSARY QUALIFICATIONS FOR HEAD OF LIMA STATE HOSPITAL.

No one may have general charge or be the executive head of the Lima state hospital unless he be an elector in this state.

COLUMBUS, OHIO, August 31, 1914.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR COX:—You enquired of me verbally whether a non-resident of Ohio is eligible to the position of superintendent of the Lima state hospital. In reply thereto I beg to advise that section 4 of article 15 of the constitution of Ohio provides as follows:

> "*No person shall be* elected or *appointed to any office in this state unless possessed of the qualifications of an elector;* provided that women who are citizens may be appointed * * * to institutions for the care of women and children * * *."

This appears to be the last expression of the people of the state on the question of eligibility to office either elective or appointive. The official must be an elector of the state, and it matters not whether the position be called "superintendent" or not. Anyone who would perform the duties usually devolving upon the superintendent of an institution such as the Lima state hospital would be subject to the same constitutional inhibition found in the section quoted. The real test rests upon the duties to be performed rather than the title of the position.

I am, therefore, of the opinion that no one may have general charge or be the executive head of the Lima state hospital unless he be an elector in this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

P. S.—Since writing the foregoing I have found the following, which confirms my conclusion as expressed above:

> "QUALIFICATIONS OF MEDICAL SUPERINTENDENT.—The place of medical superintendent of a hospital for the insane, under the act of March 27, 1876, O. L. 80, is an 'office' within the meaning of section 4, article 15, of the constitution, which ordains that 'no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector.'" (State vs. Wilson, 29 O. S., 347).

Attorney General.

1128.

DATE FOR OFFICIALLY CERTIFYING TO THE CLERK OR CLERKS OF THE BOARD OF EDUCATION THAT THE VILLAGE OR RURAL DISTRICTS OR UNION SCHOOL DISTRICTS WILL EMPLOY A SUPERINTENDENT IS MANDATORY—EMPLOYMENT OF JOINT SUPERINTENDENT FOR SUPERVISION PURPOSES BY TWO TOWNSHIPS.

The date fixed by section 4740, General Code, to wit: July 20, 1914, for officially certifying to the clerk or clerks of the board of education that the village or rural districts or union school districts will employ a superintendent, etc., is mandatory for the reason that on that date it is to be determined by virtue of such certificate or notice what supervisory districts the respective county districts shall contain.

Where two townships, which never at any time before July 20, 1914, employed a joint superintendent for supervision purposes, cannot after that date employ a superintendent for supervision purposes and certify the same to the county board of education, the county board of education must attach either all or any portion of said townships to one or more of the other supervision districts of the county, as determined by such board in accordance with the discretion which is vested in said board by section 4740, General Code.

COLUMBUS, OHIO, August 31, 1914.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Under date of August 5, 1914, you submitted for opinion thereon the following request:

> "The county board of education of Pickaway county, Ohio, met and organized on July 19, 1914. After electing a county superintendent and receiving certificates from various townships stating they had formed separate supervision districts, the said board adjourned to meet July 29, 1914. From the certificates filed it appeared that two contiguous townships, viz.: Muhlenburg and Monroe, containing eighteen teachers were isolated from the rest of the county by half time supervision districts. On the 24th day of July, 1914, the two townships met in joint session and attempted to form a supervision district and employed S. M. Sark as superintendent at a salary of one thousand dollars per year, and said Sark was to give full time to supervision. Notice of said action was filed with the county board of education prior to its meeting on July 29th and prior to any attempt being made by the county board to dispose of said two township districts. Previous to this time Muhlenburg township had been employing a superintendent, but Monroe township had not been under supervision since December, 1913.
>
> "*First.*—Is date July 20 in section 4740 mandatory or directory?
>
> "*Second.*—Do the words 'already employing a superintendent' in section 4740 take the action taken by said boards out of the operation of the statute?
>
> "*Third.*—Is the power of the county board in the matter clerical or discretionary?
>
> "*Fourth.*—If the action taken by the joint board is illegal, what, if anything, can be done by the county board to make it legal?"

Section 4738 of the General Code, as amended, 104 O. L., at page 140, provides for dividing the county school district into supervision districts, as follows:

> "The county board of education shall within thirty days after organizing divide the county school district into supervision districts, each to contain

one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty."

The provisions of section 4740 of the General Code, as amended, 104 O. L., at page 141 thereof, apply to districts or the union of school districts which already employ a superintendent, as follows:

"Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

The two contiguous townships, viz.: Muhlenburg and Monroe, specifically mentioned in your letter of inquiry, together employ eighteen teachers. It further appears that these two townships have never at any time jointly constituted a supervision district, but that on the 24th day of July, 1914, the boards of education of the respective two townships met in joint session and attempted to form a supervision district, and attempted to employ a party as superintendent at a salary of $1,000 per year, the said superintendent to give full time to supervision work. Notice of this action on the part of the joint boards of education of the respective townships was given to the county board of education prior to its meeting on July 29th. Prior to this time Muhlenburg township had been employing a superintendent, but Monroe township had not been under supervision since December, 1913.

The date fixed by said section, to wit, July 20, 1914, for officially certifying to the clerk or clerks of the board of education, that the village or rural districts or union school districts will employ a superintendent, etc., I take it is mandatory for the reason that on that date it is to be determined by virtue of such certificate or notice, as to what supervisory districts the respective county districts shall contain. In this instance notice was not given until July 24, 1914, that the said townships would constitute a

supervision district and employ a superintendent, who would give at least one half of his time to supervision work, etc.

The two townships in question were never at any time, prior to July 24, 1914, a union of school districts for supervision purposes which already employed a superintendent. They never constituted a supervision district already employing a superintendent, and therefore do not come within the provision of said section 4740, particularly the provision contained in the first part of said section. While one of the townships in question already employed a superintendent, nevertheless the two townships never therefore constituted a union of school districts for supervision pnrposes. Therefore, I am of the opinion that the two townships acting jointly as a supervision district, do not come within the provisions contained in said section 4740.

The latter part of said section provides in substance that any school, district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section, shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts. shall be in charge of the enlarged supervision district or districts until a vacancy occurs.

It appears from your inquiry, as before stated, that one of the townships in question already employed a superintendent. In my judgment the superintendent so employed would not come within the provision contained in the latter part of said section 4740, which is above referred to, because the two townships never constituted a supervision district and such superintendent could not therefore be considered as a superintendent already employed in such supervision district. In accordance with the provision contained in the latter part of said section, the two townships involved should therefore be joined for such supervision purposes to one or more of the other supervision districts of said county district. Such disposition of the two townships in question is within the discretion of the county board of education, said board having the power to attach all or any portion of said townships to one or more of the other supervision districts, as the case might be. However, the superintendent already or heretofore employed by one of the townships, as heretofore stated, cannot be retained in charge of the enlarged supervision district so formed by the county board of education, until a vacancy occurs. There is nothing that the county board of education can do in regard to the matter, except as above pointed out, to attach the two townships in question to one or more of the supervision districts already formed in the county, as provided by the latter part of said section 4740 of the General Code, supra.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1129.

COUNTY COMMISSIONERS NOT PERSONALLY LIABLE UNDER CERTAIN CONDITIONS WHERE THEY EXPEND SLIGHTLY MORE THAN $15,000 FOR THE CONSTRUCTION OF A COUNTY BUILDING, EXCLUSIVE OF FIXTURES, WITHOUT SUBMITTING THE QUESTION TO A VOTE OF THE ELECTORS.

Where county commissioners have let a contract for the construction of a county building, exclusive of certain fixtures, for a sum less than $15,000, intending to make use of fixtures already installed in the old building which is to be replaced, and when, subsequently it is discovered that the cost of removing and reinstalling the fixtures will bring the total cost up to a figure slightly in excess of $15,000, the question of expending more than $15,000 to a vote of the electors is required by the strict application of the statute, section 5638, General Code. The amount of the excess being small, and approximately the same as the cost of holding an election, the commissioners would not be personally liable should they exceed the statutory limit and complete the building, they having acted in good faith.

COLUMBUS, OHIO, August 31, 1914.

HON. E. W. COSTELLO, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Some time ago, I gave my opinion to the general effect that county commissioners might not lawfully avoid the statutory limitation of $15,000.00 upon the amount to be expended in the construction of a county building by letting a contract for the partial construction of the building excluding therefrom such essential features as lighting, heating and plumbing; the amount of such contract being less than $15,000.00; and by subsequently and independently contracting for the installation of fixtures of the kind mentioned, the aggregate cost of all the contracts being in excess of $15,000.00.

Under date of July 30th, you wrote to me submitting additional facts and requested my opinion thereon as follows:

> "The building in question is now completed exclusive of the heating plant, and the amount of $15,000.00 has been exhausted. With respect to the heating plant the purpose is to utilize equipment which has been heretofore installed in the building which the new building is designed to replace, which equipment will be substantially sufficient to fit out the new building. The commissioners desire, without entering into a contract, to employ day labor for the removal and installation of the old equipment, and to purchase in the open market such articles of new equipment as are necessary to supplement the old. The cost of carrying out the commissioners' plans will be less than $1,000.00 (this fact being stated to me verbally by you).
>
> "May the work described lawfully be done by the commissioners without submitting the expenditure to a vote of the people?"

The facts as you present them are peculiar. It seems from your statement that the commissioners may have been acting in good faith in proceeding as they did to separate the installation of certain fixtures from the remainder of the contract; and that in good faith thay may have originally ascertained that the margin of $2,000.00 between the amount of the principal contract and the amount which, without a vote of the people, could be expended in the construction of a single building, would be sufficient to provide for the installation of such fixtures, particularly in view of the fact that very little new equipment was to be purchased.

Under all these circumstances the principles laid down in my former opinion

apply. That is to say, there being some reason, at least, for dividing the contract arising out of the intention of the commissioners to use old equipment, it is not to be assumed that the commissioners are attempting an evasion of law, and that being the case, a hard and fast or technical application of the statute is not to be favored, and a substantial compliance therewith would be sufficient.

I cannot come to any conclusion other than that the limitation of section 5638 General Code, applies to the total cost of a building and its fixtures ready for use for its intended purpose. Technically, therefore, regardless of the good faith of the commissioners in dividing the contract for purposes of convenience, and regardless, too, of the reasonable anticipation on their part of their ability to bring the total cost of the building within the $15,000.00 limitation, the statute requires the submission of the proposition to expend a sum of money in excess of $15,000.00 to a vote of the electors should the aggregate cost of so much of the construction work as is necessary to complete the building, within the rule as stated by me, exceed $15,000.00. This must be my legal advice to you.

However, in view of the situation involved, and the peculiar facts stated, I am clearly of the opinion that should the officers of the county proceed to complete the work without the expense of submitting the question to the electors, there could be no recovery against them or against any other person on account of the money thus expended. I do not hesitate to express this view under the facts as you state them, that the expense of holding an election on this question would substantially equal, if not exceed the amount of the excess involved, so that the situation seems to justify a relaxation of the strict rules of law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1130.

RETIREMENT FROM BUSINESS OF A FOREIGN CORPORATION—WHAT CONTEMPLATED BY SUCH RETIREMENT.

The retirement from business of a foreign corporation contemplates the withdrawal of activities which would subject it to compliance with section 183 et seq., General Code, and does not affect its registration under section 178 et seq., General Code.

COLUMBUS, OHIO, September 2, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 23rd, which in full is as follows:

> "Where a foreign corporation files the application and statement under sections 178 and 179 of the General Code, and a certificate under said section is issued to such corporation authorizing it to transact business in this state, and such corporation also files with the secretary of state the statement required by section 183 of the General Code, and the certificate is issued by the secretary of state to such corporation under section 184, General Code, authorizing it to do business in this state, may such corporation retire from doing business in this state under sections 183 and 184, General Code, without retiring from doing business in this state generally—that is, may the corporation retire from doing business in this state upon the certificate issued to it

under sections 183 and 184, General Code, and still remain and do business under the certificate of authority issued to it under section 178?

"I am unable to find but one section authorizing a foreign corporation to retire from doing business in the state, and that is under section 11976, General Code, which authorizes a general retirement."

Your question requires an interpretation of section 11976, General Code, which provides as follows:

"When it retires from business in this state every foreign corporation is required to file with the secretary of state a certificate to that effect, signed by the president and secretary of the corporation."

In connection with this section I refer you to section 11978, which provides as follows:

"The mere retirement from business, or voluntary dissolution of a domestic or foreign corporation without filing the certificate provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five, and eleven thousand nine hundred and seventy-six, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of the next four preceding sections."

The last named section is out of place in the General Code, a fact which the legislature has recognized by the separate enactment of sections 5520 and 5521, General Code, a part of the franchise tax laws applicable to foreign corporations which provide as follows:

"Section 5520. The mere retirement from business, or voluntary dissolution of a domestic or foreign corporation, without filing the certificate provided for in sections eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act.

"Section 5521. In case of dissolution or revocation of its charter on the part of a domestic corporation, or of the retirement from business in this state on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid."

The legislative history of the provisions under consideration throws a flood of light upon their meaning. Prior to the enactment of the Willis law, so-called, 95 O. L., 143, there was no such thing as the retirement of a foreign corporation from business in this state. What are now sections 178 and 183, respectively, General Code, were then in force, but neither group of statutes contained any provision for what has become known as the retirement of a foreign corporation. There was no practical necessity for such a thing at that time because prior to 1902 the state imposed no continuing or annual tax upon the privilege of doing business in this state. It is obvious, then, that the retirement provisions which were enacted as a part of the Willis law have a direct relation to the purpose of that law. The effect of retirement is to absolve the corporation from liability to pay annual franchise taxes. It would seem to follow, then, that what the legislature had in mind in using the general phrase "re-

tirement from business" was such retirement from business as would put an end to liability for franchise taxes.

In opinions to yourself and to the tax commission, copies of which are enclosed herewith, I have held that the Willis tax, so-called, upon the continuing annual value of the privilege of exercising certain corporate powers in the state, is a tax on the privilege existing under sections 183, et seq., General Code, formerly section 148c, Revised Statutes; and that it is possible for a corporation to be registered under what is now section 178, et seq., General Code, without being liable for such annual tax and without being liable to comply with section 183, General Code.

It would seem to follow that if it is possible for a corporation to be registered in the state under section 178, et seq., alone, it is equally possible for a corporation which has complied both with this group of sections and with section 183, et seq., to relinquish the privileges enjoyed under the latter, and still to retain those possessed under the former.

Whether or not this may be done depends upon what is meant by "retirement from business." As already indicated the effect of retirement is to put an end to liability for Willis taxes; the liability for Willis taxes depends upon liability for compliance with section 183, et seq., section 178, et seq., having nothing whatever to do with the question of liability for Willis taxes; therefore, it seems to me that when the legislature enacted these provisions respecting, retirement of foreign corporations from business in Ohio, as a part of the Willis law, it must have meant retirement from the enjoyment of the privileges taxed under the remaining provisions of the Willis law, that being, as already stated, the privilege initially taxed by the exaction of the compliance fee under section 183, et seq., General Code.

Accordingly, I am of the opinion that the phrase "retirement from business," as used in section 11976 and related sections, as applicable to foreign corporations, means retirement from the exercise of the privilege covered by section 183, et seq., General Code. So that when a foreign corporation retires from business in this state it is at least entitled, at its request, to have its registration under section 178, et seq., continued on the books of your office; in fact, I am of the opinion that even without specific request on the part of the corporation it is the duty of the secretary of state to cancel the certificates issued under section 183, et seq., General Code, without making any notation with respect to the corporation's registration under section 178, et seq., General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1131.

DEFICIENCY—QUESTION OF ASSESSMENT IN ANTICIPATION OF WHICH BONDS HAVE BEEN ISSUED.

When there is a deficiency in the collection of assessments in anticipation of which bonds have been issued, it is not lawful to issue notes or bonds in anticipation of the subsequent assessments. Such assessments when subsequently collected, should be paid out of the sinking fund to supply the deficiency created by the payment of the bonds. If the sinking fund has not money enough in it to pay the bonds when due, refunding bonds should be issued.

COLUMBUS, OHIO, September 2, 1914.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—I have acknowledged receipt of your letter of July 18, 1914, in which you state that on a certain day mentioned, seventeen thousand three hundred ($17,-

300.00) dollars worth of special assessment bonds of the city of Chillicothe fell due; that said bonds were issued on account of seven (7) special assessment improvements for which assessments had been levied, and the collection thereof was completed; that there were aggregate deficiencies amounting to over $8,000.00 in the designated assessment funds; and that, accordingly, council by resolution, directed the mayor and auditor to borrow an amount of money equal to the deficiency, in anticipation of the collection of special assessments.

On these facts you request my opinion as to whether or not council may lawfully issue notes in anticipation of the collection of special assessments, under the circumstances stated; and if council is without authority to do so, whether deficiencies can be provided for by borrowing money in any way, or whether it is necessary for the sinking fund trustees of the city to pay the bonds falling due under authority of section 4517 of the General Code.

At the outset, I may state that in my opinion, the payment of the bonds in question devolves upon the sinking fund trustees, at all events. Section 4517 of the General Code provides as follows:

> "The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

There are other provisions which I need not cite which have the effect of requiring all special assessments, on account of which bonds have been issued and are outstanding, to be paid to the sinking fund trustees; and also requiring that assessments, in anticipation of which bonds have been issued, shall be applied by the sinking fund trustees to the payment of those bonds and no others. The effect of these provisions, in my opinion, is to vest in the sinking fund trustees the exclusive power and authority to pay special assessment bonds when they fall due, to the extent that there may be a deficiency in the special assessment collection, the general sinking fund, then, would have to bear the burden of such deficiency until the assessments have been fully collected.

In this connection, I do not observe in your letter, a statement as to the cause of the deficiency. If there are uncollected assessments, then, in the event that the deficiency is subsequently wiped out by the collection of such assessments, the sinking fund would not, in the long run, suffer, because such assessments, when collected, should be paid to the sinking fund trustees. In a situation of this sort I would be of the opinion that the requirement of sections 3914 and 3932, General Code, relative to the special application of special assessments, on account of which bonds have been issued, would not be controlling. That is to say, when the bonds had been paid from the general sinking fund, and the proceeds of tax levies, the reimbursement of the sinking fund by the subsequent payment to it of the belated assessments, would constitute a proper application of such assessments. Thus the integrity of the sinking fund would be maintained and the primary purpose of the statutes accomplished.

But though it be the duty of the sinking fund trustees to pay the bonds when due, they need not, if such payment would seriously deplete the sinking fund and no immediate prospect of repletion of that fund from the subsequent collection of assessments exists, actually apply the sinking fund directly to such payments.

Under the conditions mentioned in section 4520 the sinking fund trustees may

refund the indebtedness, and if these conditions do not exist, council, under sections 3916 et seq., General Code., may take similar action. If the action is that of the sinking fund trustees then, under the first section cited, refunding *bonds* must be issued; if council acts, then under section 3916 of the General Code, either notes or bonds may be issued.

However, the notes or bonds issued under section 3916 or 4520, as the case may be, would not be, in the technical sense, issued in anticipation of the collection of special assessments; they would be issued to refund a general obligation of the municipality, and for their payment general taxes would be levied; to be sure subsequently paid assessments would go into the sinking fund and thus relieve the general tax levies, but there would be no special application of the subsequently paid assessments to the notes or bonds issued, as above described, such as is required by the sections already cited and by section 3915, General Code.

Said section 3915, which is directly involved in your first inquiry, provides as follows:

> "Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments. Such notes shall be signed and sealed as municipal bonds are signed and sealed. They shall bear interest at a rate not to exceed six per cent. per annum, and be due and payable not later than five years from the date of issue. The notes shall not exceed in amount the estimated cost of the improvement, and shall recite upon their face the purpose for which they were issued. All assessments collected for the improvement, and all unexpended balances remaining in the fund after the cost and expenses of the improvement have been paid, shall be applied to the payment of the notes and the interest thereon until both are fully provided for. Council ordinances and proceedings relating to the issue of such notes shall not require publication."

I have discussed the relation of this section to others in *paria materia* in an opinion to the bureau of instruction and supervision of public offices, Columbus, Ohio; copy of which I enclose herewith. In that opinion you will observe that I hold that the purpose of section 3915 is to make it possible for the city to finance a special assessment improvement during the progress of the work without actually issuing bonds. That is, my belief is that sections 3914 and 3915 construed together, establish the conclusion that notes may be issued as preliminary to the subsequent issue of bonds and both in anticipation of the same special assessment.

Of course, in the opinion referred to, I did not consider the exact question which you have; namely, as to whether or not notes may be issued in anticipation of the collection of assessments after the bonds have been issued, and when they are due and cannot be paid from the assessments.

I am inclined to doubt the legality of such procedure. In the first place, as I have already stated, the sinking fund trustees are charged with the duty of paying special assessment bonds, and are entitled to all assessments on account of which bonds have been issued. Therefore, when bonds have been once issued in anticipation of the collection of special assessments, the subsequently collected assessments belong to the sinking fund and cannot be lawfully diverted into any other channel. This would hold true even if the bonds themselves have been paid, for reasons already given.

But, if an attempt were made to issue special assessment notes, under section 3915, an inconsistency would at once develop upon the subsequent collection of assessments. Sinking fund trustees are not charged with the duty of paying off *notes* of the municipality, as distinguished from its bonds. Therefore, the clash would be as between the sinking fund trustees, who would lay claim to the subsequently paid assessments because bonds have been issued in anticipation of them, and the city treasurer whose duty it would be to pay the notes as such.

In the second place, it is the duty of the sinking fund trustees to pay the special assessment bonds. If notes are issued under section 3915, General Code, in anticipation of the collection of assessments, the proceeds of the sale of such notes, in order to be made applicable to the payment of the bonds, would have to be turned over to the sinking fund trustees. I find no authority in law for the sinking fund trustees to receive such money. To be sure the fund might be transferred to the sinking fund by appropriate action, but this is an indirect way of accomplishing the result, and the fact that such indirection would be required to bring about the consummation of the project shows, to my mind, that it was not the intention of the legislature that such notes should be issued for that purpose.

I have already observed that you do not state how the deficiency occurred, nor do you state what is meant by the "anticipation" of special assessments under which the notes were attempted to be issued. The query, in my mind is as to whether the assessments have merely not been paid, and payment may be expected in the future on the one hand, or, on the other hand, whether there is an actual deficiency in the assessments.

In the event that the deficiency grows out of an erroneous calculation as to the amount of the assessment, or any other circumstance affecting the amount of the assessment itself, I do not think that a different conclusion would be reached. Bonds have already been issued in anticipation of the collection of a certain amount of assessments. These bonds in amount exceed the assessments actually made. To the extent of the excess, it may be said, then, that the subsequent assessments or reassessments have been anticipated, so that if the mistake had been discovered immediately and the additional assessments or reassessments had been certified, these assessments would have clearly belonged to the sinking fund when paid for the retirement of the bonds already issued. That the council has waited until the bonds are about to fall due before making the reassessments does not change the essential nature of the case. The assessments have been anticipated even though they have not yet been made, and, therefore, when paid they belong to the sinking fund to be applied to the payment of the bonds; and if the bonds fall due and must be met out of general sinking fund moneys, the sinking fund is entitled to reimbursement out of the proceeds of the subsequent assessments, upon the principles already laid down.

In passing, I do not believe that it is any more proper to make another issue of special assessment *bonds*, under section 3914, to take care of a situation like that which you describe, than it is to issue *notes*, under section 3915, for that purpose. In my judgment neither one of these sections is available, and the proper method in which to meet a situation of this sort is to pay the bonds and permit the sinking fund to be repleted by the payment of the subsequently collected assessment; or in the event that the amount in the sinking fund, at the time, is insufficient for such purpose, to issue refunding bonds or notes therefor.

I have discussed your questions together, and in a general way. Answering them specifically and in their order I beg to state that council may not lawfully issue notes in anticipation of the collection of special assessments, under section 3916, General Code, when bonds have already been issued in anticipation of the collection of the same assessments, and for the purpose of paying such said bonds, when they become due, there being a deficiency in the fund derived from the collection of such assessments.

I am of the opinion, further, that the proper way to meet a deficiency of this sort, which may be merely temporary, is to issue refunding bonds or notes. This may be done where a lower rate of interest can be obtained by the sinking fund trustees, acting under section 4520, General Code; otherwise it must be done by council, under section 3916, General Code. If the sinking fund trustess act, they must issue bonds; and if the council acts, notes may be issued. In the event notes are issued, the payment of such notes does not, of course, devolve upon the sinking fund trustees; but this is

immaterial because whether the refunding medium be notes or bonds, the subsequently paid assessments are not to be directly applied to their payment, but go to reimburse the sinking fund for the advances made on account of the original bonds. In short, what is in effect done is for the general taxpayers to advance the money and then to have the tax moneys reimbursed by the subsequently paid assessments.

Answering your third question, I am of the opinion that in any event special assessment bonds, when they fall due, must be paid by the sinking fund trustees whether there is a deficiency in the funds in their possession specially applicable to such bonds or not.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1132.

PUBLICATION OF ORDINANCES AND RESOLUTIONS OF A GENERAL NATURE IN MUNICIPALITIES—PUBLICATION IN NEWSPAPERS OF OPPOSITE POLITICS—PUBLICATION IN GERMAN NEWSPAPER—POSTING.

1. Publication of municipal ordinances and resolutions of a general nature in municipalities in which two newspapers of opposite politics of general circulation and of which one side at least is printed in the municipality shall be published in two of such newspapers.

2. If there are not two such newspapers, publication must be made in any newspapers of general circulation in the municipality, one side of which at least is printed therein.

3. If there are no newspapers one side of which is printed in the municipality, publication must be made in any newspaper of general circulation.

4. If there are no newspapers which meet the requirements of either of the two preceding paragraphs, it is optional to publish in said newspaper or to post.

5. In case there are no newspapers meeting the requirements of the preceding paragraphs, then posting is obligatory.

6. Should there be published in the municipality a newspaper printed in the German language, which has a bona fide circulation within the municipality of not less than one thousand copies, publication must be made in such newspaper.

COLUMBUS, OHIO, September 2, 1914.

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

GENTLEMEN:—Your favor of July 15th requesting my opinion as to how publication of municipal ordinances or resolutions of a general nature or providing for improvements shall be made, received. The sections of the code applicable are the following:

> "Section 4227. Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose. (R. S. section 1695; 96 v. 82 section 196).
>
> "Section 4228. Ordinances and resolutions requiring publication shall

be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council.

"Section 4229. Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of sale of bonds once a week for four consecutive weeks; all other matters shall be published once.

"Section 4232. In municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by this title to be published, to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof. Advertising for bids for the construction of public improvements shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks. Notices of the sale of bonds shall be published in such manner and for such time as is provided in this title for the sale of bonds by a municipal corporation, when not sold to the sinking fund. The clerk shall make a certificate of such posting and the times when and places where done, in the manner provided in the preceding section, and such certificate shall be prima facie evidence that the copies were posted up as required.

"Section 4676. Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for.

"Section 6255. For sufficient publication of a notice or advertisement, required by law to be published for a definite period, at least one side of the newspaper in which such publication is made shall be printed in the county or municipal corporation in which such notice or advertisement is required to be published."

The first question that arises is as to whether or not the word "notice" in section 4676, and the words "notices or advertisement" in section 6255 include ordinances or resolutions. I am of the opinion that ordinances and resolutions come within the terms "notice or advertisement." Particularly is this evident from a reading of section 4227 wherein it is provided:

"Ordinances of a general nature shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Clearly the word "notice" in this section shows that the legislature meant it to cover ordinances.

If two or more newspapers of opposite politics are published and of general circulation in the municipality and at least one side of each newspaper is printed therein then publication must be made in two of such newspapers of opposite politics; section 4229 requiring publication and general circulation, and section 6255 requiring printing of one side therein.

If there are not two such newspapers as fulfill the requirements stated in the preceding paragraph, then publication must be made in any newspaper of general circulation in the municipality, one side of which newspaper at least is printed in said municipality; section 6255 requiring the printing and section 4676 permitting publication in the one newspaper, unless posting is resorted to; section 4232. A reading of sections 4676 and 4232 will show that publication may be made under either section.

If there are no newspapers, one side of which is printed in the municipality, then publication must be made in any newspaper of general circulation in the municipality; section 4676, unless posting is resorted to; section 4232. It is to be understood that where a publisher refuses to publish, the same situation arises as if no such newspaper were published; section 4676.

If there are newspapers which meet the requirements of the two preceding paragraphs, it is optional then to publish in such newspapers or to post; section 4232.

In case there are no newspapers meeting the requirements of the preceding paragraphs, then posting is the only method that can be used for publication.

Furthermore, should there be published in a municipality a newspaper printed in the German language which has a bona fide circulation within such municipality of not less than one thousand copies, then, in addition to the other publication required by law, publication must be made in such German newspaper; section 4228.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1133.

GINSENG CONSTITUTES A GROWING CROP WITHIN THE MEANING OF TAXING STATUTES—TO BE LISTED AS PERSONAL PROPERTY.

The plant known as ginseng, when in a state of cultivation, constitutes a growing crop within the meaning of the taxing statutes, though it takes several years to mature. Its value is not to be considered a part of the real estate, but the value of the crop, if it has any ascertainable value, is to be listed as personal property.

COLUMBUS, OHIO, September 4, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 31st, requesting my opinion on the question presented by certain citizens of Muskingum county, upon the following facts as stated by them:

> "Ginseng is a plant grown from the seed for the purpose of producing salable roots which constitute the only commercial product of its cultivation. The seed is planted under a natural shade, i. e., in the woods. It takes eighteen months to germinate. Thereupon the plant is cultivated for seven or eight years until a matured crop of salable roots is produced.
>
> "There is considerable risk inherent in the production of the matured

crop and the value of the crop is uncertain, if not entirely speculative, until the crop is harvested.

"The foregoing facts relate to cultivated ginseng and not to the same commodity growing in a state of nature.

"Is ginseng in the ground, under the circumstances described, taxable at all? If it is not taxable as such should its value enter into the value of the real estate in which it is planted, and be considered by the assessor in valuing such real estate? If it is separately taxable should it be assessed as personal property?

The following sections of the General Code are involved in the consideration of the questions submitted:

"Section 5322. The terms "real property" and "land" as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto.

"Section 5325. The term 'personal property' as so used, includes first, every tangible thing being the subject to ownership, whether animate or inanimate, other than money, and *not forming part of a parcel of real property,* as hereinbefore defined; * * *.

"Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title.

"Section 5370. Each person of full age and sound mind shall list the personal property of which he is owner, * * *.

"Section 5371. * * * personal property upon farms shall be listed in the township, city or village in which it is situated. * * *.

"Section 5376. Such statement shall truly and distinctly set forth * * *: seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; * * *.

"Section 5560. Each separate parcel of real property shall be valued at its true value in money, *excluding the value of the crops growing thereon.* * * * * * * * * * * * *."

Probably the first question which arises is as to whether or not, under the circumstances mentioned, cultivated ginseng constitutes a growing crop within the meaning of section 5560. This statute has, so far as I am able to ascertain, received no real authenticative interpretation. In Miller vs. Miller, 15 N. P. n. s. 33, there is a discussion of this subject. I quote from the opinion of Jones, J., as follows:

"While it is not customary to speak of plants, shrubs and flowers as 'crops,' growing or otherwise, yet on consideration there seems to be no reason why they should not be so classified. Such articles in a florist's stock are the product of what is planted in the ground, and become the subject of man's cultivation and labor and skill. They grow in and derive sustenance from the earth, whether the earth remains in its natural location, or is placed in boxes, pots or other receptacles. True, the courts have usually employed the term 'annual' products, in defining crops, but as pointed out in defendant's brief, such a limitation is too narrow, as there are at least some crops

that do not mature in a single year, and in certain localities more than a single crop may possibly be produced in the same year. This court is therefore ready to adopt the argument of defendant's counsel, that a florist's stock may be classified as a 'growing crop.'

Mr. Freeman, in his work on Executions, says:

"Section 113. The decisions holding certain crops to be personal estate and therefore subject to execution, have generally embraced nothing beyond those crops, which, being sown or planted are capable of reaching perfection within one year. But we think that a crop which could not reach perfection in less than two or three years would also be personal property, if its growth can be regarded as chiefly attributable to the skill and labor of the owner. We think too, that the purpose for which the product is cultivated may be taken into consideration in determining its character as real or personal estate. Thus, fruit trees planted in an orchard to permanently enhance the value of the real estate ought to be regarded in a very different light from trees growing in a nursery for the purpose of sale, and which the owner treats as merchandise to be sold to whomsoever may apply."

Although, as I shall hereinafter point out, the decision in the case is probably obiter, I am disposed to adopt the reasoning of the court on this point because it appeals to me as eminently sound. The old distinction between *fructus naturales* and *fructus industrales*, while probably not a true test in all cases to determine whether or not a growing thing constitutes a "crop" may be, I think with propriety, applied to the present case. Whatever may be the rule with respect to ginseng growing in a state of nature, like any weed or wild flower, when it appears, as it does, from the statement of facts upon which this opinion is predicated, that the plant is germinated from the seed and is actually cultivated with a view to harvesting and selling a commercial product, it constitutes, in my judgment, a "crop," though it takes seven or eight years to mature.

But under the statutes above cited and quoted what is the consequence of holding that ginseng under cultivation constitutes a "growing crop?" Does it follow because such crops are not to be considered in valuing the land on which they are growing that they are to be exempted from taxation altogether? This question is not easy of solution in the absence of authorities. On the one hand it might be argued that the definition of "personal property," as used in section 5325, General Code, could not include growing crops for the reason that only such tangible things, being the subject of ownership, as do not form a part of a parcel of real property "*as hereinbefore defined*" are within the purview of the definition; and looking at section 5322, it appears that the term "real property" includes, not only the land itself, but also "all things contained therein." On this line of reasoning it would follow that the term "personal property" as defined in section 5325, and applicable throughout the field of personal property taxation is exclusive of all things contained in a parcel of real estate; so that when the assessor is directed not to value growing crops as a part of the real estate, this is equivalent to an exemption of such growing crops because they would have to be included within the definition of "real property."

Such a process of reasoning is strictly logical, but it involves certain difficulties. In the first place, there is a presumption against exemption from taxation. I need not elaborate upon a principle with which the commission is familiar. Suffice it to state that exemptions are presumed against, and that even what is known as an incidental or casual exemption will not be found by the courts if such an interpretation can be avoided.

In the second place, the strict interpretation above referred to runs counter to

the constitution itself, in that it would have the effect of making section 5560 amount to an attempt to construct an unconstitutional exemption. Only such property can be effectively exempted from taxation as the legislature is authorized to exempt therefrom by express provision of article XII, section 2, which contains no reference to growing crops.

Now it is well understood that the legislature in constructing its machinery for taxation may afford what may be termed an accidental exemption to some species of property merely by failing to provide adequate machinery for the taxation of such property. As already stated, such exemption is vigorously presumed against, in theory at least, by the courts, but to my mind, the above interpretation of the related statutes would, as already indicated, make section 5660 stand as more than a mere incidental exemption, and would stamp it with the character of a deliberate attempt to violate the constitution, for under such interpretation the situation would be as follows:

By reason of the definitive sections, interpreted as above indicated, the legislature would be held to have made growing crops a part of the land for taxation purposes, the same as timber, minerals or other "things contained therein;" that being the case the direct command to the assessor not to consider the value of such crops in arriving at the value of the land, if having the effect of exempting such crops from taxation altogether, would be a direct exemption and not an accidental one. As such it would be unconstitutional. Such being the case, then, another principle comes into play, viz., the presumption of constitutionality; by virtue of which statutes of doubtful import are so interpreted as to preserve their validity under the constitution. How then, could such an interpretation be constructed as would render the related statutes constitutional? Obviously, by ignoring the strict language of section 5325, and particularly the words "hereinbefore" as used therein; for if personal property be defined as including all tangible things the subject of ownership other than such as are *taxed* as real estate, then the effect of the provision that the assessor shall not consider the growing crops as a part of the realty, would be simply to make them taxable as personal property and returnable as such by their respective owners. Such is, I think, the true interpretation of all the related statutes in the light of the constitution. Whatever tangible things, the subject of ownership, which are not to be taken into consideration in arriving at the value of real property, are to be separately listed as items of personal property. This was the view of the court in the nisi prius decision above cited. On this point, Jones, J., said:

> "The position taken by the defendant is:
>
> "1st. The property covered by this assessment is a growing crop.
> "2d. Growing crops are not subject to taxation under the laws of Ohio.
>
> "That is to say, that even if this class of property has not by legislation been expressly exempted from taxation, yet on the other hand, no legislation has ever been enacted making it so subject. It is further said, that while the constitution provides that laws shall be passed taxing all property, yet the provision is not self-executing, and that the legislature, whether by oversight or by design, has omitted to enact any statute that provides for the taxation of a growing crop.
>
> "On behalf of the plaintiff it is argued that even if a florist's stock be regarded as growing crop, it is personal property, as defined by section 5325, which includes 'every tangible thing being the subject of ownership, whether being animate or inanimate, other than money, and not forming part of a parcel of real estate,' and as such it is subject to taxation under the sweep-

ing provisions of section 5328, General Code, which makes all personal property in the state subject to taxation, except such as is *'expressly exempted therefrom'* * * *

"Much stress is laid on the provision of section 5560, General Code, that 'each separate parcel of real property shall be valued at its true value in money, *excluding the value of the crops growing thereon.*'

"This a plain peremptory direction to the assessing officers. Does it imply any meaning further than it carries on its face? Does it seek to classify growing crops as either real or personal property, or by any implication to exclude them as subjects for taxation? * * *.

"It seems to the court that the object of the legislature in excluding the value of growing crops from the assessment of real estate for taxation is quite obvious, and is in accord with justice and common sense. At the time that the original of section 5560, General Code, was enacted, real estate was only appraised for taxation once in ten years, and the valuation once made stood unchanged for the whole of the decennial period. Even now, the valuation stands for four years before a reappraisement is had. It is perfectly apparent that it might happen that at the date of appraisement the value of the growing crop might be large, small, or possibly there might be no crop at all, and that it would be unjust and absurd to enhance or diminish the value of the ground for the succeeding nine or three years, as the case might have been, while the condition might change from year to year. The real estate owner who happened to have a promising crop at the time of the appraisement would have to pay an increased tax for a succeeding period of years in which he might have poor crops, or even plant no crop at all, while the owner who had no crop at all at the appraisement period, would profit at the expense of the state during successive years of profitable cultivation of the same land. In adopting this part of the statute the court thinks that the legislature had no other object in view than that indicated, and in view of the provision of section 5328, General Code, which requires the exemption from taxation to be *express*, the court does not think that any exemption can be read into section 5560 by implication.

"But it is said that growing crops have never been taxed in this state. If they are proper subjects of taxation, the failure of the owners to return them, or of the taxing authorities to require them to be returned, however long continued, does not transfer them to the exempted list. In other words, it might be said that immunity from taxation cannot be acquired by prescription.

"But there is probably a very good reason for the fact referred to (assuming it to be the case) and one which does not reflect upon the good conscience of either the taxpayer or the assessor. Returns of personal property for taxation are made in Ohio between the second Monday in April and the third Monday in May—usually near the first part of the period, and covering the property owned at the first mentioned date. On the second Monday in April it would be impossible to say within any certainty, at least as to the great majority of crops, whether they ever would have any value; to be sure whether they had commenced to germinate. Sometimes they might not then even be sown. Many conditions might attend the advancing season that would affect the growing crop, and its value, when just that sown, can hardly be said to be anything more than speculative. If personal property had to be returned for taxation in June or July it is highly probable that growing crops would cut quite a figure in the list.

"It is said the taxing period comes at a time when florist's stocks are large, and a hardship is thereby worked upon them. This may be true, but the same might be said of any property owner who has a more than ordinarily large amount of personalty in his hands on the return day.

"It is well known that the business of raising and selling plants and flowers is often carried on upon a large scale, and often in a profitable manner. The florist, like other business men, engages in his occupation to supply a public demand for certain articles that gratify the eye and the sense of beauty, and he does so with the object of reaping a profit. No apparent reason exists why the legislature should intend to exempt his wares from taxation, or why they should be exempted, any more than the merchandise of any kind in which anyone else traffics as a means of livelihood and profit. Nor is it claimed by the defendants that such reason exists—it should be said to prevent what might seem a possible reflection upon them, that they are not here claiming that they should be a privileged class, but simply that under the existing law they are not required to pay taxes on their stock.

"This court thinks that there is sufficient authority under the provisions of section 5376, General Code, for the listing of this stock for taxation as personalty, and that considering it as a growing crop it is neither exempt from taxation, or unincluded in the legislative provision as to what shall be taxed.

"In conclusion, it may be added, in view of the constitutional mandate requiring the legislature to pass laws providing for the taxation of all property, and the comprehensive language of the statutes enacted in compliance with that enactment, that the court will be slow to presume that the legislative body either intentionally ignored the constitutional requirement as to one certain class of property, or failed in its duty by oversight or negligence. It would seem that one of these presumptions must be entertained, if it be held, either that the legislature has exempted this class of property from taxation directly, or has made no provision by which it could be taxed. And as the exemption would have to be express, and no express exemption exists, then in the absence of such express exemption the property in question cannot escape taxation."

Now, I am of the opinion, that this portion of Judge Jones' decision is a dictum for the reason that the florist's stock, concerning which the controversy in the case before him arose, cannot be regarded as "growing crops" under the facts stated in the pleadings. Indeed, the decision was affirmed upon that ground, apparently, as evidenced by the brief decision of the circuit court, which has not been reported, but a copy of which has been shown me.

Despite, however, the nature of the decision, I am disposed to follow it. Its reasoning is in accord with the views which I have already expressed, and I am of the opinion that it should be taken as the law of the state applicable to taxation of growing crops actually planted in the soil, at least until a different conclusion is reached by the courts.

Accordingly, I am of the opinion that ginseng in a state of cultivation, as described in the statement of facts to me, constitutes personal property for the purpose of taxation, and as such should be listed at the true value in money thereof by its owner.

It is probably true, as stated in the letter submitted to me, that certain practical difficulties are involved in the application of this ruling. The matter of valuation is one of them. The owners of ginseng are entitled to list an unmatured crop of that plant in the ground at a value which makes due allowance for all risks inherent in its production, and for the length of time which the crop will take to mature. But the case is no more than an extreme instance of a principle that runs through the entire field of valuation for purpose of taxation, and it is felt that the taxing officials may be trusted to apply the law with judgment and discretion.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1134.

INDUSTRIAL COMMISSION MAY PAY NECESSARY EXPENSES OF ADVISERS APPOINTED BY IT—SUCH EXPENSES TO BE PAID FROM FUND FOR MAINTENANCE.

The industrial commission may pay the necessary expenses of advisers appointed by it under section 22 of the industrial commission act, such expenses to be paid out of subdivision "F" of its fund for maintenance.

COLUMBUS, OHIO, September 12, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission, Columbus, Ohio.*

DEAR SIR:—Under date of August 22, 1914, you ask whether or not the expenses of any members of committees appointed as advisers under section 22 of the industrial commission act (103 O. L., 95), may lawfully be paid out of funds appropriated by the general assembly for the maintenance of that department.

That part of section 22 of said act, which is here applicable reads thus:

> "It shall also be the duty of the industrial commission, and it shall have full power, jurisdiction and authority:
>
> "(1) To appoint advisers, who shall, without compensation, assist the industrial commission in the execution of its duties; * * *."

The foregoing language confers full authority upon your commission to appoint these advisers, and I think that the word "compensation," as used in this section, should be defined as meaning remuneration for services performed. Therefore, you will see that the inhibition against compensation was not intended to deprive your commission of the right to pay the necessary expenses of these advisers. As you very well state, such advisers will be appointed from various parts of the state in order that the provision may be given its widest and most effective possible scope, and this will necessitate meetings at a specified point in order that proper assistance may be rendered your commission in the execution of its duties. I cannot believe that it was the intention of the general assembly to have these advisers assist the commission at a loss to themselves by reason of their being compelled to pay their own expenses while serving the state in such capacity. If such were the case it would be practically impossible to procure the service of such persons, and the foregoing quoted section would thus be rendered ineffective. The general assembly thought it proper to allow your commission to obtain advice in the execution of its duties and must have intended to repose in it the power to carry out this provision of law, and such power necessarily would carry with it the right to pay the necessary expenses of these advisers, provided, of course, an appropriation has been made therefor.

Under subdivision "F" of the appropriation to the industrial commission for maintenance (104 O. L. 86) it will be found that $80,000.00 has been set apart for contract or open order service, which includes general plant service and contingencies. This classification of appropriations has not been sub-classified in respect to this branch of your maintenance department

Briefly stated my opinion is that your commission is authorized to pay the necessary traveling expenses and the expense of attending meetings of such advisers as you appoint under the section quoted, and that such payment should be made out of subdivision "F" of the maintenance fund of your department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1135.

OPERATION OF STEAM BOILER—WHEN SUCH BOILER IS EXEMPT FROM INSPECTION UNDER SECTION 1058-7, GENERAL CODE.

When a boiler is used in the operation of a steam threshing machine, it is used for agricultural purposes, and is exempt from inspection under section 1058-7, General Code.

If such boiler is used for the operation of a saw mill, which is used in sawing timber for commercial purposes, it does not come within the foregoing exemption and is subject to inspection.

When such boilers are used for the operation of machinery for sawing wood in convenient lengths for fire wood, for those residing on farms, or where it is used for the purpose of clearing land, such use would be an agricultural purpose, and it would then be within the exemption. If the wood were to be cut solely for the purpose of marketing the same, or for the sale of timber, such use would not be agricultural, and would be without the exemption.

COLUMBUS, OHIO, September 12, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of August 22, 1914, in which you say:

"We desire your construction of section 1058-7 of the General Code, relative to the inspection of steam boilers.

"Said section exempts from inspection boilers used for certain purposes, among others being 'portable boilers used for agricultural purposes.' This department has construed said section as exempting boilers used in connection with the operation of steam threshing machines when so used. It so happens, however, that in many instances the owners of such boilers, after the threshing season is over, use them for other purposes such as operating sawmills for sawing lumber and also for sawing wood, and when used for the latter purpose the boiler is generally moved from farm to farm and the work of wood sawing is done for individual farmers on their premises.

"What we desire to know is:

"1. Whether a boiler which is used in the operation of a steam threshing machine is to be regarded as 'used for agricultural purposes' within the meaning of the section above quoted.

"2. If so, whether its use during portions of the year when it is not used in the operation of a threshing machine, for the operation of a sawmill brings it within the rule requiring inspection.

"3. Whether such boilers are subject to inspection when used for the operation of machinery for sawing wood as above indicated."

Section 1058-7 of the General Code, as amended, 103 O. L., 649, reads thus:

"All steam boilers and their appurtenances, except boilers of railroad locomotives subject to inspection under federal laws, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water, gas and oil, and portable boilers *used for agricultural purposes*, and in construction of and repairs to public roads, railroads and bridges, boilers on automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagrations, boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the

jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressures in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. And shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

I shall answer your questions in the order in which you have presented them.

1. I think that a threshing machine when used for the purpose of threshing grain, may be said to be utilized for agricultural purposes, and the boiler thereof is, under such circumstances, used for agricultural purposes, and consequently is within the exception referred to in the foregoing quoted statute. That is to say, when the boiler is used with a threshing machine employed for the purpose of threshing grain such boiler may be said to be used for agricultural purposes.

In Ellis & Co. vs. Hulse, 23 Q. B. D., 24, it was held that a locomotive sometimes let by the owner for the purpose of carrying straw and manure, and sometimes used by the owner himself for hire for like purposes, was a locomotive used solely for agricultural purposes. It was argued that because the engine was let for hire it was used for other than such agricultural purposes, but this view the court refused to entertain.

In Mach vs. Baker, 55 J. P., 583, it was held that a traction engine that draws a threshing machine from one farm to another is used solely for agricultural purposes. These two decisions go much further in exempting from the operation of the law such machines than is necessary in order to answer your question.

2. When the boiler is not used in the operation of a threshing machine, but is used as a means of supplying power for the operation of a saw-mill, it seems to me that it does not then come within the foregoing exception, because it is not then used for agricultural purposes, but, on the contrary, is part of the machinery of the saw-mill. I assume that the mill which you have in mind is used for the usual purposes of a saw-mill where timber is cut into convenient sizes for commercial purposes.

In Hoddell vs. Parker, 2 K. B., 323 (1910), it was decided that a threshing engine used for the purpose of hauling wheat to a mill was not, when so used, employed in agricultural purposes. This very clearly indicates that a boiler, such as the one referred to by you, may be used for separate and distinct purposes, and may possess the attributes of each to such an extent as to enable the law to operate on it in different ways when each use is separately considered. Therefore, simply because the boiler is within the exception, under some circumstances, it does not necessarily follow that it is within the exception under all circumstances. When it is not used for a purpose exempting it from the operation of the statute, it must be held to come within the purview of the law. Consequently when the boiler is used for the operation of a saw-mill, such as the one described by me, I think that inspection thereof is required.

3. As your second question calls for a construction of the law with reference to the use of boilers in saw-mills, I take it that your third question must be intended to cover a different situation, although you state that the boiler is used for "sawing wood as above indicated." I assume that what you desire to have answered in this question is whether boilers should be inspected when they are used to operate saws for the purpose of dividing wood or timber found on the farm into convenient lengths for fire wood, and also when such boilers furnish the motive power for the operation of saws used in clearing land of timber.

If the sole purpose of the boiler is that indicated in my assumption, then it is my judgment that such boilers are not subject to inspection, as they come within the exception. I do not think it does any violence to the language of the act, and I feel confident that it is in conformity with the spirit thereof to hold that the reduction of wood found upon the farm into convenient lengths for fire-wood for those residing on the farm, is an agricultural purpose. Of course, if the wood were to be cut for the

sole purpose of selling the same, then I am inclined to doubt if it can be said that the use of the boiler would then be for agricultural purposes. The same construction should apply to the clearing of land. If the object merely is to render the premises more available for farming purposes, then anything which resulted in the removal of the timber from the land would be an agricultural purpose, but if the standing timber were removed for the purpose of a sale of such timber, the work of removing it would properly be said not to be an agricultural purpose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1136.

FIVE OR MORE WORKMEN EMPLOYED BY AN INDEPENDENT CONTRACTOR ON FEDERAL BUILDING WITHIN THE PURVIEW OF THE WORKMEN'S COMPENSATION ACT.

An independent contractor employing five or more workmen in Ohio, is, while engaged in the construction of a post office building upon land owned by the federal government in this state, within the purview of the workmen's compensation act.

COLUMBUS, OHIO, September 12, 1914.

Industrial Commission of Ohio, Majestic Building, Columbus, Ohio.

GENTLEMEN:—Under date of July 22, 1914, you submit the following inquiry:

> "Is an employer of five or more workmen or operatives engaged in the construction of a United States post office upon lands owned by the United States government within the state of Ohio, an employer within the meaning of the workmen's compensation law?"

Under the provisions of section 13 of the workmen's compensation act, every person, firm and private corporation, having in its service five or more workmen or operatives regularly in the same business, or in or about the same establishment, are employers, and under section 14, correlatively, every person in the service of any such person, firm or private corporation, employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, is an employe, excepting those whose employment is but casual or not in the usual course of trade, business, profession or occupation of the employer.

In former opinions rendered to your department, I have held that this law has extra-territorial force to the extent that when the contract of employment is made in this state, it comes within the purview of this act, and if the employe is injured while in the service of his employer beyond the borders of this state, he is entitled to compensation. All questions involved in actions of this character have been fully set out in these opinions, and therefore, I regard it as unnecessary further to discuss this phase of the question.

With these considerations in view I do not believe that it is material here to discuss the question of whether or not land owned by the United States is solely subject to its jurisdiction exclusive of that of the state. See sections 13770 et seq, General Code. Many interesting branches of that question have been discussed in the various reports with reference to criminal proceedings. For instance, in Battle vs. United States, 209 U. S. 36, it was held that the crime of murder committed on gov-

ernment post office property was justifiable in the federal court, while in United States vs. Press Publishing Co., 219 U. S. 1, the holding was that the United States had no jurisdiction of the crime of criminal libel, jurisdiction thereof having been vested in the state court, although the libel was published on federal property.

The United States government has not legislated with reference to master and servant when that relationship exists on post office property in the state, and it has been held by the solicitor of the department of commerce and labor that a workman employed by a government contractor is not entitled to receive compensation from the federal government under the federal workmen's compensation act. See opinions solicitor department commerce and labor, page 34.

There being no congressional legislation on this subject to supersede that of the state, we are confronted with the question whether article 1, section 8, subdivision 17 of the constitution of the United States prevents the application of the workmen's compensation act of this state under the circumstances set out in your letter. The exact language of the federal constitution stating the powers of congress reads thus:

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards, *and other needful buildings.*"

Whether the post offices which you have in mind are located on land ceded by the state or have been purchased by the consent of the general assembly, is not here of serious importance, if my view of the law is correct. It has been held by the courts that under this provision of the federal constitution the state courts had jurisdiction over actions in tort committed on federal property. As illustrative of these I call your attention to the following:

In Madden vs. Arnold, 22 App. Div. 240, plaintiff sued for damages for injuries inflicted by a dog on land purchased by the United States, over which the state legislature had ceded jurisdiction, reserving to the state concurrent jurisdiction with the federal government so far as execution of civil and criminal process was concerned. It was urged that there was no jurisdiction in the state courts under article 1, section 8, Sub. 17 of the constitution of the United States providing that congress should have power to exercise exclusive jurisdiction over all places purchased by the consent of the legislature for the erection of forts and other needful buildings. It was not claimed that congress had legislated with reference to actions in damage occurring at such places, hence the question was whether in the absence of such legislation the state courts were deprived of jurisdiction. The court held that they were not and calls attention to the fact that it would even have the right to entertain actions for injuries occurring in other states and that the same principle would authorize the suit in question. This case contains an exhaustive discussion of cases bearing upon this question.

"An action can be maintained in a state court for tort committed upon one of its citizens within the limits of the Brooklyn navy yard."

Armstrong vs. Foote, 11 Abb. Prac, 384 (N. Y.)
McCarthy vs. Packard Co., 105 App. Div. 436.

Note the resemblance of the New York statute to sections 13770 et seq., General Code.

If the state court has jurisdiction over actions in tort it would seem that any constitutional provision limiting or abolishing the right of such actions could also be enforced in the state court. As the workmen's compensation act is designed to pro-

vide a more proper, fair, equitable and correctly economic method of caring for those who have been injured in the course of their employment than existed at common law it would follow that it should be given full force and effect wherever the action in tort could have been brought. It lays down the public policy of this state, and such public policy should be enforced within the territorial confines of Ohio.

In Railway Co. vs. McGlinn, 114 U. S. 542, the supreme court of the United States held that it was proper to enforce an act of the legislature of Kansas which was applicable to an action in damages arising out of the killing of a cow within the limits of the Ft. Leavenworth military reservation. There the jurisdiction over the territory had been ceded to the United States. It was contended that the Kansas act became inoperative upon such cession. This the court held to be unsound, holding that the government of the state of Kansas extended over the reservation and its legislation was operative therein except so far as the use of the land as an instrumentality of the general government might have excepted it from such legislation.

The liability of the employer under the workmen's compensation act is not dependent upon the particular place where he is engaged in work, but rather upon the fact that he has in his service a designated number of employes and the law of the state governs him in this particular when he employs the men within its borders

You do not state in your question whether the employment was for this particluar piece of work alone, and I assume that it was not, but that, on the contrary, the employer was in the general contracting business in Ohio employing five or more workmen regularly in his business. As soon as he made these contracts of hire he was obligated to pay the premium, and wheresoever the employe was injured he was entitled to the benefits and bound by the obligations conferred upon him by the act in question. Even if the employer were hiring the workmen for the construction of a government building which occupied all his time and men for a long period of time, this would not alter the situation. It might be argued that the requirement under these last circumstances that the contractor should contribute to the state insurance fund would be a tax on a federal agency, and consequently would be invalid. I do not think this theory would be upheld by the courts, as it is not a tax, but rather compulsory insurance on the part of the employer, and the various restrictions which are put upon his right of defense are in the nature of penalties imposed upon him for his failure to comply with the law, and at the same time give to the employe practically those rights which he would have had, had his employer been insured as required by law. To exempt those employers who act as independent contractors in government service would be to give the law an effect which I do not think it was designed to receive.

You understand that I am writing this opinion upon the theory that the employer was an independent contractor. If he were not he would come within the purview of the federal compensation act, and consequently the state law would not be applicable.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1137.

IN CASE OF INJURY, EMPLOYE OF NEWS COMPANY ENTITLED TO COMPENSATION OUT OF STATE INSURANCE FUND, IF HIS EMPLOYER HAS COMPLIED WITH THE WORKMEN'S COMPENSATION ACT.

If an employe of a news company is injured in the course of his employment, he is entitled to compensation out of the state insurance fund, if his employer has complied with the workmen's compensation act, by paying into such fund the premium required of him.

The question of the liability of the railroad company, upon whose trains the news agent is working, to such employe, is immaterial. Such employe would still retain his common law right of action against the railroad company.

Compliance by the railroad company with the act in no way affects whatever common law rights the employe of the news company may have, unless he was also an employe of the railroad company.

The workmen's compensation act applies to an employe of a news company when he is working for such company, even though his duties require him to ride upon interstate trains.

Contracts by which the news company is to indemnify the railroad company against payment of damage to employes of the news company are not inhibited by section 54 of the workmen's compensation act.

COLUMBUS, OHIO, September 12, 1914.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of August 19, 1914, you ask this department to answer the following questions which have been submitted to you by the Union News Co. of Cincinnati, Ohio:

> "(1) If one of our employes is injured upon the railroad by whom he is employed, does he have a cause of action against the railroad, if we comply with the workmen's compensation act?
>
> "(2) If the railroad has also complied with the act, is the employe's right of action for damages in any way affected by the fact?
>
> "(3) Does the act apply to an employe of the Union News Co. injured while working on a train, which is engaged in interstate commerce?
>
> "(4) Are our contracts with the railroad, by which we agreed to indemnify them against loss occasioned by injury to our employes, void under section 54 of the act, because they do not provide for payment directly to the injured employe? (You will notice, of course, that section 54 provides for cases in which the indemnity is to be given to protect the employer against injuries to his own employes and not, as in our case, to employes of another)."

(1) This question is extremely contradictory in that it refers to "one of our employes," and also speaks of the "railroad by which he is employed." I do not know whether he is hired jointly by those two companies or whether the question is erroneously stated. In view of the language contained in the fourth question, I assume that the employe is in the service of the Union News Co., and not hired by the railroad company, although in the performance of his duty to his master he rides upon the trains of the railroad. This is really a matter with which your commission and this department has no concern.

If the news company employs five or more workmen it is its duty to pay the premium required of it by law into the state insurance fund, regardless of whether or

not its employes would have a right of action against the railroad upon which they are riding at the time of their injury. The news company is protected by its contribution to the state insurance fund from liability for injuries received by its employes in the course of their employment, except, of course, where they are injured through the failure of their employer to observe statutory requirements for their safety, or by reason of his wilful act. I desire to suggest, however, that the concluding paragraph of section 25 of the workmen's compensation act, 103 O. L. 72, should have some bearing upon this question. After referring to the disbursement of the state insurance fund by your commission, the following language is used:

> "And such payment or payments to such injured employes or to their dependents in case death has ensued, *shall be in lieu of any and all rights of action whatsoever against the employer of such injured or killed employe.*"

As this act is plainly designed as a substitute for the common law liability of master to servant, I do not think it should be construed so as to include relationships other than that of employer and employe. There is nothing in the law to indicate that it was intended to include all cases of liability for negligence, but, on the contrary, the language just quoted plainly provides that payment out of the state insurance fund is to be in lieu not of all rights of action, but merely of any and all rights of action against the employer. If the general assembly had intended to bar the employe of resort to court under all circumstances, it would, in my judgment, have distinctly so stated. The only cause of action abolished being that against the employer, it would appear to follow that, if the employe had any other ground for legal proceeding, the act was not intended to repeal it. From this it would seem that compliance by the employer with the provisions of the workmen's compensation act would have no effect on any right of action which the employe would have, excepting that arising against his employer.

(2) As the workmen's compensation act only applies to employer and employe I do not see how it would be possible for the railroad company to insure in the state insurance fund the employe of some other person, firm or corporation. In defining "employe," "workman" and "operative," section 14 of the law in question construes these terms to mean "every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer."

Under section 22 every employer of such employes shall pay a premium for his employment or occupation, and those who comply are not liable to their employes, with certain exceptions. This indicates beyond all doubt that it is only employes who are to be insured. The rules of your board with reference to the fixing of a premium further emphasize this view.

From this it must necessarily follow that if the servant of the Union News Co. is not an employe of the railroad company, its compliance with the act in no way affects its relationship to him.

(3) It is fundamental, I think, that the state under its police power may, in the absence of congressional legislation, enact statutes for the protection of employes who are engaged in interstate commerce.

> Railroad Co. vs. Castle 224 U. S. 541.
> See also Labatt on "Master and Servant," section 2808.

As the federal employers' liability act only applies to *employes* of common carriers

by rail, and as there has been no congressional legislation with reference to agents of news companies traveling on interstate trains, it would seem that the state law would apply to them.

Observe what has been already said in an opinion from me to your department with reference to the extra-territorial effect of the workmen's compensation act.

(4) In this question it is stated that the news company provides for indemnity to the railroad company in case the latter is compelled to respond in damages for injuries to the employes of the former. This indicates that the news agents are not in the service of the railroad company, and, of course, it is elementary that one who is not employed by a railroad company, although he fulfills duties on a train for his own employer, cannot be said to be a servant of the railroad company, except so far as those duties are actually discharged under the direction and control of such railroad company.

See Labatt on "Master and Servant," section 49.

Of course, if the news agent were performing work for the railroad company, he would properly be said to be in its service. This has been elucidated in several cases, among which may be mentioned:

Baltimore & Ohio R. R. Co. vs. McCamey, 12 C. C. 543.

Section 54 of the workmen's compensation act is clear in its terms. It inhibits contracts for the purpose of indemnifying the employer on account of injury to his employes through the negligence of the employer or his officer, agent or servant. This section is designed to prevent the employer from evading the provisions of the workmen's compensation act, and is in harmony with that part of section 22 which permits employers to carry their own insurance. As this section is solely applicable to agreements providing against exemption from liability of the employer to his employe, it must follow that it has no pertinency to contracts whereby the employer agrees to indemnify third persons for injuries received by its own employes.

Whether or not such contracts are void, as against public policy, is not asked, and I do not think it within the province of this department to answer any such question, as it is one upon which the courts have differed very widely and should be determined in actions between private persons in which the state has no direct interest. As illustrative of the manner in which these questions have arisen, and as to the diversity of the decisions, I desire to call attention to the following:

Santa Fe, etc. Co. vs. Grant Bros. 228 U. S. 177.
Baltimore & Ohio S. W. Ry. vs. Voight 176 U. S. 498.
Yeomans vs. Steam Navigation Co. 44 Calif. 71.
Pennsylvania Co. vs. Woolworth 26 O. S. 585.
Louisville etc. R. R. Co. vs. Keefer 146 Ind. 21.
Grant vs. Ill. etc. R. R. Co. 182 Ill. 332.
Bates vs. Old Colony R. R. Co. 147 Mass. 255.
Railroad vs. Curran 19 O. S. 1.
Kirkendall vs. Union Pac. Co. 200 Fed. 197.
Denver & Rio Grande R. R. Co. vs. Whan 11 L. R. A. (n. s.) 432.

An extended note to the case last cited fully discusses various authorities dealing with this question.

Very truly yours.

TIMOTHY S. HOGAN,
Attorney General.

Since writing the foregoing opinion the United States district court, through Judge Sater, has held that the workmen's compensation act of this state does not apply to interstate carriers by rail even as to their intrastate business. I have already submitted to your department a copy of this opinion.

1138.

ALL PAPERS IN PROCEEDINGS TO SELL REAL ESTATE UNDER THE LAND REGISTRATION LAW SHOULD BE DELIVERED TO THE COUNTY RECORDER—WHERE LAND REGISTRATION LAW APPLIES, PROBATE COURT TO HAVE CARE OF ALL PAPERS AND RECORDS BELONGING TO THAT COURT—LAND REGISTRATION LAW APPLIES ONLY TO THOSE CASES INSTITUTED ON OR SUBSEQUENT TO JULY 1, 1914.

Under section 23 of the land registration act, 103 O. L., 927, all the papers in proceedings to sell real estate should be delivered to the county recorder, regardless of the provisions of section 1584, General Code, providing that each probate judge shall have the care and custody of all papers and records belonging to the probate court. The former is a special statute and should be read as an exception to the general rule laid down in section 1584, General Code.

The land registration law applies only to those cases which have been instituted on or subsequent to July 1, 1914, and has no effect upon the cases pending on that date.

COLUMBUS, OHIO, September 12, 1914.

HON. CHARLES KRICHBAUM, *Probate Judge, Canton, Ohio.*

DEAR SIR:—Under date of August 26, 1914, you state that you regard section 23 of the land registration act, and section 1584 and 10774 of the General Code as being inconsistent, and ask what rule of practice should be adopted.

Section 23 of the land registration act, 103 O. L., 927, provides in part:

> "The clerk shall once in every cause make a final record thereof, and immediately thereafter deliver to the recorder all papers in the case, taking a receipt therefor, which papers the recorder shall file, index and carefully preserve."

Section 10774 requires the executor or administrator of an estate to apply to the probate court or the common pleas court for authority to sell a decedent's real estate, when the personal estate is insufficient to pay the debts of the decedent and the allowance to the widow and children. Subsequent sections clearly confer upon the probate court authority to entertain such actions.

Section 1584 provides that:

> "Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office."

I assume that your difficulty lies in the fact that under the sections last cited, whenever an action has been instituted in the probate court, all papers pertaining to such suit shall be kept on file in the office of the probate court.

Section 64 of the land registration act requires the inclusion of a cause of action for registration in all suits calling for the judicial sale of realty, which would, of course, include an action brought under sections 10774, et seq. Under section 23 of this act it is manifest that immediately upon the making of the final record in such proceedings all papers in the case are to be delivered to the recorder who shall file, index, and carefully preserve the same. As the land registration act is the later enactment, and is furthermore a special statute, I think that instead of calling for the doctrine of implied repeal, this state of affairs justifies the application of the theory that where the same

statute, or different statutes upon the same subject, contain incompatible provisions one of which is general and the other special, the latter shall be held and treated as an exception to the former.

Cincinnati vs. Conner, 55 O. S., 88.
Brower vs. Hunt, 18 O. S., 341.
State vs. McGregor, 44 O. S., 631.
Doll vs. Barr, 58 O. S., 113.
Cincinnati vs. Holmes, 56 O. S., 104.
Gas Co. vs. Tiffin, 59 O. S., 420.
Mitchell vs. State, 78 O. S., 347.

The land registration act being, as before suggested, special, it should be held as an exception to the other statutes by you cited. It relates to a particular kind of original records which are to be filed in the recorder's office, and this being true, I think that it should be followed to the letter. In other words, all the papers in the case should be filed with the county recorder.

I note your suggestion that the intended purpose of both laws could be carried out by having the registration of the land title in an amended petition, so that the probate court could retain that portion of the case arising out of the one cause of action, and transmit to the recorder that part of the case dealing with the land registration act. This, however, would not be in harmony with section 64 of the land registration act which requires the application for registration to be made in the petition asking for the sale of the realty, the allegations to be included in separate causes of action. Furthermore, before any order of sale or partition can be made, it is necessary that the title be registered. The object of the law was to require the doing of these two things in the same proceeding, and to separate them in the manner suggested would not conform to this purpose.

You also state that you have a number of cases which were pending prior to July 1, 1914, and ask whether it is necessary that there be registration of title in such cases. You will observe that section 64 provides that the petition which asks for a sale of the realty shall also contain a separate cause of action embodying the necessary allegations for the registration. Prior to July 1, 1914, no petition could contain a cause of action for registration of title, as there was no law in effect authorizing it. As the statute requires the petition to contain such cause of action, it must follow that it was the legislative intent to have the law only applicable when both cases could be embodied in the same petition. As this could only take place on or after July 1, 1914, it must follow that the act does not apply to these actions which were instituted prior to the date herein mentioned. In addition to this there is a well known rule of statutory construction that changes in the law do not affect pending actions unless there is express provision to accomplish that purpose contained in the new law.

It is, therefore, my opinion that the land registration law has no effect upon those cases which were pending on July 1, 1914.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1139.

TAXATION OF OHIO MUNICIPAL BONDS DEPOSITED WITH THE STATE TREASURER BY FOREIGN TRUST COMPANIES AS SECURITY.

Taxable Ohio municipal bonds deposited with the treasurer of state by foreign trust companies as security for the execution of trusts in this state, are subject to taxation.

COLUMBUS, OHIO, September, 12, 1914.

HON. J. P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You submit for my opinion upon the question therein stated, correspondence between yourself and the Cleveland Trust Co. The question is as follows:

> "Are bonds of the city of Cleveland issued subsequent to January 1, 1913, and deposited with the treasurer of state by a foreign trust company as security for the execution of trusts undertaken by it in this state, subject to taxation in Ohio?"

The following sections of the General Code may be considered in this connection:

> "Section 9774. A trust company may purchase, lease, hold and convey real estate, exclusive of trust property, for the purpose and in the manner provided by this chapter as to commercial banks, and subject to like restrictions and limitations.
>
> "Section 9775. Trust companies shall have the same powers in the acceptance and execution of trusts which are now conferred upon them by statute.
>
> "Section 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."
>
> "Section 9779. The treasurer of state shall hold such fund or securities deposited within as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided.
>
> "Section 9780. No such corporation, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part in this state without complying with the provisions of this and the two preceding sections. Any trust,

deed or mortgage given or taken in violation of the provisions thereof shall be null and void.

"Section 9796. No bank or banking institution incorporated under the laws of any other state, shall be permitted to receive deposits or transact banking business of any kind in this state, except to lend money.

"Section 5404. The president, secretary and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money.

"Section 5407. A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an office or other place of business, and engages in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stock, or other evidences of indebtedness, with a view to profit, is a bank, or banker, within the meaning of this chapter.

"Section 5408. All the shares of the stockholders in an incorporated bank or banking association, *located in this state*, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, *located in this state*, the capital stock of which is divided into shares held by the owners of such bank, and the capital employed, or the property representing it, in an unincorporated bank in this state, shall be listed at the true value in money, and taxed only in the city, ward or village where such bank is located.

"Section 5437. Neither insurance companies and associations, incorporated by the authority of another state or government, nor the superintendent of insurance, shall be required to make returns for taxation of the deposits of such companies or associations, made as required by law, with the superintendent of insurance, for the benefit and security of policy holders; nor be governed with respect to such deposits, by the provisions of law relating to the listing of personal property or to the making of tax returns by corporations."

It is apparent to me, from a consideration of the first group of statutes above quoted, that foreign trust companies are not permitted to engage in Ohio in any species of banking business; their activities in this state are limited to the acceptance and execution of trusts, and as a prerequisite of so acting in Ohio they are required to deposit with the treasurer of state certain securities for the faithful performance of the trusts assumed in this state by them.

This conclusion is material because the answer to your question depends upon whether foreign trust companies accepting and executing trusts in this state are to be regarded as "corporations" within the meaning of section 5404, General Code, or as "banks" within the meaning of sections 5407 et seq., General Code.

It will be observed that sections 5404-6, inclusive, General Code, do not apply to, or in any way govern the taxation of banking corporations, they being excluded from the operation of those sections by express language in section 5404 itself.

If, therefore, a foreign trust company is a banking corporation for the taxation of which special provision is made by law, then sections 5404 et seq., do not apply to or govern the taxation of any property of such corporations in Ohio.

But I am satisfied that a foreign trust company, accepting and performing trusts in Ohio under the conditions mentioned in the first group of statutes above quoted, is not, within the meaning of the taxation laws, a bank.

In the first place, such a foreign trust company is permitted by law to engage in but one of the various activities mentioned in section 5406, which defines what constitutes a bank within the meaning of the taxation laws, viz.: lending money, and this only being the assumption that in the execution of trusts in Ohio, a foreign trust company might lend money in this state through an office located in this state. Such trust companies may not receive money on deposit at an office or place of business in this state, may not buy or sell bullion, bills of exchange, notes, bonds, stock or other evidences of indebtedness with a view to profit in this state. But whether or not in the execution of a trust, any one of these things might be done in this state and through an office located in this state, it would not be done as a business, and with a view to direct profit on the part of the trust company, but merely as incidental to the execution of the trust, which is itself the main and only authorized activity of the trust company, which may be conducted in Ohio.

In the second place, even if the business of a trust company, or rather the acts which it is permitted to do in Ohio, upon depositing certain securities with the treasurer of state, should satisfy the definition of section 5407, I would still be of the opinion that a foreign trust company would not be subject to the bank taxation laws of Ohio, for it is not every "bank" as defined in section 5407 that is a "banking corporation whose taxation is specifically provided for" within the meaning of section 5404. This appears upon consideration of section 5408 which limits "the special provision" with reference to the taxation of banks to banks "located in this state." The reason for this limitation exists in the fact that these statutes are intended to apply *inter alia* to the taxation of national banking associations. Such associations can be taxed—or to be more accurate, their shares of stock and real estate can be taxed—only by permission of congress, they being federal agencies, subject to state taxation only by consent of the federal government. The congressional legislation, which I need not cite, provides that a state may tax the shares of stock in a national bank, and the real estate of such bank; but that the shares of stock shall be taxed at the *place where the bank is located.*

Ohio, conforming her legislation for the taxation of banks to the necessities of the case with respect to national banks, has provided a scheme of taxation which applies only to banks "located in this state." The word "located" in this context designates the place where the physical banking house or main office of the bank or banking association is found. A bank could not be said to "be located in this state" within the meaning of this provision by reason of doing business in this state alone; for so to hold might lead to a violation of the principles embodied in the federal legislation with respect to national banking associations.

It follows, therefore, that a foreign trust company if accepting and executing trusts in Ohio, could not be, under any circumstances, a "bank located in this state" within the meaning of the taxation laws.

Not being such, it is not a "banking * * * corporation whose taxation is specifically provided for" within the meaning of section 5404.

Not being within the exception of section 5404, such corporations, to the extent that they may have taxable property in Ohio, are governed by the provisions of that section. This is apparent, first, upon consideration of the all-inclusive language of that section wherein it describes the corporations other than the excepted ones as follows: "for whatever purpose they may have been created, whether incorporated by a law of this state or not," and in the second place, such an application of the section is indicated by consideration of the fundamental rule of statutory interpretation that an exception from the purview of a statute is strictly construed and limited to the exact scope indicated by its phraseology. Authorities might be cited on this point, but it is elementary. The principle then requires that the exception in section 5404 be narrowly interpreted so as to apply, as its words clearly purport, only to "banking * * * cor-

porations whose taxation is specifically provided for," and so as not to extend to all "banking corporations" whether their taxation is specifically provided for or not.

Other similar principles indicate this same conclusion. Thus, the constitution of the state, and the operative general sections such as 5328, General Code, which I need not quote, lay down the rule that unless expressly exempted therefrom all property subject to the jurisdiction of the state shall be taxed. This rule, embodying as it does the fundamental policy of the state, requires that as between two interpretations of a group of related statutes, one of which would lead to the taxation of a class of persons or corporations, or property, and the other of which will lead to an implied or accidental exemption from taxation, the former interpretation must be chosen and the latter rejected.

For all these reasons, then, I am of the opinion that foreign trust companies accepting and executing trusts in this state are within the rule of sections 5404 et seq., General Code, and such taxable property as they may have in this state must be listed for taxation as therein required.

When once this conclusion is reached the ultimate question which you present is solved; for under section 5404 it has been held more than once that a foreign corporation required, in order to do certain things in Ohio, to deposit securities with a certain state officer, must list these securities for taxation in this state, either in Franklin county where the securities are actually held, or in a county in this state where the company maintains its principal agency or office.

Insurance Co. vs. Bowland 196 U. S. 611.
Sims vs. Best I. C. C. n. s. 41.
Assurance Co. vs. Halliday 110 Fed. 259.
Assurance Co. vs. Halliday 126 Fed. 257.
Assurance Co. vs. Halliday 127 Fed. 830.

These cases dispose of all questions which might arise under section 5404. In the first place they dispose of the question as to whether or not intangible property like bonds, can have a *situs* for taxation other than the domicile of the owner. These cases answer such a question in the affirmative.

These cases also dispose of the question as to whether or not such intangible property compulsorily brought within the state is "property within the state" within the meaning of section 5404. This question is answered in the affirmative.

The cases also dispose of the question as to whether or not section 5404 requires the listing of "investments in bonds, stock, joint stock companies or otherwise," as the language of our constitution and statutes have it, such property not being specifically mentioned in section 5404, although "moneys and credits" being property of a similar type are mentioned in the section. This question is answered in the affirmative, the supreme court of the United States relying upon the definition of "personal property" found in section 5325, General Code.

In short, I am not aware of any point which might, in the exercise of extreme ingenuity, be conceived of, which is not covered by the decisions which I have cited.

It is true that the supreme court of this state has never been called upon to pass upon this question, the decisions being those of the federal courts and a circuit court of the state. However, the legislature of the state has accepted this interpretation of the statute under discussion, and has attempted to legislate for the benefit of insurance companies upon the basis of the idea embodied in these decisions. Section 5437 above quoted, which was enacted after some of these decisions were rendered, shows the manner in which the general assembly has accepted the interpretation of section 5404 which the courts had formerly made.

Of course, bonds of the city of Cleveland issued since January 1, 1913, are subject to taxation (article XII, section 2 of the constitution, as amended); therefore, I am of

the opinion that bonds of the city of Cleveland issued subsequent to January 1, 1913 and deposited with the treasurer of state by a foreign trust company as security for the execution of trusts by such foreign company in this state, are subject to taxation in Ohio; if the company maintains no managerial office in this state, but merely acts through agents under instructions given from the home office, then the securities must be listed in Franklin county; otherwise, if the company actually has a principal business office in this state and a managing officer here in charge of the Ohio business, the securities must be listed in the county in which such office is located. In either event it is the duty of the company to list the securities for taxation, but if the company fails to do so, and the existence of the securities is known to the district assessor of the proper county, he has ample power to enter them upon the tax list.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1140.

CONTRACT ENTERED INTO BETWEEN BOARD OF EDUCATION AND COAL COMPANY, OF WHICH ONE OF THE MEMBERS OF THE BOARD IS A STOCKHOLDER, WITHOUT ADVERTISING AND BIDS, IS ILLEGAL.

A contract in excess of $50.00, which is entered into between a board of education and a coal company, of which one of the members of the board is a stockholder, without advertising and bids, is illegal and contrary to section 12911, General Code.

COLUMBUS, OHIO, September 12, 1914.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Under date of August 13, 1914, you submit for my opinion the following:

> "I beg to inquire of you, if in your opinion, the following facts constitute a violation of sections 12910-12911-12912, or any other sections of the Ohio law, relating to officers being interested in contracts: Facts are as follows: 'A' is a member of the board of education of a city school district, which district happens to include some territory in the township outside of the city limits. 'A' is a stockholder and officer in a corporation which owns and operates a coal mine, and after proper publication this corporation was awarded a contract to furnish coal to a municipal corporation, being the city which is located in the territory comprising the school district of which 'A' is a member of the board of education."

It is the opinion of this department that a city school district represents an entity entirely separate and independent from the city government, and, therefore, a member of a city board of education who is interested in a contract of sale in any way to the city would not come within the terms of a statute prohibiting an officer from being interested in a contract for the purchase of property or supplies for use of the city.

Section 12911 of the General Code, however, is as follows:

> "Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance

for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

This statute prohibits interest on the part of an officer of trust in a contract for the purchase of property or supplies for the use of a city with which he is not connected, when the contract amounts to more than fifty dollars, and when the same is not let on bids duly advertised as provided by law.

I am of the opinion in the instance presented by you, 'A' being a stockholder in the corporation selling coal to the city has such an interest as is contemplated by this provision. If the amount of the sale exceeds fifty dollars, therefore, and if the contract was not let on bids duly advertised as provided by law, the facts presented will constitute a violation of this statute. You say that the contract was awarded after proper publication, but your facts are not sufficient to disclose whether or not the contract was let on bids. If the contract was let on bids, it is, of course, evident that the terms of section 12911 are not contravened.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1141.

CLERK OF THE BOARD OF EDUCATION CAN RECEIVE EXTRA COMPENSATION FOR PERFORMING THE DUTIES OF TREASURER OF SUCH BOARD—THE BOARD OF EDUCATION HAS A LEGAL RIGHT TO FIX THE COMPENSATION OF SUCH CLERK WHEN HE IS REQUIRED TO PERFORM THE ADDED DUTIES OF TREASURER OF THE BOARD OF EDUCATION.

Section 4782, General Code, as amended, 104 O. L., 159, provides for creating a depository for the school moneys of the school district, in which event the board of education, by resolution adopted by a vote of a majority of its members, shall dispense with the treasurer of the school moneys belonging to such school district. Said section carries the provision that upon the establishment of such depository, and the dispensation of the treasury on the part of the board of education, thereupon the clerk of the board of education of such district shall perform all the services, discharge all the duties and be subject to all the obligation required by law of the treasurer of such school district.

Upon consideration of sections 4763 to 4784, General Code, the clerk of the board of education can receive extra compensation for performing the duties of treasurer of such board, and the board of education has the legal right to fix the compensation of such clerk, when he is required to perform the added duties of treasurer of the board of education, because of the dispensation of said treasurer under section 4782, General Code.

COLUMBUS, OHIO, September 12, 1914.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Under date of June 16, 1914, you submitted for an opinion, the following request:

"Section 4781 of the General Code of Ohio provides:

" 'The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund

of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment on their salaries previous to August thirty-first, must not be made until all reports required by law have been filed with the county auditor, and his certificate presented to the board of education as required herein.'

"Section 4782 of the General Code, as amended in Ohio laws 104, at page 159 provides:

" 'When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members—shall dispense with a treasurer of the school moneys belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts.'

"Now, I would like to have your written opinion as to whether the clerk is entitled to extra compensation in performing the duties of the treasurer, or is he only entitled to the same compensation that he received before these additional burdens were cast upon him.

"I would also like to have your opinion as to when section 4715 of the General Code, as amended in Ohio Laws 104, at pages 135 and 136, goes into effect."

Chapter 7 of title 13 of the General Code, which embraces sections 4763 to 4784, inclusive, of the General Code, deal with the subject-matter of treasurer and clerk, of school boards. Sections 4764 to 4773 of the General Code, inclusive, deal generally with the duties which are imposed upon the treasurer of a board of education, and sections 4774 to 4779 of the General Code, inclusive, provide for the general duties imposed upon the clerk of a board of education. But referring to the sections hereinbefore mentioned, it becomes apparent that the duties of the two officials are separate and distinct.

In the event that a depository is provided for the school moneys of a district, as authorized by law, then the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with the treasurer of the school moneys belonging to such school district. This provision is carried in section 4782 of the General Code, as amended, 104 O. L., at page 159, which you quote above in your inquiry. Said section carries the further provision to the effect that in such case the clerk of the board of education of a district shall perform all the services, discharge all the duties, and be subject to all the obligations required by law, of the treasurer of such school districts. This, in effect, amounts to the imposition of new duties on such clerk, which said added duties are not incident or germane to the regular duties of his office, for, as above pointed out, the duties of a clerk and a treasurer of a board of education are made separate and distinct by the statutory provisions wherein their respective duties are specifically enumerated. These sections are referred to above.

In the case of Lewis, auditor, vs. State ex rel. Harrison et al., 21 O. C. C. Rep., page 410(11 Ohio Cir. Dec. 647), the court held as follows:

"The services performed on the decennial county board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners are not so 'incident' or 'germane' to the regular duties of the offices to which they have been respectively elected, as to make the pro-

vision for compensation contained in the Hendley law, in contravention of the act of the legislature (94 O. L., 386), or of the constitution (Art. II, Sec. 20.)"

At page 414 of the opinion (21 O. C. C. Rep.), the court aptly says:

"It was said in White vs. East Saginaw (43 Michigan, 567), in a somewhat different inquiry:

" 'The imposition of new duties not "incident" or "germane" to the regular duties of his office upon an officer, does not change his office, but invests him with a new office.' "

Furthermore, section 4764 of the General Code provides that each school district treasurer shall execute a bond with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, etc., *before entering upon the duties of his office, as follows:*

"Section 4764. *Before entering upon the duties of his office, each school district treasurer shall execute a bond,* with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of section 7604-7608, inclusive, the bond shall be in such amount as the board of education may require."

When a depository is established and by virtue thereof the treasurer of the school moneys of the school board is dispensed with, then section 4783 provides that the clerk shall perform the duties of such treasurer, as follows:

"Section 4783. When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

The last sentence of the last quoted section provides, in substance, that such clerk, before entering upon such duties (the duties of the treasurer), shall give an additional bond equal in amount and in the same manner prescribed by law, for the treasurer of the school district. The provision for the giving of a bond by a school district treasurer is contained in section 4764 of the General Code, supra, and that section carries the provision that before entering upon the duties of his office, each school district treasurer shall execute a bond, etc.

Reading sections 4783 and 4764 together we find that the clerk, before entering upon the duties of the dispensed treasurer, which is the same as entering upon the duties of office of treasurer, shall give a bond, as required in section 4764 of the General Code, supra.

Section 4773 of the General Code provides that the treasurer of school funds, at the expiration of his term of service, shall deliver to his successor in office, all books, papers, money and other property in his hands belonging to the district, as follows:

"At the expiration of his term of service, each treasurer shall deliver to his successor in office, all books, papers, money, and other property in

his hands belonging to the district, and take duplicate receipts of his successor therefor. One of these he shall deposit with the clerk of the board of education within three days thereafter."

On March 7, 1911, this department rendered to Hon. John W. Zeller, then the state commissioner of common schools, an opinion upon the following request:

"A township board of education has provided a depository for the school funds, as provided in section 7604, General Code. By resolution they dispensed with their treasurer and required the clerk of the board to perform said treasurer's duties as provided in section 4782, General Code.

QUERY: Does section 4782, General Code, conflict with section 4763, General Code, to the extent that a board of education may not dispense with their treasurer? If it does not, may the treasurer who was acting under authority of section 4763, compel said board of education to pay him for services from the time since the clerk assumed the office, as provided under section 4783?"

In that opinion it was held that the office of treasurer of the school funds was of indefinite duration, as follows:

"It is my opinion that section 4782, General Code, does not conflict with section 4763, General Code, to the extent that such board of education may not dispense with their treasurer. When the township treasurer was elected he was, or should have been, aware that his duties as treasurer of the school fund were of indefinite duration, and that his services could be dispensed with at any time by a majority vote of the board of education upon a depository for the school funds moneys being provided for."

Section 4763 of the General Code, as it existed at the time said opinion was rendered, provided, in substance, that in each city, village and township school district the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. Said section has since been amended at page 159 of 104 Ohio Laws, and now provides, in substance, that in each city school district the treasurer of the city funds shall be the treasurer of the school funds, and in all village and rural school districts, which do not provide legal depositories, as provided in sections 7604-7608, inclusive, the county treasurer shall be the treasurer of the school funds of such districts. Practically the only change made in said section is the provision that requires the county treasurer to act as the treasurer of village and rural school districts which have not provided legal depositories in place of village and township treasurers acting as the treasurers of their respective village or township school districts. However, this change, as so made in said section 4763, General Code, does not affect, or in anywise change the opinion above referred to, as to the indefinite duration of the term of the treasurer of a township or rural school district.

In accordance with said opinion, the board of education of a district may terminate the office of treasurer of such district at any time upon the establishment of a depository for the school funds of such district, in which event, in accordance with sections 4782 and 4783, supra, the clerk of such board of education succeeds to and shall discharge all the duties imposed upon the treasurer of school districts, as required by law. When the office of treasurer is so terminated by the establishment of a depository, under section 4782, General Code, supra, then it follows upon the treasurer to deliver to his successor in office all books, papers, money, and other property in his hands belonging to the district, and take duplicate receipt of his successor therefor, in accordance with section 4773 of the General Code, supra.

It would seem to follow, therefore, in accordance with the language employed in section 4773 of the General Code, that under these circumstances, the clerk of a board of education is the successor in office to the treasurer of such board of education, when such board of education dispenses with the services of such treasurer, under the provisions contained in section 4782, General Code, supra.

In accordance with the foregoing, it seems to follow that the clerk of a board of education, when required to assume the added duties devolving upon the treasurer of a board of education because of the dispensing with such treasurer, in accordance with section 4782 of the General Code, acts in the capacity of a dual official. That is, both as treasurer of the board of education and as clerk of the board of education.

Section 4781, General Code, distinctly vests in a board of education the legal right to fix the compensation of its clerk and treasurer. Under this last statutory provision, it would seem to follow that a board of education of a school district has a right to fix the compensation of its clerk by increasing the same when such clerk assumes and performs the added duties of treasurer of such school district, under the circumstances above commented upon. Under the rule laid down in the case of State ex rel. vs. Board of Education, 21 C. C. Rep., page 785, this action on the part of such board of education would not be in contravention of section 20 of article II, of the constitution of Ohio. In said case it is held, as follows:

> "The officers mentioned in section 20, article II of the constitution of Ohio, do not refer to either members of a board of school examiners or to the officers of a municipal corporation."

Therefore, answering your first question, I am of the opinion that a clerk of a board of education can receive extra compensation for performing the duties of the treasurer of such board, and that the board of education has the legal right to fix the compensation of such clerk when he is required to perform the added duties of treasurer of the board of education because of the dispensing with such treasurer, under section 4782, General Code, supra.

Regarding the second question contained in your request, I have asked for further facts and information relative thereto, and I am, therefore, withholding an official opinion thereon until a later date.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1142.

THE RIGHT OF THE COUNTY COMMISSIONERS TO TRANSFER FROM THE COUNTY FUND OR FROM THE PROCEEDS OF ANY OTHER COUNTY TAX LEVIES TO SUPPLY DEFICIENCIES IN COUNTY BOARD OF EDUCATION FUND, IN CASE THERE IS NO MONEY AVAILABLE IN THE SHEEP FUND.

The county commissioners may not lawfully transfer from the general county fund, or from the proceeds of any other county tax levies to supply deficiencies in the county board of education fund, in case there is no money available in the sheep fund, under section 5653, General Code, as amended.

COLUMBUS, OHIO, September 12, 1914.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—At the request of Honorable Harry W. Miller, assistant prosecuting

attorney, in a letter to this department under date of August 14, 1914, I beg leave to submit my opinion upon the question presented by him as follows:

"When there is no money available in the sheep fund under the provisions of section 5653 of the act of February 5, 1914, may the county commissioners transfer moneys from the general fund to the county board of education fund?"

This question invites consideration of the following sections of the General Code, as amended by the general assembly at its first extraordinary session of 1914:

"Section 5653. After paying all such sheep claims at the June session of the county commissioners, if there remain more than one thousand dollars of such fund, the excess at such June session shall be transferred and disposed as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred shall be transferred to the county board of education fund at the discretion of the county commissioners.

"Section 4744-1. The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district.

"Section 4744-2. On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents.

"Section 4744-3. The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

All of the above sections were amended by the general assembly in the act to which you refer, 104 O. L., 133.

It is apparent from the above quoted sections that the county board of education fund is in no proper sense a county fund. Its primary source consists of contributions from the semi-annual apportionment of school funds to the various rural and village school districts constituting the county school district. The county school district is defined in section 4684, amended in the same act, as follows:

> "Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural school district is situated in more than one county such district shall become a part of the county school district in which the greatest part of the territory of such village or rural district is situated."

It seems (although I do not decide this question) that the county treasurer is the custodian of the funds of the county school district and that the county auditor is ex-officio the disbursing officer of that district; but the district as such is not the county, it being apparent by reason of provisions of section 4684 that in most cases, at least, the county school district would not be territorially *co-terminus* with the county, and it being equally apparent that even if the school district should happen to be identical in territory with the county, it would be a separate and distinct subdivision just as a township school district was a subdivision separate and apart from a township with which it happened to be territorially identical.

It is, of course, fundamental that taxes levied for county purposes can be expended only for county purposes (article 12, section 5 of the constitution); State ex rel. Brennan vs. Benham, 89 O. S. Therefore, it would be, in my opinion, unlawful for any county tax levy moneys to be transferred to and for the benefit of the county school district, even if some color of statutory authority might exist.

In addition, however, I am satisfied that there is no statute under which colorable authority to make such a transfer might be claimed. Sections 2296 et seq., General Code, provide a method of transfer by the county commissioners of funds "under their supervision, from one fund to another," but these sections only authorize transfers among funds both of which are under the county commissioners' supervision, (Infirmary Directors vs. Commissioners, 6 N. P. n. s., 347); whereas it appears that the county board of education fund is under the supervision of the county board of education, and not that of the county commissioners.

Section 5655, General Code, which formerly authorized the commissioners to transfer surpluses in any established fund or division of a fund, to another existing fund, can no longer be relied upon for this purpose, because it was repealed in 103 O. L., 521; but even this section, when it was in force, merely authorized transfers to "another fund for which a tax is to be or otherwise would be levied;" whereas no tax is levied directly for the purposes of the county board of education fund.

For all the above stated reasons, then, I am of the opinion that aside from the authority found in section 5653, General Code, as amended, the county commissioners have no power to transfer any tax moneys to county board of education funds.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1143.

HOW THE MONEYS PAID INTO THE COUNTY BOARD OF EDUCATION FUND ON ACCOUNT OF THE SALARIES OF COUNTY AND DISTRICT SUPERINTENDENTS ARE TO BE USED * * * SUCH FUNDS ARE AUTOMATICALLY APPROPRIATED FOR THE PAYMENT OF SUCH SALARIES AND CANNOT BE USED FOR ANY OTHER PURPOSE—TRANSFERS FROM THE DOG TAX FUND, UNDER SECTION 5653, GENERAL CO E.

The moneys paid into the county board of education fund on account of the salaries of county and district superintendents, under section 4744-3, General Code, as amended, 104 O. L., 143, are automatically appropriated to the payment of such salaries, and cannot be used for any other purpose. The expenses of the county superintendent and his allowance for clerk hire, the expenses of the members of the board of education and the expenses of the county institute, which are payable out of this fund, must be paid from moneys coming into it otherwise than under section 4744-3, viz.: examination fees, under section 7820, as amended, 104 O. L., 104, and transfers from the dog tax fund, under section 5653, General Code, as amended, there being no other source of the county board of education fund.

If the allowance to the superintendent is made in advance, such allowance would appropriate moneys in the fund other than those appropriated to salaries; so that the expense of conducting institutions and he expenses of the members of the board of education could not be paid unless there were in the fund more than enough to pay the salaries and superintendent's allowance.

COLUMBUS, OHIO, September 12, 1914.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—In your letter of August 18th you call my attention to sections 4734 and 4744-1, General Code, as amended at the first extraordinary session of the present general assembly, and to the sections providing specifically for the sources of what is known as the county board of education fund.

You inquire how the salaries and expenses payable from this fund can be met in the event that the surplus transferable from the dog tax fund under section 5653, General Code, as amended is insufficient to meet the expenses themselves.

Preliminary to a final answer to your question, I beg leave to refer you to the enclosed copy of an opinion to Hon. H. M. Small, prosecuting attorney of Scioto county, in which I hold that county commissioners are not authorized to transfer any county funds other than proceeds of dog tax to the board of education fund, so that if there should happen to be insufficient money in the fund for its purposes under the sections which you cite there is no way whatever to meet such a deficiency.

I observe that sections 4734 and 4744-1, General Code, provide for the payment of certain expenses out of the county board of education fund. The provision is explicit in the case of section 4734 and implicit in section 4744-1, for that section provides merely that the county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help; without describing or referring to the fund from which this allowance shall be drawn. Yet it seems reasonably clear that the intention is that the allowance shall be made out of the county board of education fund. Section 4744-1 provides then that half of the salary of the county superintendent shall be paid out of the county board of education fund. This, however, is no more explicit than the direction to pay the expenses of the members of the county board of education from the same source, found in section 4334, General Code.

In fact, each class of *expenditure* from the board of education fund is provided for

either expressly or by necessary implication as in the case of the three hundred dollars allowance in section 4744-1.

It so happens that the primary sources of the fund other than the transfer of the dog tax are fixed with reference to certain salaries. The exact provision is that of section 4744-3 (104 O. L. 143) which is as follows:

> "Section 4744-3. The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the "county board of education fund." The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

I have characterized this provision as a designation of certain sources of the county board of education fund by reference to certain salaries payable from that fund. It is, however, more than this. In my opinion the amounts ascertained under the rules of this section and paid into the fund are appropriated to the purposes which the statute mentions. Thus I think it is the legislative intention that the portion paid into the fund on account of salaries of county and district superintendents shall not be paid out of the fund for any other purpose; that is to say the county board of education fund does not appear to be a general commingled fund which may be drawn upon at will for any of the objects which the statute mentions; but with respect to the salaries at least it is clear that certain sources of the fund are, as section 4744-3 has it "to pay such portion of the salaries," etc. I have considered this point, because without considering it, it could not be determined whether a deficiency in the board of education fund should be shared in by those entitled to receive payment therefrom on account of salaries, and those entitled to receive payment of expenses therefrom, so that so long as the money should remain in the fund it might be drawn on indiscriminately for salaries and expenses until it become exhausted. I do not think, as I have already stated, that this was the legislative intention, and I agree with you in the conclusion, which you appear to assume, that the money coming into the fund under section 4744-3, General Code, cannot be drawn upon for the payment of expenses and clerical hire.

The legislation of 1914 creates a source of revenue for the county board of education fund which has not been mentioned, and also authorizes an expenditure from that fund to which attention has not been called. I refer to section 7820, General Code, as amended 104 O. L. 104, which provides that the fees on applications for examination by the board of county school examiners shall be paid into the board of education fund; and to section 7860, General Code, as amended 104 O. L. 156, which provides that the expenses of conducting a county teachers institute shall be paid from the county board of education fund.

The situation then seems to be as follows:

The money coming into the county board of education fund from the sources specified in section 4744-3, General Code, must be held to be appropriated for the payment of salaries, and may not be used by the county board of education for any other purpose; but there is no distinction or preference among the other expenditures from this fund, provided the revenues accruing to it from examination fees and transfer of dog tax prove insufficient to meet such other expenses. In other words, the moneys

transferred from the dog tax fund (if there is a surplus in this fund and if the commissioners choose to transfer it, which they cannot be compelled to do), together with the examination fees already mentioned constitute the only general revenues so to speak accruing to the county board of education fund; these revenues and these only are available to pay the following charges against the fund:

1. Expenses of members of the county board of education.
2. The county superintendent's allowance for traveling expenses and clerk hire.
3. The expenses of conducting the county institute.

Practically it seems almost certain that these revenues will prove insufficient to provide for these expenditures, especially in those counties in which there is either no considerable surplus in the dog tax fund and those in which the county commissioners refuse to transfer such surplus to the county board of education fund. This assumption, however, may be in point of fact incorrect. Should it prove to be correct in a given county, then I would be of the opinion first that no payments on account of expenses might lawfully be made until the county board of education fund has moneys in it from one of the two sources which I have enumerated; and second that while there is money from the sources mentioned in the fund, the same may be expended indiscriminately for any or all of the other purposes enumerated, without preferring one to the other, until the fund is exhausted, after which expenditures of these three kinds cannot lawfully be made.

I should make an exception, however, in the case of the county superintendent's allowance for traveling expenses and clerical help. The authority to make this allowance, in my opinion, is equivalent to authority to appropriate the sum allowed in advance and segregate it so to speak from the remainder of the general balance in the county board of education fund. At least I am of the opinion that if the allowance of which section 4744-1 speaks is made in advance, the effect of such an allowance is to appropriate any moneys coming into the county board of education fund from sources other than those mentioned in section 4744-3, so as to make such moneys not available for the payment of expenses of members of the board of education, and the expenses of the county institute. In the event the allowance is thus made, therefore, the deficiency would fall upon either the members of the board of education with respect to their expenses, or the county institute, or both, as the case might prove to be.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1144.

DEPUTY CLERKS UNDER PROBATE JUDGE ARE IN THE UNCLASSIFIED SERVICE, SUCH DEPUTIES BEING DEPUTIES WITHIN THE MEANING OF SUBDIVISION 8-A OF SECTION 8 OF THE CIVIL SERVICE ACT.

Deputy clerks under the probate judge are in the unclassified service, such deputies being deputies within the meaning of subdivision 8-a of section 8 of the civil service act.

COLUMBUS, OHIO, September 12, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of August 27, 1914, you inquire:

> "Is the office of clerk of the probate court an elective or principal executive office, and are the deputy clerks authorized by law to act generally

for and in place of their principals, and do they hold a fiduciary relation to said principals? The question we desire to determine is whether or not the deputy clerks under the probate judge are in or out of the classified service?"

Section 16 of article IV of the constitution of Ohio, reads:

"There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but, the general assembly may provide, by law, for the election of a clerk, with a like term of office, for each or any other of the courts of record, and may authorize the judge of the probate court to perform the duties of clerk for this court, under such regulations as may be directed by law. Clerks of courts shall be removable for such cause and in such manner as shall be prescribed by law.

Section 1584, General Code, provides:

"Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

In the case of Warwick vs. The State, 25 Ohio State 21, Welch, J., says on page 24:

"* * * In the absence of a deputy clerk, the probate judge is his own clerk, and responsible for acts done or omitted as such clerk, on the same principles applicable to other ministerial officers. The provision of law authorizing him to appoint a *deputy* clerk plainly implies that he is his own clerk—that he is both court and clerk; for there can be no deputy where there is no principal. * * *."

The view which the court takes is that there are two positions; one a judicial position, the other a ministerial position. When the probate judge acts as judge of said court he acts in a judicial capacity, and when he acts as clerk he acts in a ministerial capacity.

In the case of Mellinger et al. vs. Mellinger, 73 Ohio St., Justice Crew, on pages 227 and 228, quotes from section 533, Revised Statutes, now section 1584, General Code, supra, and then says:

"A deputy clerk appointed under this section does not, by virtue of such appointment become deputy probate judge, and acts performed by him after his appointment are not therefore, within the rule, that the acts of the deputy are regarded in law as the acts of the principal."

The deputy clerk is not therefore a deputy probate judge.

By section 1584, General Code, the deputy clerk is authorized to "perform the

duties appertaining to the office of clerk of the court." The deputy is not made the clerk of the court but he is authorized to perform the duties of the clerk. The clerk of the probate court is the probate judge, and as such, he occupies two positions, to-wit, judge and clerk.

The deputy clerks authorized by section 1584, General Code, are authorized by law to act generally for and in place of their principal, the clerk, and hold a fiduciary relation to him. They are therefore deputies within the meaning of subdivision 8 (a) of section 8 of the civil service act, which reads:

> "The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

As such deputies they are in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1145.

NO PERSON IN THE CLASSIFIED SERVICE MAY SERVE AS A MEMBER OF AN EXECUTIVE COMMITTEE OF A POLITICAL PARTY.

Under virtue of section 486-23, General Code, no person in the classified service can serve as a member of an executive committee of a political party.

COLUMBUS, OHIO, September 12, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of August 24, 1914, Hon. R. W. Cahill, prosecuting attorney of Napoleon, Ohio, submits the following inquiry:

> "At a meeting of the democratic county central committee, held last Saturday, the following parties were elected as members of the county executive committee:
> "B. F. H., district assessor.
> "F. A. D., resident engineer state highway commission.
> "G. S. M., official court reporter.
> "M. V. M., superintendent of municipal water and electric light plant.
> "J. M. R., probate judge.
> "Will you please give me as soon as possible the status of these men touching their eligibility to serve on this committee?"

Part of the above positions are in the classified service, and part in the unclassified service, under the civil service act.

The district assessor and the probate judge are in the unclassified service. The superintendent of municipal water and electric light plant of a city and the official court reporter are in the classified service. The civil service act does not apply to villages.

The status of the resident engineers of the state highway department, under the

civil service act, is now under consideration by this department and a separate opinion will be given.

Section 23 of the civil service act, section 486-23, General Code, provides in part:

> "* * * nor shall any officer or employe in the classified service of the state and the counties, cities and city school districts thereof be an officer in any political organization, or take part in politics, other than to vote as he pleases, and to express freely his political opinions."

This provision would prevent a person in the classified service from being a member of an executive committee of a political party.

The district assessor and probate judge may serve on the executive committee.

The official court stenographer and the superintendent of municipal water and electric light plant connot serve on such committee and at the same time hold their positions.

Until an opinion is rendered fixing the status of resident engineers of the state highway department, the person holding this position should not serve upon the executive committee.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1146.

MUNICIPAL COURT CREATED BY CHARTER DECLARED BY COURTS TO BE WITHOUT JURISDICTION IN STATE MATTERS—FEES JUSTICE OF PEACE ENTITLED TO FOR HEARING STATE CASES—RIGHT OF JUSTICE OF THE PEACE TO RECEIVE SUCH FEES FROM THE CITY.

In Middletown, Ohio, where the municipal court created by charter was declared by the courts to be without jurisdiction in state matters, the justice of the peace designated to hear state cases is entitled only to the fees prescribed by statute for such services and he cannot be compensated in any way by the city therefor.

COLUMBUS, OHIO, September 12, 1914.

HON. W. G. PALMER, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—Under date of August 11th, you request my opinion as follows:

> "You are possibly familiar with the litigation we have had in reference to the charter adopted and under which we are now operating. This charter pretended to create a court having jurisdiction of cases of a criminal nature under both state statutes and city ordinances. The matter in the court of appeals convinces us that the court had no proper jurisdiction in state cases and the court since that time has not been trying any such.
>
> "After the decision of the court of appeals, the city commissioners directed the chief of police to take all persons held for violation of statute law before some justice of the peace and this he has been doing since that time.
>
> "I am asked whether or not the city authorities have any right under the law to pay any compensation to such justice for handling these cases.
>
> "Would section 4570, General Code, permit any compensation being paid to such justice for such service?"

I understand that an established municipal court is still caring for all municipal cases; that is, cases of violation of ordinances of the municipality, but that the justice of the peace in question is complying with a request to hear all cases of violation of state law.

I beg to refer you to a former opinion rendered by this department to the bureau of inspection and supervision of public offices, under date of May 27, 1913. In this opinion the compensation of a justice of the peace appointed to act instead of a mayor in cities having no police judge, in section 4549 of the General Code, was considered, and the conclusion is reached that the city has no authority or right whatever to pay a justice of the peace any compensation whatever for his services in state cases, the justice being permitted to retain the fees prescribed by statute for such services.

The argument advanced therein applies to the case at hand, and I am of the opinion that the justice in question may receive for services in such state cases, no compensation outside of that prescribed by statute for such services. I am enclosing a copy of the opinion referred to.

I am pleased to agree with your own view that section 4570 has no application whatever to the case at hand for the reason that the same applies only to such justices of the peace as are appointed to act during the absence, inability or disability of the police judge of a bona fide or legally authorized police court, and for the further reason that the compensation paid such police judge by the city, must be construed as compensation for services in ordinance cases only.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1147.

DUTY OF LANDOWNERS OR TENANTS TO DESTROY NOXIOUS WEEDS GROWING ON PUBLIC ROADS ABUTTING LANDS OF SUCH OWNERS OR TENANTS—PROCEEDINGS WHERE SUCH LANDOWNERS OR TENANTS FAIL TO DESTROY SUCH NOXIOUS WEEDS.

It is made the duty of a landowner or tenant under sections 7148 and 7148-1, General Code, to destroy noxious weeds growing on public roads abutting the lands owned or occupied by such landowners or tenants. If both the land owner and tenant fail to destroy such noxious weeds, the road superintendent may do so, and certify the cost thereof together with a description of the real estate to the county auditor, who shall assess the cost against the land. The assessment of the cost of destroying such weeds may not legally be made against a tenant.

COLUMBUS, Ohio, September 12, 1914.

HON. CARL F. SCHULER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Under date of August 5th you wrote to me as follows:

"I am writing you this letter in order that I may receive some enlightenment on sections 7148 and 7148-1, in this to wit:

"If the tenant fails to destroy the brush, weeds, briars, etc., along the roads abutting the lands occupied by him, can the landowner be made pay the assessment for work and labor performed by the road superintendent along said lands?

"If both the landowner and tenant fails to destroy the brush, weeds, briars,

etc., along said lands, and the road superintendent destroys them, who must pay for the said work, the landowner or the tenant?"

Sections 7148 and 7148-1, General Code, as found in 103 O. L., page 549, read as follows:

"Section 7148. The superintendent of such roads shall allow a landowner or tenant to destroy such brush, briars, burrs, vines, thistles or other noxious weeds, growing or being on such roads along the lands abutting thereon, owned or occupied by such landowner or tenant. Such landowner or tenant shall do the work or cause it to be done before the first day of the month in which it is required to be done as specified in section 7146. In case such owner or tenant fails to comply with section 7146, and the foregoing provisions of this section, the superintendent of roads or turnpikes shall do the work or cause it to be done.

"Section 7148-1. When such work is done by the superintendent the township trustees shall certify to the auditor of the county the amount of the cost of the work with the expense thereto attached, and a correct description of the land upon which the work was performed, and the auditor shall place the amount upon the tax duplicate to be collected as other taxes. The county treasurer shall pay the amount when collected to the township treasurer as other funds."

Assuming these statutes to be constitutional, I see no difficulty in answering your questions as they relate solely to the method of assessing the cost of the destruction of certain brush, weeds, etc., when a landowner or a tenant fails to destroy them. Your first question seems to imply that it first becomes the duty of the tenant to destroy the brush, etc., whereas the duty makes it the duty of the landlord or tenant to destroy the same without giving one a preference over the other. If both the landowner and the tenant fail to destroy such weeds, etc., it becomes the duty of the road superintendent to destroy the same; and when the road superintendent does do so, his only recourse is to notify the township trustees and they in turn must certify the amount of the cost of the work, together with a description of the land on which the work was performed, to the auditor of the county. The auditor must place the amount so certified upon the tax duplicate and the county treasurer must collect it the same as other taxes. While this statute does not expressly provide that the cost of such work is to be assessed either against the landlord or the tenant, yet the fact that it requires a correct description of the real estate to accompany the certificate of the township trustees to the county auditor, very clearly indicates that it was the legislative intent, and I am of the opinion that the cost of destroying such weeds, etc., is to be assessed against the *land*. In no event would it be legal or proper to certify the cost of such work against the tenant.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1148.

COUNTY COMMISSIONERS HAVE NO AUTHORITY TO CONSTRUCT A PUBLIC COMFORT STATION AS SUCH.

The county commissioners have no authority to construct a public comfort station as such; they may only install such toilet accessories as may be incidental to the official and public use of county buildings, which they are authorized to construct.

COLUMBUS, OHIO, September 12, 1914.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Montgomery County, Dayton, Ohio.*

DEAR SIR:—Under date of August 12th, you requested my opinion on the following:

> "The board of commissioners of Montgomery county have been asked by the citizens of Dayton to construct a public comfort station in the basement of the old court house, and some time ago I verbally advised the county commissioners that in my opinion they had no authority to construct a public comfort station *as such*, but that they might make such additions to the court house in the way of toilet rooms that would be accessible to the general public. I doubt their authority in constructing such toilet rooms to make improvements beyond what would naturally be required by the public use of the court house and county offices. In other words, that their authority would be confined to an improvement such as would be needed for the officers and public having business in the court house, and not construct toilet rooms that would have the accommodation of the general public in view rather than the use as a part of the county offices.
>
> "The commissioners have again asked me whether they would have authority to issue bonds for the purpose of erecting a public comfort station in the basement of the old court house; and it is stated that you expressed an opinion to a member of the legislature to the effect that the commissioners had such authority, and my object in writing you this letter is to ascertain your views upon that subject.
>
> "It seems to me that if the commissioners have such authority it must be by virtue of General Code, section 3434, and that such toilet accessories might be construed as an improvement to the court house; but, as above stated, it seems to me that the improvement would necessarily be limited to the needs of the public using the county offices of the court house, and could not be extended to the construction of rooms calculated for use of the public at large.
>
> "Municipal corporations are expressly authorized to erect public toilet and comfort stations and issue bonds therefor under General Code section 3939, and it seems to me that this is a matter for the city of Dayton rather than the county of Montgomery to undertake under the present statutes."

After a careful investigation of the relative statutes, I am pleased to incorporate your own opinion and the reasons advanced by you, in answer to your request, as the official opinion of my department.

I can find no express authority in the statutes anywhere, authorizing the county commissioners to construct and fit out a public comfort station. Their authorization to construct a court house can be extended only as regard toilet accessories to such as are necessary for the incidental purposes of the court house itself, to wit: the

accommodation of the officers and employes tenanted in said building and such portion of the general public as find it necessary to conduct business with such.

Since the statutes, therefore, neither expressly or impliedly authorize the construction and equipment of a public comfort station by the county commissioners, I am obliged to conclude that the public, as such, must depend upon the authority granted municipal corporations for such conveniences.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1149.

AGRICULTURAL COMMISSION ACT—DISPOSITION OF FINES, FEES AND COSTS AS PROVIDED BY SECTION 114 OF SAID ACT—TO WHAT FEES THE COSTS REFER TO IN ABÓVE SECTION—DISPOSITION OF FINES AS PROVIDED BY SECTION 1313, GENERAL CODE, UNDER PROSECUTIONS BROUGHT BY THE AGRICULTURAL COMMISSION IN ENFORCEMENT OF LAWS RELATING TO THE PRACTICE OF PHARMACY.

Construction of

Sections 12672, 12672-1, 12673 and 1313, General Code, with reference to the disposition of fines, fees and costs, as provided by Section 114, agricultural commission act. Said fines, fees and costs are collected by the agricultural commission in the prosecution and enforcement of laws relating to the subject-matter of pure food; said laws were formerly enforced by the state dairy and food department. The disposition of fines, as provided by section 1313, General Code, as amended in the agricultural commission act, applies to fines collected and assessed under prosecutions brought by the agricultural commission in the enforcement of the laws relating to the practice of pharmacy.

The fines collected under and by virtue of the provisions contained in section 12673, General Code, as amended in the agricultural commission act, applies to fines and costs collected in the prosecution and enforcement of the provisions contained in section 12672, General Code, of the act restricting the selling, bartering and giving away of cocaine and other drugs, as the same provides at page 105, O. L.

COLUMBUS, OHIO, September 12, 1914.

HON. O'BRIEN O'DONNELL, *Probate Judge, Toledo, Ohio.*

DEAR SIR:—Under date of March 6, 1914, you submitted the following for an official opinion:

> "I desire an opinion from your department as to the disposition of fines, costs, etc., assessed and collected for violation of the dope law, so called, as passed April 17, 1913, and found in vol. 103, page 505 of the Laws of Ohio.
>
> "For your information I will state that the law above referred to was section 12672 of the General Code, which I was instrumental in having amended, and which act contains an express repeal of the old section 12672. At the same session of the legislature a law creating an agricultural commission was passed and will be found in vol. 103, Ohio Laws, at page 304. This law, while creating the commission, fixing its duties, powers, etc., among other matters is a sort of codification of several statutes passed at various times in the past. And in this same bill is found the old section 12672, exactly as it was prior to that session of the legislature. In the last section

of the agricultural commission bill (page 341) is also an express repeal of 12672. You will notice that the dope act, so called, and found on page 505, was passed April 17, 1913, and approved May 2, 1913. You will also notice that the agricultural commission law was passed April 15, 1913, and approved May 3, 1913, or one day after the dope bill, so called, was approved.

"For your information I will say that in one of the first cases prosecuted in this court under the dope law (page 505), it was contended that the dope law, so called, was repealed by the agricultural commission act, for the reason that this law having been approved on May 3, 1913, a day after the approval of the dope law, so called, thereby repealed the dope law. After a very complete argument for and against the repeal of these statutes, I took the case under advisement, and found a case in point which held that the law last passed by the legislature, and approved first by the governor, repealed the prior section, passed at the same session, which was signed also by the governor. In that state the constitutional provision as to the enacting of laws, are very similar to Ohio. I call your attention to this case which will be found in 26 Penn., page 446, and is entitled Bank vs. Commonwealth. Consequently I held that the General Code, 12672, as found on page 505, was not repealed by section 12672, included in the agricultural commission bill, and found at page 340. If 12672, as included in the agricultural commission act, and found at page 340, is repealed by 12672, being the dope law, and found on page 505, what is the effect of section 12673 found on page 340.

"In the agricultural commission act, and found at page 328 of Ohio Laws, is a provision 'All fines, fees and costs collected under prosecution, begun or caused to be begun by the agricultural commission, shall be paid by the court to the commission.' Again at page 340, and in section 12673 of the agricultural commission act, is found further provision that 'All fines, collected under section 12672 shall be paid to the agricultural commission.' The next section being section 1313 and found on page 340, provides that 'The agricultural commission shall enforce the laws relating to the practice of pharmacy * * * fines assessed and collected under prosecution, commenced or caused to be commenced by the agricultural commission, shall be paid into the state treasury each month.' Section 123, found on page 340, provided that 'Each section of this act, and every part thereof, is hereby declared to be an independent section.'

"Now if fines and costs are assessed and collected under the dope law, so called, as found at page 505, what disposition is to be made of such fines and costs? I am frank to say that taking into consideration all the inconsistencies in these laws referred to I am at a loss to know where the fines and costs should go. Again, what fees and costs are contemplated in this act? Is it the court costs, and is it the witness fees and sheriff fees?"

The conflicting enactments in regard to the sections which you cite in your request and the many inconsistencies which appear therein, create considerable confusion when we come to apply and construe said sections, and you have accurately set forth the situation regarding the enactments of said sections and the inconsistencies appearing therein, in your request.

Regarding section 12672 of the General Code, cited in your inquiry, much confusion arises when we come to deciding which is the later enactment, because the act which was passed first was last approved, and the act which was passed second was first approved; that is to say, the so called dope act (being section 12672 of the General Code), which regulates the sale of cocaine, morphine and other drugs, was passed April 17, 1913, and approved May 2, 1913, and appears in 103 O. L., page 505. Said section 12672 of the General Code also was enacted as a part of the agri-

cultural commission act in practically the same form and language as it appeared before the amendment of April 17, 1913.

The agricultural commission law was passed April 15, 1913, and was approved May 3, 1913. As to which act was the later enactment in this situation the courts are divided and are not harmonious. One rule of statutory construction is to the effect that a law which was last enacted by the general assembly was the one which prevails, while on the other hand many authorities are to the effect that the governor is part of the legislative machinery and therefore amendments which are last signed by the governor should prevail, especially under constitutions similar to that of Ohio.

You state in your request that the question as to which act was the later enactment was directly at issue in your court, and that you decided this issue upon the authority of the case of the Southwark Bank vs. the Commonwealth, supra, holding that section 12672 of the socalled dope law (103 O. L., 505) was not repealed by section 12672 of the agricultural commission act (103 O. L., p. 340). Inasmuch as this question has been determined by a judicial decision, I am willing for the purpose of this opinion to assume its correctness. Therefore, in answer to your question as to what is the effect of section 12673, found on page 340, it is my opinion that said section 12673 applies to 12672 of the General Code, as the same appears in the socalled dope act, page 505 of the 103 O. L. Section 12673 is as follows:

> "It shall be the duty of the agricultural commission to enforce the provisions of section twelve thousand six hundred and seventy-two, and all fines collected under section twelve thousand six hundred and seventy-two shall be paid to the agricultural commission, and by it covered into the state treasury."

Prior to its last amendment said section provided that the Ohio board of pharmacy should enforce the provisions of section 12672 and that the fines collected thereunder should be paid to the secretary of the state pharmacy board.

You next inquire in regard to section 1313, as found on page 340 of the 103 O. L., which said section provides as follows:

> "The agricultural commission shall enforce the laws relating to the practice of pharmacy. If it has information that any provision of the law has been violated, it shall investigate the matter, and, upon probable cause appearing, file a complaint and prosecute the offender. Fines assessed and collected under prosecutions commenced, or caused to be commenced, by the agricultural commission shall be paid into the state treasury each month to the credit of the general revenue fund."

Said section 1313, prior to the last mentioned amendment thereof, provided that the secretary of the state board of pharmacy should enforce the laws relating to the practice of pharmacy, and that the fines assessed and collected under prosecutions, commenced or caused to be commenced by the state board of pharmacy, should be paid by the treasurer thereof, and by him paid into the state treasury to the credit of the fund for the use of such board. Said section 1313 was originally enacted May 9, 1908 (99 O. L., 492), as a part of an act entitled as follows:

> "To revise and consolidate laws relating to the appointment, powers and duties of the state board of health, the state board of medical registration and examination, *the Ohio board of pharmacy* and the state board of embalming examiners."

Under the General Code said section 1313, prior to its amendment, was part

of chapter 21, division 2 and title 3, which said chapter relates to the subject-matter of the state board of pharmacy.

You also inquire regarding the provision contained in the agricultural commission act, found at page 328 of the 103rd volume of Ohio Laws, which provision so referred to, reads as follows:

> "All fines, fees and costs collected under prosecutions begun or caused to be begun by the agricultural commission, shall be paid by the court to the commission."

This provision is part of section 114 of the agricultural commission act, and prior to the adoption of the agricultural commission act this section appeared in the General Code as section 378 thereof. Said section 378 constitutes a part of chapter 7, division 1, title 3 of the General Code, and relates to the subject matter of the state dairy and food commissioner. Said section was originally enacted as a part of the act entitled "An act to create the office of the dairy and food commissioner" (83 O. L., page 120). Said provision has remained substantially the same throughout all subsequent amendments. Prior to the last amendment, appearing in 103 O. L., at page 328, said section provided in substance that all fines, fees and costs collected under prosecutions, begun by the state dairy and food commissioner, should be paid by the court to the commissioner, etc. In the last amendment thereof said section was changed to provide that such fines, fees and costs should be collected by the agricultural commission and paid by the court to such commission, etc.

Sections 112 and 113 of the agricultural commission act, found at pages 227 and 228, 103 O. L., immediately preceding section 114, relates to the provisions formerly carried in the dairy and food commission act. Section 11 of the agricultural commission act, 103 O. L., page 306, provides as follows:

> "The agricultural commission shall succeed to and be possessed of the rights, authority and powers now exercised by the * * * state dairy and food commission, * * * the state board of pharmacy, * * *."

By way of summary, I wish to say that section 114 of the agricultural commission act, formerly section 378 of the General Code, is that portion of the agricultural commission act which relates to the department formerly known as the dairy and food department, and was originally enacted as a part of the act creating that department; section 1313 of the General Code, as amended, 103 O. L., at page 340, relates to the enforcement of the laws relating to the practice of pharmacy, and as before stated, was originally enacted as a part of the act passed in relation to the practice of pharmacy, section 12673 of the General Code, prior to the amendment thereof in the agricultural commission act, related to the enforcement and collection of fines under section 12672 of the General Code, and formerly provided that such fines should be collected, and the provisions of said section 12672 should be enforced by the secretary of the state pharmacy board.

The Ohio agricultural commission act has combined within its provisions several state departments which formerly existed as separate and distinct departments. Section 114 appears in that portion of the agricultural commission act which relates to the enforcement of the laws formerly contained in sections governing the state dairy and food department.

It would seem to follow, therefore, that said section 114 relates to fines, fees and costs collected under prosecution to be begun or caused to be begun by the agricultural commission in the enforcement of said laws, formerly enforced by the state dairy and food commissioner. Upon like reasoning, it would seem to follow that section 1313, as amended in the agricultural commission act, has reference to and applies

to the enforcement of the laws relating to the practice of pharmacy, the enforcement of which said laws was formerly placed under the jurisdiction of the secretary of the state pharmacy board. Likewise, it is my opinion that section 12673, as amended at page 340 of the 103 O. L., refers and applies only to section 12672 of the so called dope act, as amended on page 505 of the 103rd volume of Ohio Laws. Said section 12672 relates solely to the subject matter of the sales of certain drugs, and their compounds and derivities, and can hardly be said to constitute a part of the laws relating to the practice of pharmacy. As before pointed out, this section never appeared as a part of the act relating to the practice of pharmacy, but was passed and enacted as a separate and distinct section. Fines and cost which are assessed and collected under the dope law, so called, as found at page 505 of the 103 O. L. (being section 12672), are to be disposed of, therefore, in accordance with section 12673, as amended, 103 O. L., page 340.

Regarding the question of costs, about which you also inquire, it is my opinion that the same should be disposed of as in all other criminal cases, as provided under the county fee fund act, and that such costs also contemplate and include witness and sheriff fees.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1150.

PETITION FOR CHARTER ELECTION—COMPLIANCE WITH SECTION 8, ARTICLE XVIII OF THE CONSTITUTION—ACTION OF COUNCIL ON A PETITION IN COMPLYING WITH ABOVE ARTICLE OF THE CONSTITUTION—CALLING A CHARTER ELECTION WHEN PROPER PETITIONS HAVE BEEN FILED.

1. The filing of a petition asking for a submission to the electors of a city, of the question "Shall a commission be chosen to frame a charter," with the city auditor, is not such compliance with section 8 of article XXIII of the constitution as to compel the city council to call an election thereon.

2. Where a petition for such election is so filed with the city auditor, the council may, if it deems proper and two-thirds of its members vote therefor, call such election, but it is not mandatory upon the council to so act.

3. Where a proper petition is filed with or presented to a municipal council, a majority vote of such council is all that is required in calling a charter election.

COLUMBUS, OHIO, September 12, 1914.

HON. A. A. PORTER, *City Solicitor, Zanesville, Ohio.*

DEAR SIR:—I have your letter of June 17, 1914, in which you inquire:

> "On March 30, 1914, a petition addressed to the city council of the city of Zanesville, Ohio, asking for a submission of the question 'Shall a commission be chosen to frame a charter,' under favor of section 8 of article 18 of the state constitution, was filed with the city auditor of Zanesville, Ohio. The parties filing the same stated that it contained the signatures of ten per cent. of the electors of said city. This petition has never been presented to or filed

with the council of said city, and has never been examined by said council to determine its genuineness.

"Under the above state of facts, is council legally bound to call an election?"

Section 8 of article 18 of the constitution reads in part:

> "The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter.' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid."

No legislative action looking to the carrying out of the provisions of this section nor making provision as to when or where the petition may be filed, has been taken, although by the act of April 28, 1913 (103 O. L., 767), analogous conditions are cared for by providing that upon the filing of a petition signed by ten per cent. of those who voted at the last municipal election with the board of deputy state supervisor of elections, asking that the question of organizing the municipality under any one of the plans of government provided in said act be submitted to the electors of such municipality. The board shall certify the facts to council and the council shall, within thirty days, provide for submitting such question at a special election to be held not more than 90 nor less than 60 days after the filing of such petition.

To adopt this analogy, the charter petition has not been filed with the proper officials, nor can it be considered as presented to council when filed with the city auditor, who must be held to be a city officer and not merely an officer of the council.

Under this constitutional provision, it is in the power of council, without the presentation of a petition, and on its own motion may make a call for a charter election, but this requires a vote of two-thirds of the members of council.

When a petition of ten per centum of the electors is filed with, or presented to the council, its duty is mandatory to "forthwith provide by ordinance for submission to the electors of the question. "Shall a commission be chosen to frame a charter?", in which event a majority vote is all that is necessary to pass the ordinance.

This conclusion necessitates the holding that the council may, but is not legally bound nor compelled under the circumstances you state, to call an election, as such call is only mandatory when a proper petition is presented to council.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1151.

TAXES AND TAXATION—SERIAL BOND MAY BE ISSUED UNDER AUTHORITY OF ATICLE XII, SECTION 11 OF THE CONSTITUTION—COMPLIANCE WITH ARTICLE XII, SECTION 11 OF THE CONSTITUTION IN REFERENCE TO SERIAL BONDS.

*Under article XII, section 11 of the constitution, as amended, serial bonds may be issued, and provision for the annual levy of taxes for the retirement of the indebtedness so incurred considered as a unit, the levies being equal in amount and distribution over the entire number of years between the incurring of the indebtedness and the date of maturity of the last series, would be a sufficient compliance with the constitutional requirement that provision be made for the annual levy of an amount sufficient to provide a sinking fund, although the series might so mature as practically to preclude any accumulation of a technical fund and to require the principal to be expended in the retirement of the maturing bonds as fast as it is levied. The phrase "annual levy * * * of taxes * * * sufficient to provide * * * a sinking fund" is interpreted as requiring that the burden of taxation on account of a debt incurred at a given time shall be evenly distributed during the life of the indebtedness, considered as a unit; and not as requiring the accumulation of a "sinking fund" in the strict and technical sense.*

COLUMBUS, OHIO, September 12, 1914.

HON. LEE WARREN JAMES, *City Attorney, Dayton, Ohio.*

DEAR SIR:—Your letter of July 28th, previously acknowledged, requests my opinion as to whether or not municipalities may now issue serial instead of sinking fund bonds.

Article XII, section 11 of the constitution provides as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The exact meaning and intention of this provision cannot be ascertained by examination of the debates of the constitutional convention. I find that the original proposal respecting the retirement of bonded indebtedness of the state and its subdivisions required the issuance of serial bonds by stipulating that in the legislation under which such indebtedness is incurred or renewed provision be made for "the payment of not less than two per centum of the principal together with annual interest on the same each year until such indebtedness is paid." This was objected to by Messrs. Knight and Harris on the ground that it would preclude the issuance of bonds otherwise than in series; but so far as I have been able to ascertain not necessarily on the ground that long term bonds were to be preferred to serial bonds. That is, the idea of these speakers seemed to be that the borrowing authorities of the subdivisions should retain their power to choose as to which of the two methods should be in a given instance employed, which power of choice would have been taken away had the proposal as originally framed been passed and adopted. Ultimately the present form of the section was adopted by amendment to the taxation proposal (Const. Debates, volume 2, page 1880-1881); but there was no debate on the change at the time it was voted upon.

I find that the constitutions of other states contain provisions substantially

equivalent to our article XII, section 11; for instance, that of Colorado is as follows:

> "No city or town shall contract any debt by loan in any form except by means of an ordinance * * * specifying the purpose to which the funds to be raised shall be applied and providing for the levy of a tax * * * sufficient to pay the annual interest and extinguishment of principal of such debt within fifteen, or not less than ten years from the creation thereof * *."

While the words "sinking fund" are not used in this provision, it is manifest that the idea of a sinking fund was necessarily implied therein; for a debt would ordinarily be extinguished by annual levies such as seem to be implied through the creation of a sinking fund.

Under this provision it was held in Denver vs. Hallett, 34 Colorado, 393, that bonds might be issued, payable in annual installments so that an apportioned amount might mature each year.

The decision cited seems to regard an issue of serial bonds as a single indebtedness for the purpose of the Colorado constitution. To this extent the case is clearly in point. It is equally as true under the Ohio constitution as it is under the Colorado constitution that the borrowing of money for a given purpose through the issuance of bonds is a single act of "legislation" as the Ohio constitution has it. Hence, it follows, I think, that the indebtedness thus created is a single "bonded indebtedness" within the meaning of the same provision.

It may be said that though the indebtedness is single, it does not have a single "date of maturity." It appears that provision for the payment of the indebtedness at "maturity" is the material requirement of amended Article XII, section 11; so that it might be urged that although the exercise of the borrowing power might be a single legislative act, and although the indebtedness might be a single indebtedness, yet in the case of the issuance of serial bonds there would be no one date of maturity.

Does the constitution then contemplate or require that bonds of a single issue shall all mature at the same time? Certainly there is no such positive provision therein, nor do I find any implication to that effect. The requirement of the constitution is that provision be made for the payment of all bonds at maturity, and this cannot be stretched to the meaning that all bonds issued at the same time for the same purpose shall mature at the same time.

From these considerations then, I conclude:

1. That the section does not require all bonds of a single issue to mature together, and that from the mere use of the words "at maturity" no prohibition against the use of serial bonds can be inferred.

2. I conclude that in this respect the Colorado constitution and the Ohio constitution are to be interpreted alike, that is, to the extent that both require antecedent provision to be made for the levy and collection of taxes sufficient to retire the bonds at maturity, both permit the issuance of serial bonds and the levy of taxes in such manner as to retire the several series as they mature, as well as the issuance of what may be termed straight sinking fund bonds.

There would be no doubt in my mind upon the question which you submit, were it not for the fact that the Ohio constitution expressly requires provision for the accumulation of a "sinking fund," while the Colorado constitution does not require more than that the debt be "extinguished." Under the Colorado constitution, bonds of a single issue falling due together could be extinguished by annual tax levies only through the accumulation of a sinking fund, but bonds falling due in series; that is to say in *annual* series, could be extinguished by annual tax levies without the accumulation of any technical sinking fund, so that it is at least clearer under the Colorado

constitution that both options are preserved, than it is under the Ohio constitution which expressly requires that sinking fund levies be made.

Of course, strictly speaking, a sinking fund is a fund accumulated by annual or other periodical investment which by accretion will equal the principal of an indebtedness due at a future date. Given the number of years which the indebtedness has to run, and the average rate of the investment available to the managers of the fund, the amount required to be set aside and added to the principal of the fund each year can be determined by simple mathematical calculation. This calculation, of course, cannot be made in advance, because of the possibility of enforced reinvestment of a part of the fund at a greater, or less rate of interest, but from year to year when the time arrives for adding to the fund, the amount which should be added in that year can be calculated.

But in describing a sinking fund, I have left out one very material factor. I have stated that there is implicit in the term the idea of an annual or periodical setting aside and investment. What I have not stated is that there is also present the idea that any amount annually set aside to the credit of the sinking fund shall be, roughly speaking, an aliquot part of the total indebtedness, ascertained by dividing the whole of the number of years, or other periods of time between the date of issue and the date of maturity. Of course, the periodical investments will not be precisely equal, because of accretions to the fund through its investment. Therefore, another idea is brought into the meaning of the term, viz., the idea of management with a view to adjusting the amount of investment to the anticipated accretions in such manner as to make the investment installments as nearly equal as possible without producing a surplus or deficit at the end of the period. Thus in creating a sinking fund against the retirement of an issue of bonds which matures at a single date, the actual periodical investment will be less than the ascertained aliquot part of the whole indebtedness, because of the certainty of accretions to the fund produced by the investment thereof.

In a word, then, the fundamental and underlying idea of a sinking fund is the equalization of the burden of the indebtedness among the years, or other periods of time between the date of its incurring and that of its maturity. This idea of equality of burden is the ruling and determining factor. For instance, no calculation as to the amount required to be set aside in a given year can be made, except upon the basis or assumption of equality.

In short, then, that is a "sinking fund" which is accumulated by the periodical setting aside of approximately the same amount, and its investment with a view to accumulating a fund equal to the principal of the indebtedness, when the latter matures.

This is the public policy that is embodied in the constitutional amendment under discussion. It was the policy embodied in the original proposal which was changed in the manner which I have already described. Both the original and the final proposal contemplated the enforced equalization of the burden of the public debt over the period which the debt would have to run. The framers of the constitution undoubtedly had in mind the temptation of public officers in common with all human beings to provide for present needs and to let the future take care of itself. Posterity not possessing the immediate and effective privilege of political suffrage, the line of least resistance suggests to the public officer the expediency of ignoring their just rights and catering to the seemingly more pressing desires of present constituents. This tendency when allowed to operate unchecked undoubtedly constitutes one of the greatest evils to which popular governments are subject, and has in it the elements of self destruction. For if a bonded indebtedness is permitted to be incurred without any obligation to commence accumulation of a redemption fund, or otherwise to provide for its retirement; and if the evil day of making such provision is put off from time to time by officers who will have retired before the bonds become due, then when the date of maturity arrives and the public treasury contains no funds available for the payment of the debt, the officials then in office will face the alternative of refunding

or repudiation, unless the tax limits permit the production of revenue in a single year sufficient in amount to discharge the indebtedness.

Any one of the three possible consequences of such a course is a great public evil. Repudiation wipes out credit, halts further public improvements, and thus, as I have stated, is destructive of the common wealth itself

Refunding casts upon future generations the obligation to pay for an improvement which has been enjoyed in the past and to which the people who have enjoyed it have not contributed, save by way of payment of interest—a tremendous injustice; while discharging the loan out of the proceeds of a single tax levy makes the tax payers of a given year pay for the improvement of which they have no greater benefit than those of preceding and possibly succeeding years.

So it is that the only sound public policy is that which decrees that the cost of an improvement for the making of which a debt must be created, shall be shared in as equally as possible by the tax paying public which will enjoy the improvement during the life of the indebtedness.

These fundamental considerations then clearly disclose the evil intended to be remedied by article XII, section 11, and indicate with accuracy that the requirement respecting provision for a sinking fund is designed to secure equality of the burdens of taxation during the life of an indebtedness; which indeed is the primary purpose of any sinking fund.

This, then, is the intent which in my opinon, must be given effect under article XII, section 11, of the constitution I am of the opinion that serial bonds may be issued as well under this section, as under the former constitution, but I am further of the opinion that in any issue of serial bonds, provision must be made and carried into effect, whereby during the life of the whole indebtedness considered as a unit, the burden of taxation will be equalized and the indebtedness ultimately retired. That being the case, if the series are so arranged as to fall due at intervals of years; such as every five years, until the last series matures, I would be of the opinion that substantially equal annual levies must be made during the life of the whole indebtedness. That is, during the period between the date of issuance and the date of maturity of the last series. This could be done, and the series could be paid as they fall due.

Such would be, in my opinion, provision for a sinking fund without the meaning of the constitution.

If the series are arranged so as to fall due annually, or semi-annually, then I would be of the opinion that substantially equal levies would have to be made. This would be the case with ordinary serial bonds and in reality no technical "sinking fund" would be accumulated at all, the bonds merely being met out of the principal sum levied each year with little, if any, opportunity for investment and accretion. Yet the principal purpose of the amendment and the controlling one, as I have interpreted it, would be achieved the ultimate retirement of the whole indebtedness through annual levies substantially equal in amount.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1152.

A CITY, THE CORPORATE LIMITS OF WHICH ARE CO-EXTENSIVE WITH THE BOUNDARIES OF A TOWNSHIP, MAY MAKE LEVIES FOR TOWNSHIP PURPOSES UNDER PROVISION OF SECTION 5649-3a, GENERAL CODE—SUCH LEVIES ARE GOVERNED BY THE TWO MILL LIMITATION—LEVIES FOR PUBLIC HEALTH—POOR RELIEF AND CORRECTIONAL PURPOSES NOT LEVIES FOR TOWNSHIP PURPOSES—STATUS OF JUSTICE OF THE PEACE UNDER SECTION 1747, ET SEQ., GENERAL CODE.

As a matter of principle, it is conceivable that a city or village, the corporate limits of which are co-extensive with the boundaries of a township may make levies for purposes which would not be "corporate purposes" within the meaning of section 5649-3a, General Code, but would be more properly characterized as "township purposes" as therein stated, and that as to such levies the five mill limitation does not govern, but the same are governed by the two mill limitation.

Levies for public health purposes, poor relief purposes and correctional purposes are not levies for township purposes within the meaning of this principle, but are to be included within the five mill limitation in cities, the corporate limits of which are co-extensive with those of a township as well as in cities the corporate limits of which are not so co-extensive.

Under section 1474, General Code, et seq., the justices of the peace who are required to be elected in the township or townships within the corporate limits of the city of Cincinnati, and who are to receive a salary out of the city treasury, and are to be otherwise supported therefrom, are township offices, and their maintenance is a township function which the city of Cincinnati owes on account of the fact that its boundaries are identical with those of one or more townships. Therefore, so long as the city of Cincinnati remains liable for the support of one or more justices of the peace elected under these sections, it may levy for that purpose, outside of the five mill limitation, and within the two mill limitation.

COLUMBUS, OHIO, September 14, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have transmitted to me a letter, addressed to you by Hon. Charles A. Groom, acting city solicitor of the city of Cincinnati, and have requested my opinion upon the question which Mr. Groom submits therein.

Mr. Groom's letter is a very able argument in favor of a principle for which he contends, and its application to facts which are set forth there in detail. I find it necessary, therefore, to abstract the question and to clothe it in my own phraseology as follows:

> "Where the boundaries of a city are co-extensive with those of a township, are all the levies made by the city authorities within such territory to be included within the five mill limitation prescribed by section 5649-3a, General Code, known as the Smith law; or are not the city levying authorities entitled to levy in addition thereto, for such purposes as may be designated township purposes, subject to the additional limitation of two mills for such purposes prescribed by said section?
>
> "If it is determined that under the circumstances stated, the municipal authorities have the right to levy in addition to the five mills and subject to the two-mill limitation, for such purposes as may be designated as township purposes, what of the following purposes suggested by Mr. Groom's abstract

of the municipal budget may be considered as township purposes within the purview of such a principle:

"1. Purposes of the municipal board of health?

"2. The relief of the poor, including medical aid, the house of refuge, the city infirmary, the municipal lodging house, the public baths, social investigation and relief in the department of charities and corrections, etc., and the burial of paupers?

"3. The salaries and contingent expenses of justices of the peace, provided for by statutes disposing of the fees of such justices, and fixing salaries for them?

The first question which requires, merely, the establishment of a general principle, involves consideration of the following sections of the General Code.

"Section 3512. When the corporate limits of a city or village become identical with those of a township, all township *offices* shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation.

"Section 5649-3a. * * * The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. * * *."

Looking at section 3512, General Code, it is apparent that the effect of the territorial identity of the corporate limits and those of a township is not to abolish the township as a territorial subdivision of the state nor as an agency of civil government. It is the township *offices* and not the township that is abolished.

Furthermore, section 3512, General Code, provides that after the territorial merger takes place the duties of the township offices which have been abolished thereby shall be performed by the "corresponding officers" of the municipality with certain exceptions. Giving to this language its exact effect, it would seem that municipal officers, in discharging such duties as might be designated as those of the abolished township offices, would be acting, not strictly as officers of the municipality, but as officers of the township. This may be conceded as a principle. It is true that in McGill vs. State, 34 O. S., 228, it was said at page 251, per Boynton, J., who delivered the opinion, that the original form of this section (which, however, was by no means identical in phraseology with the present statute),

"preserves the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships. But for all other purposes the township organization in this class of cities and villages is established."

This statement, however, was a mere passing remark, and as it is, is subject to

more than one interpretation. Thus, while it is true, as Judge Boynton says, that the township *organization* and its separate *corporate* existence is terminated for all purposes excepting that of electing justices of the peace and constables, it by no means follows that any *functions* that might be properly termed township functions are abolished when the territorial limits of the township and the municipality become co-extensive; nor is it true that the functions pertaining to township officers necessarily terminate under these circumstances.

Thus it was held in Curtiss vs. McDougal, 26 O. S., 66, that under these circumstances chattel mortgages required by law to be filed in the office of the township clerk must be filed in the office of the clerk of the village or city, the corporate limits of which are identical with those of the township. As stated in the opinion of that case, per McIlvaine, C. J.,

> "The *duties* of the office were not remitted, but were transferred to the clerk of the incorporated village."

And again, speaking of another section of the then Municipal Code, purporting to preserve the corporate existence of the township under these circumstances for the purpose of electing justices of the peace and constables for such township, etc., he says:

> "It does not * * * by its terms purport to destroy the township organization in any case or to merge it into that of a city or village."

So it is apparent that the township as a subdivision of the state and certain functions pertaining to township offices as such, remain technically in existence after the boundaries of the original township become co-extensive with those of the municipality.

Turning now to section 5649-3a, it appears that the interior limitation of five mills therein referred to is imposed upon levies "by a municipal corporation on the taxable property in the corporation for corporation purposes," and that the two-mill limitation therein is imposed upon levies "by a township for township purposes." Giving full effect to all of the words used in this context, it seems clear that if in order to discharge some function, duty or obligation pertaining to a township as such, it becomes necessary to levy taxes in a territory within boundaries which confine both a municipality and a township, such tax levies cannot be said to be made "by a municipal corporation for corporate purposes." They would be made by officers of the municipality and might be said, in that view, to constitute levies made "by a municipal corporation," but they cannot be said to be made "for corporation purposes." On the other hand, such levies would be levies "for township purposes."

The only serious question is as to whether they would be levies "by a township." This question, however, is answered by the considerations already discussed. When a municipal council, in order to provide for the discharge of some township function cast upon it as the functionary corresponding to the township trustees with respect to the levying power, through the extension of the municipal boundaries until they include the township, such council represents the township and not the municipality as such, and its levies are levies "by a township."

In short, then, I am of the opinion, in answer to the first question suggested by Mr. Groom's letter, that such tax levies as must be made by the council of a municipal corporation, the boundaries of which are co-terminus with those of the township in order to discharge a township function, if there are such levies, may be made outside of the five-mill limitation prescribed by section 5649-3a and subject to the two-mill limitation thereof.

But the statement of this principle is one thing, and its application to specific facts is another. In order so to apply it, it becomes necessary, I think, to define with

exactness the tax levies which may be said to be made for "township purposes" within the purview of the principle itself.

It seems to me that no great difficulty is encountered in framing such a definition, although, of course, no authorities on the question are available. I define them as follows:

Whatever purposes there may be for which a municipality, the territorial limits of which are co-extensive with those of a township, is required to levy taxes by reason of such identity of boundaries, and for which, considered as distinct purposes, the municipality would not be obliged to levy taxes, save by reason of the succession of its officers to the powers and duties of township officers, are township purposes within the meaning of the Smith law.

This definition eliminates from consideration such purposes as for which the municipality would have power to levy taxes otherwise than as the successor, so to speak, of the township, under the provisions of section 3512 of the General Code. That is to say, unless the necessity for levying taxes or the power to levy them results from the operation of this section alone, the purpose for which they are levied cannot be considered as other than a purely municipal purpose.

That this must be so, becomes, I think, apparent upon reflection. If a given purpose is one for which a municipality has power to levy or with respect to which it is obliged to provide revenue as a municipality, regardless of whether or not its limits are co-terminus with those of a township, then the consequence of designating such a purpose as a township purpose, when the territorial boundaries do happen to be co-extensive with those of a township, would be to create an invidious discrimination under the Smith law in favor of municipalities whose boundaries are co-terminus with those of a township, and against other municipalities, for the one class would be entitled under such an interpretation to levy taxes outside of the five-mill limitation for a purpose identically the same as one for which a municipality of the other class would be required or authorized to levy within that limitation.

It is this very principle of equality which has induced me to accept the *principle* contended for. If by reason of the operation of section 3512, General Code, there is cast upon the municipality burdens requiring the levy of taxes which it would not otherwise have, and which it does not bear in common with all other municipalities, it would seem to be the spirit of the Smith law that the necessary taxes should not be subject to the limitations common to all municipalities; but as the converse of this it follows, I think, that a burden which a municipality of the class now under discussion shares in common with other municipalities not of that class can under no circumstances be regarded as a township purpose. It appears, then, that the definition will exclude such purposes requiring the levy of taxes as are common to all municipalities and all townships as such. There are, of course, some levies of this character. Both the municipality and the township are for some purposes merely subdivisions of the state, with a view to the administration of its laws. The Smith law is not, I think, to be interpreted so as to exclude from the category of corporation purposes, such purposes as for which a "municipal corporation" is authorized or required to levy taxes as governmental subdivision. Such purposes are none the less "municipal" and "corporation" purposes because of this character.

But it is at least obvious that the kind of purposes which I am now discussing are those which are common to all municipalities alike, whether their boundaries are co-terminus with those of a township or not, and it is sufficient on this point to state again that if a purpose is common to all municipalities, it is a corporation purpose even though the same purpose may be one for which a township, as such, is authorized or required to levy taxes. This definition then disposes of two classes of levies suggested by Mr. Groom as constituting levies for township purposes, viz., levies for health purposes and levies for poor relief, for by sections 4404 to 4476, inclusive, of the General Code, the municipality is made a subdivision of the state for health purposes under the ad-

ministration of a board of health appointed by the mayor. Townships are also local health agencies, and the township trustees therein are constituted by section 3391 to 3394, inclusive, General Code, township boards of health, having the same duties, powers and jurisdiction within the township outside of any municipality "as by law are imposed upon or granted to boards of health in municipalities."

I am of the opinion that all levies made by the council of a municipal corporation, the boundaries of which are co-terminus with those of the township for local health purposes, are in every sense levies "made by a municipal corporation for corporation purposes" within the meaning of section 5649-3a, General Code, and must, therefore, be included within the five-mill limit thereof.

The case with respect to poor relief is not so clear, but stands, in my judgment upon the same foundation. Section 3476, General Code, provides as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

The remaining sections of the same chapter provide machinery for extending temporary relief outside of the county infirmary. All these provisions are alternative. Thus, section 3479, referring to legal settlement, refers to such settlement "in the township or municipal corporation therein."

Section 3480, providing for the initial complaint, requires that it be made to "the township trustees or proper municipal officers;" and in case medical services are rendered, it provides that "thereupon the township or municipal corporation shall be liable, etc."

The "proper municipal authorities" to extend poor relief are not left to conjecture, but are provided for by the municipal code.

Section 4368, General Code, provides explicitly that the director of public safety shall by the "chief administrative authority of the charity, correction and building departments" and related statutes give to him complete managerial authority with respect to these departments and the institutions therein.

Section 4326, General Code, makes the director of public service the manager of city baths and play grounds (which are mentioned because they are referred to in Mr. Groom's letter, either under the heading of public health or poor relief, I am not certain which).

With respect to houses of refuge, also referred to by Mr. Groom, it appears by sections 4077, et seq., General Code, that these institutions cannot be regarded as in any sense pertaining to a township, being exclusively municipal in character. Similarly he refers to infirmaries which are governed by sections 4089 to 4096, General Code, and under the supervision of the director of public safety. So also with regard to hospitals, provided for by section 4021, et seq., General Code. In this connection I may state that townships have certain powers with respect to some similar institutions, but upon principles already laid down I would not regard this fact as material.

It is sufficient to state, I think, that the relief and support of the poor and the maintenance of the various institutions which I have just mentioned, constitute purely a municipal function. That a township may also be authorized or required to assume the discharge of these functions does not alter the case, for on the principles already laid down, if a given function is not exclusively a township function, and is therefore not cast upon a municipality, the corporate limits of which are co-extensive with those of a township, to the exclusion of other municipalities, it must be regarded as a "cor-

poration purpose" and not as a "township purpose" within the meaning of the Smith law.

A very doubtful question is presented by the third class of levies referred to in Mr. Groom's communication, viz., levies for salaries and expenses in connection with justices of the peace courts. Here another principle is brought into play. It appears that while justices of the peace are elected in townships, and while section 3512, General Code, seems to be intended principally to preserve the township for the purpose of the election of justices and constables, yet a town ship as such (meaning thereby a township, the corporate limits of which are not co-extensive with those of a municipality) is not authorized generally to levy taxes for the salaries and expenses of justices of the peace and constables, except that the township trustees must furnish the justices of the peace with a civil docket (section 1724, General Code). There are special acts regulating the courts of justices of the peace in certain cities, which usually provide that the fees of justices of the peace and constables shall be paid into the city treasury, and that such justices and constables shall be allowed certain salaries in lieu of fees. (See sections 1747 to 1806, inclusive, General Code, some of which have application to Cincinnati.) Such local statutes, of course, prevail over the general provisions of section 3512, General Code, and this is the case in Cincinnati.

Section 1747, General Code, provides as follows:

> "In all townships, the boundaries of which are, or hereafter may be, wholly within the limits of the city of Cincinnati, there shall be five justices of the peace, each of whom shall receive an annual salary of twenty-five hundred dollars, seven hundred and fifty dollars each year for clerk hire and shall be provided with necessary blanks and stationery and such suitable office accommodations as the city council directs."

This section has been repealed by the enactment of an act for the creation of a municipal court in the city of Cincinnati, but my understanding is that the justices of the peace in office at the time said repeal went into effect are to serve out their unexpired terms. Statutes like this take precedence of course, over section 3512, General Code, as already remarked, so that the disposition of the fees of justices instead of being made by ordinance as prescribed in the General Code, is made by the statute itself.

Under these statutes, as distinguished from section 3512, General Code, I am of the opinion that the annual salaries payable to justices of the peace, and the other expenses chargeable to the treasury of the city of Cincinnati, under section 1747, General Code, do constitute "township purposes" within the meaning of section 5649-3a as I have interpreted it. The justices of the peace are to be elected in *townships* under section 1747. The city must provide the specified salaries and allowance for clerk hire as well as the office accommodations, etc., regardless of whether or not the fees collected by the justices of the peace, and paid into the treasury of the city, equal the burden thus cast upon the city. Therefore, it is immaterial in my mind that the city is to receive the benefit of the fees collected by the justices of the peace. In other words, the city of Cincinnati is directly charged by law with the burden of supporting the justices' courts. This burden must be borne through the exercise of the power of taxation. Such taxation would not be for a "corporation purpose," in my judgment, but would be for a "township purpose," although the ordinary township would not be obliged to levy any taxes for such purposes. In a word, then, there exists in the township or townships included in the city of Cincinnati a "purpose" for which taxes must be collected, which is not common to all townships, and is not common to all municipalities.

I wish to emphasize, that in concluding, that the city of Cincinnati is entitled to

levy for the support of justices' courts therein outside of the five-mill limitation. I am confining myself to an interpretation of section 1747, et seq., General Code, in connection with the Smith law. I do not attempt to pass upon questions which might arise in a given case under section 3512, when a city whose boundaries are co-extensive with those of a township might, by ordinance, provide for the salaries of justices of the peace, and for the disposition of their fees, nor do I pass upon questions respecting levies for the support of municipal courts and other specially created justices' courts. Each case, I apprehend, is to be governed by its own peculiar status and circumstances, though I may hazard the general view that all municipal courts, as such, partaking, as they do, something of the nature of a mayor's court or police court, are to be regarded as departments of the city government and their support as constituting a "corporation purpose" within the meaning of section 5649-3a, General Code. But as stated, it would be perhaps better not to pass upon such questions without examining the municipal court acts themselves.

Expressing no view, then, as to any general rule under section 3512, General Code, I conclude that under section 1747, et seq., General Code, in so far as their effect may be preserved during the terms of office of justices of the peace now serving in Cincinnati, the levy of taxes which the council of the city of Cincinnati must make in order to provide for the support of such justices of the peace is to be made outside of the five-mill limitation provided for by section 5649-3a, General Code, and inside of the two-mill limitation provided for by the same section.

I may add that the general principle which I have accepted in the first part of this opinion may have a very real and substantial application in other localities, though it does not appear to have such an application in the city of Cincinnati. For example, if at the time the boundaries of a municipal corporation become co-extensive with those of a township, there were liabilities of the township, as such, which the municipality would, by virtue of section 3512, General Code, be obliged to assume, the levy of taxes by the council of the municipality for the purpose of discharging such liabilities would clearly be levies for a "township purpose" within the meaning of the Smith law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1153.

SINKING FUND COMMISSIONERS OF A CITY SCHOOL—HAVE NO CONTROL IN THE SELECTION OF A DEPOSITORY FOR SCHOOL MONEY UNDER THEIR CONTROL.

The sinking fund commissioners of a city school district have no control in the selection of a depository for money subject to their control.

COLUMBUS, OHIO, September 14, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of August 15 submitting for my opinion the following questions:

> "Is it legal for the board of sinking fund commissioners of a city board of education to deposit the funds in their charge in a bank situated outside state of Ohio?"
>
> "On May 27, 1913, you gave an opinion to this department to the effect

that moneys belonging to a board of education under the control of a board of sinking fund commissioners should remain in the custody of the treasurer of the school district. Would the board of sinking fund commissioners have any legal right to designate any particular bank in which the treasurer of the board should deposit the funds under the control of the board of sinking fund commissioners?"

The opinion to which you refer in reality answers your present question. School district sinking fund moneys belong in the custody of the school district treasurer and where a depository is provided for the custody of moneys of the school district, the authority to designate the depository is that which the statutes pertaining to this subject themselves create, viz.: the board of education. I know of no authority whatever in the board of sinking fund commissioners of a city school district to control the selection of a depository for the moneys belonging to the sinking fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1154.

CONTRACTORS DOING COUNTY WORK—FILING OF A STATEMENT MENTIONED IN SECTION 3 OF THE MECHANICS LIEN LAW WITH COUNTY COMMISSIONERS DRAWING ESTIMATES.

Contractors doing work for a county are not required before drawing estimates, to file with the county commissioners the statement mentioned in section 3 of the mechanics lien law, because that law has no application to such case; sections 8324 et seq., should govern in such case.

COLUMBUS, OHIO, September 14, 1914.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 17, 1914, wherein you state:

"Under section 3 of the mechanics lien law, 103 O. L., 369-370, before a contractor may draw an estimate, he has to furnish various certificates, affidavits and statements, showing that all laborers, material men and subcontractors have been paid to date.

"We find that to follow the provisions of the statute, it will not only require a great deal of unnecessary clerical work on the part of the county, but even if all the work be carefully done, and the statements looked after, still there is no assurance that the county will not still be liable to material men, subcontractors or laborers of whom the county happens to have no knowledge. On the other hand, the burden to contractors in paying their subcontractors, material men and other help, before drawing any money on an estimate, will result either in fraudulent statements, or the driving out of business of many contractors, with the consequent rise in cost of work to the county.

"In order to meet this condition, and to provide for the same and that the mechanics lien law seeks to subserve, we have devised a form of bond to be given by a contractor, in lieu of the statements, certificates and affidavits required under the mechanics lien law.

"As this is a matter of state wide importance, and as the practice through-

out the state ought to be uniform, I am taking the liberty of submitting herewith a copy of the form of bond that we are now using, and cordially invite any criticism or suggestion that your office may have to offer.

"Unless it be pointed out wherein the taking of such a bond would be either illegal or of doubtful propriety, we shall attempt to devise a form of original bond which shall apply both to the performance of the contract and the payment of subcontractors, material men and laborers.

"Any suggestion that you or your office may have to offer will be thankfully received."

Section 3 of the mechanics lien law of 1913, 103 O. L., page 369, provides:

"The original contractor shall, whenever any payment of money shall be become due from the owner, part owner, or lessee, or whenever he desires to draw any money from the owner, part owner, or lessee, under such contract or upon the written demand of any mortgagee, make out and give to the owner, part owner, lessee or mortgagee or his agent, a statement under oath showing the name of every subcontractor or laborer in his employ, and of every person furnishing machinery, material, or fuel, giving the amount, if any, which is due, or to become due, to them, or any of them, for work done or machinery, material or fuel furnished to him, which statement shall be accompanied by a certificate signed by every person furnishing machinery, material or fuel to him in substantially the following form:

"The undersigned certified that to date hereof, commencing on the ----------day of----------, he has furnished machinery, material, or fuel, as the case may be, to----------, for constructing (altering, erecting, improving, repairing, removing, digging or drilling, as the case may be), a certain----------, situated on or around, or in front of the following described property:---------- ---------- and there is now due or owing to the undersigned the amount shown on the statement herein, (or the undersigned has been paid in full thereof, as the case may be),----------.

"And the original contractor shall also deliver to such owner, part owner, lessee or mortgagee, similar sworn statements from each subcontractor, accompanied by like certificates from every person furnishing machinery, material or fuel to such subcontractor. The owner, part owner, or lessee, or his agent, may retain out of any money then due, or to become due to the principal contractor an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers and material men, as shown by the contractor's and subcontractors' statement, for work done, or machinery, material, or fuel furnished, and pay said money to them according to their respective rights, and all payments so made shall as between such owner, part owner, lessee, or mortgagee and such contractor, and as between such subcontractors and persons performing labor or furnishing machinery material or fuel, be considered the same as if paid to such original contractor. Until the statements provided for in this section are made and furnished in the manner and form as herein provided the contractor shall have no right of action or lien against the owner, part owner or lessee on account of such contract, and the subcontractor shall have no right of action or lien against the owner, part owner, lessee or contractor until he shall have furnished such statements, and any payments made by the owner, part owner or lessee before such statements are made, or without retaining sufficient money, if that amount be due or it is to become due, to pay the subcontractor, laborers, or material men, as shown by the statements, shall be considered illegal and

made in violation of the rights of the persons intended to be benefited by this act, and the rights of such subcontractors, laborers and material men to a lien, shall not be affected thereby. If neither such owner, part owner or lessee nor his agent can be found within the county, then it shall not be necessary for the contractor or subcontractor to make out and deliver such statements, as a prerequisite to the institution of proceedings under this act or other suit or proceeding. In order that the owner, part owner, lessee, mortgagee or contractor may be protected, he or his agent may at any time during the progress of the work demand in writing of the contractor or any subcontractor any or all statements herein provided for, which shall be made by the contractor or subcontractor and given to the owner, part owner, lessee, mortgagee, contractor or his agent, and if such contractor or subcontractor fails to furnish such statements within ten days after demand is made, he shall be liable to such owner, part owner, lessee, mortgagee or contractor making such demand, each time he so refuses or neglects to comply with such demand occasioned by such neglect or refusal."

When this section is read in connection with other sections of the same act, it becomes apparent that it applies only to work carried on by private agencies and not to work done by a public agency such as a township, municipality or county. Sections 8324 et seq., General Code, which were left unaffected by the adoption of the mechanics lien law of 1913, provide a method whereby any subcontractor, material man, laborer or mechanic, who has performed labor or furnished material, fuel or machinery, or who is furnishing or is about to furnish any of these items for the construction of a public building, may obtain a lien upon the fund available for the construction thereof.

The procedure for obtaining a lien upon such fund under sections 8324 et seq., is materially different from the procedure for obtaining a lien under the new mechanics lien law. It is sufficient to say, without going into an extended discussion of the various points of difference between these two laws, that sections 8324 et seq. do not require a contractor before he can draw any money on his contract to file a list of the names of every subcontractor or laborer in his employ and of every person furnishing material, machinery or fuel, or a statement of the amount due such persons in the construction of a public building, as is required of a contractor under section 3 above quoted.

The form of the bond that you have submitted to me is predicated upon the theory that the new mechanics lien law is applicable to work done by a county and that a contractor performing such work would have to comply with the provisions of section 3 of said law. As the provisions of said section are not applicable in such case, I am of the opinion that a bond of that kind would not subserve any useful purpose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1155.

TRUST COMPANIES, WHOSE BUSINESS IN OHIO IS CONFINED MERELY TO LOANING MONEY ON REAL ESTATE, SHOULD PAY FEES PROVIDED FOR IN SECTION 736, GENERAL CODE.

Trust companies, whose business in Ohio is confined merely to loaning money on real estate, would be doing business in Ohio and should, therefore, pay the fee provided for in paragraph c of section 736, General Code.

COLUMBUS, OHIO, September 21, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 2, 1914, you made the following request for my opinion:

> "Please render to this office an opinion as to whether or not paragraph c of section 1, house bill 267, passed April 9, 1913, would apply to foreign trust companies whose business in the state of Ohio is confined merely to the loaning of money upon real estate security."

The act to which you refer is entitled "An act to provide for certain fees to be paid for corporations, associations and persons subject to inspection and examination by the superintendent of banks; also certain fees to be paid by foreign trust companies; and for the disposition to be made of such fees," 103 O. L. 180.

This act provides:

> "Section 1. That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio:
>
> * * * *
>
> (c) "Each foreign trust company desiring and intending to do business in this state shall pay to the superintendent of banks a fee of fifty dollars for issuance to it of a certificate authorizing it to transact business in this state. Such fee to be paid before such certificate is issued."

The provision for fees to be paid by trust companies is very broad. There is no implication even in this provision to the effect that the fee is one to be paid by trust companies which transact the ordinary trust business in this state. On the contrary, the language of the section is explicit that each foreign trust comapny desiring and intending to do business in this state shall pay the fee, and the only logical construction to give it is that every trust company desiring and intending to transact any business in this state must pay the fee.

Your inquiry is as to trust companies whose business in Ohio is confined merely to loaning money upon real estate; this would be doing business in Ohio, and would bring such companies under the provisions of this act, and they should pay the fee.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1156.

ARCHITECTS EMPLOYED BY BOARD OF ADMINISTRATION—PER CENT. TO BE ALLOWED ARCHITECTS ON CERTAIN CONTRACTS—MODEL PLAN OF BUILDING—COMPUTING OF ARCHITECTS' FEES.

A contract between architects and the board of administration calls for 3½ per cent. of the contract price of building let under plans. At that time the board did not contemplate furnishing brick; at the time the contract for building was let, the board decided to furnish brick. Architects should be entitled to their percentage on the entire contract, inclusive of brick.

The board of administration had architects make model plan of the building under contract. The board used said plans for two buildings, the contracts for which were awarded the same day at different prices. Since it cannot be determined on which of said contracts the architects' fees were to be computed, it is only just and equitable that the mean between the two sums be the basis upon which to compute said fees.

COLUMBUS, OHIO, September 21, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 15, 1914, wherein you state as follows:

> "Enclosed find agreement between the Ohio board of administration and Richards, McCarty & Bulford, architects.
>
> "Richards, McCarty & Bulford filed in this office plans, specifications, estimates of cost and bill of material for a dormitory, designated as design 'B-1.' with the understanding that the same were to be used for dormitories which might be built at some future time; the estimate of cost of said building being $76,000.00.
>
> "Two contracts were entered into on the same date—June 30, 1914—one dormitory to be erected at the Institution for Feeble Minded for $57,285.00 exclusive of the brick to be furnished by the state for $6,000.00, making a total cost of the building $63,285.00; and the other at the Ohio Hospital for Epileptics for $61,915.00, also exclusive of the brick for $5,185.00, making total cost of said building $67,100.00.
>
> "At the time the agreement was entered into with the architects, the board of administration did not contemplate the making of brick for state buildings.
>
> "The question arises as to the manner in which the architects' fees should be computed, and your written opinion is respectfully requested on the following:
>
> "1. Should the architects' fees be computed inclusive or exclusive of the brick?
>
> "2. Should said fees be computed on each contract awarded; or,
>
> "3. Should said fees be computed on only one contract, and, if so, which one; or,
>
> "4. Can the amount of the two contracts be added together and fees allowed on half of the total amount of the contracts?"

The agreement between the Ohio board of administration and the architects in question, which you enclosed in your letter of inquiry, is dated November 22, 1913, and is in the form of a letter from the Ohio board of administration to the architects in question. In such letter of agreement it is stipulated that the work is to be done

"on a basis of 3½% of the contract price, with an understanding that if supervision is required there will be additional charge.

In order to get the exact facts relative to the understanding which the Ohio board of administration had when it entered into the contract with the architects in question, I requested said board to advise me by letter concerning the same, and under date of September 12th, I received a letter from said Ohio board of administration, as follows:

> "In reference to the bill of Richards, McCarty & Bulford, architects, for plans and specifications for dormitory buildings, design B-1, now being erected at the Institution for Feeble Minded and Hospital for Epileptics, we desire to say that the board purchased the plans outright on a basis of 3½ per cent. of the contract price, with the understanding that it would erect one or a dozen buildings from the plans as it saw fit. As a matter of fact, two buildings were contracted for at the same time at different prices from these plans, and as a basis for payment, the board took the average price.
>
> "At the time the board entered into this contract with the architects, it did not have a brick plant and did not contemplate the furnishing of brick for these buildings."

Your first question is as to whether or not the architects' fees should be computed inclusive or exclusive of the brick.

My understanding of the facts is this: that the Ohio board of administration desired to have plans, specifications and estimates made of a model dormitory which has been designated as design "B-1," which plans, etc., were to be used for the construction of a building wheresoever the board should determine that such a building would be proper; that at the time that the contract with the architects was entered into the Ohio board of administration did not have in contemplation that it would furnish any of the material to be used in said building, as it was authorized by law to do since, at that time, it did not have any facilities with which so to do; consequently, the condition surrounding the making of said contract was that the contract, when let, was to be for not only the labor but all of the materials which went into said building. Later, the Ohio board of administration, under authority of law, came into possession of a brick making plant, and at the time that the contract for the building was entered into it was in a position to furnish the brick for said building. Since, however, the fees of the architects are to be based upon the contract price, it must, to my mind, have been in consideration that it was to be based upon the contract price for the entire building, including the brick, since it was not contemplated at the time of entering into the contract with the architects that the board of administration would furnish any brick for said building. I am, therefore, of the opinion that the architects' fees should be computed inclusive of the brick.

Your next question is as to whether the said fees should be computed on each contract awarded or only one contract, and if so, which one?

The facts, as I understand them, are these: that after the plans for the model dormitory were submitted to the Ohio board of administration, it decided to erect two dormitories in accordance with said plans; one at the Institution for Feeble Minded, at Columbus, Ohio, and the other at the hospital for Epileptics, at Gallipolis, Ohio; that it advertised for bids on both of said institutions, and that on June 30, 1914, two contracts were awarded, one for the building at Columbus and the other at Gallipolis.

From the letter of the Ohio board of administration, copy of which is heretofore set forth, it appears that it was the intention of the board, and that it did purchase the plans outright with the understanding that it would erect one or a dozen buildings from the plans, as it saw fit; consequently, I do not believe that the fee should be com-

puted on each contract awarded. The difficult question, however, arises as to which one of the two contracts awarded on the same day should be used in order to compute the architects' fees. One of the contracts for the building, as it appears in the letter, was awarded for $63,285.00 and the other for $67,100.00. Since, as I have before stated, I do not believe that the architects' fees should be based on both the contracts, and since it is impossible to say which contract for the building should be used as the basis upon which to compute the architects' fees, it would seem to me to be not only proper, but also legal, to add the amount of the two contracts together and to allow the fees on one-half of the total amount thereof, thus striking a mean between the two contracts. If it were attempted to allow the amount on the lower contract it could well be argued that the fees should be as well computed on the higher.

Since there is no way to determine on which of said contracts the fee should be computed, I am of the opinion, as before stated, that it is only just and proper to get a mean between the two contracts.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1157.

BUDGET COMMISSION—EFFECT OF DECISION, STATE EX REL. POGUE VS. GROOM—WORK COMPLETED BY BUDGET COMMISSION PRIOR TO SEPTEMBER 15, 1914—CHANGE OF PERSONNEL OF BUDGET COMMISSION—PROSECUTING ATTORNEY MEMBER OF BUDGET COMMISSION.

Where a budget commission has completed its work prior to September 15, 1914, levies fixed in accordance with its determinations are valid, notwithstanding the decision of State ex rel. Pogue vs. Groom, decided September 15, 1914, to the effect that the Kilpatrick law was unconstitutional in so far as it changed the personnel of the budget commission by providing that the third member should be the city solicitor in certain counties, and a representative of the board of education in other counties, instead of the prosecuting attorney. The acts of the budget commission, constituted in accordance with the Kilpatrick act, are at least those of de facto officers and are valid as such; but as two members of the budget commissioners constitute a quorum, that fact alone is probably sufficient to sustain such act.

Where the work of the budget commission was unfinished on September 15, 1914, or where the commission had closed its work, but had not reduced all levies, and therefore was liable to be reconvened for the purpose of fully completing its work, the prosecuting attorney must take his place on the board and is entitled to participate in its further action; and if the budget commission, as it must now be constituted, determines to reconsider any action prior to September 15, 1914, it may do so and act in such case de novo. Otherwise, however, the work done by the budget commission prior to September 15, 1914, though all the work of the commission was not completed on that date, would stand.

COLUMBUS, OHIO, September 21, 1914.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of September 17th requests my opinion upon the following questions which have arisen in view of the decision of the supreme court in the case of State ex rel. Pogue vs. Groom, decided September 15, 1914:

(1) Where a budget commission has completed its work, certified its action to the county auditor and has adjourned prior to September 15, 1914, are the levies fixed in accordance with its determination valid, or must the budget commission, the per-

sonnel of which is fixed in accordance with the decision cited, convene and go over the same work in order to validate the tax levies.

(2) The tax commission, in the exercise of its general powers, has a standing order directed to county auditors (who are members of the budget commission) to the effect that when fixed by the budget commission the levies for a given county shall be sent to the commission for examination. If the commission finds that any of the levies so fixed in a given county exceed the limitations of the law, the attention of the local officials is called to the matter and the budget commission, if it has adjourned, is ordered to reconvene and complete its work by correcting the erroneous levy.

Where on September 15, 1914, certificates of local tax rates were in the hands of the commission for examination, as aforesaid, and the local budget commission had not certified the result of its work to the county auditor, in an official way, the figures sent to the tax commission being tentatively; and where, in such event, the commission subsequently finds the rates so tentatively determined, to be within the limitations of the law, may the prosecuting attorney insist upon his right to participate in the further action of the budget commission necessary in order to make the tentative action final, and to certifiy the result to the county auditor? In so acting may he insist upon the right to have a voice in the determination of the several rates de novo?

Under the same circumstances outlined in the second question, except that the commission finds some of the rates to be excessive, is the prosecuting attorney's subsequent action as a member of the budget commission confined to the correction of such excessive rates merely, or may he insist upon the right to participate in the determination of all the rates de novo?

The case which you mention has not, at this writing, been reported. I find, however, that the supreme court has unanimously concurred in a journal entry which states the conclusion of law reached therein. This conclusion is that section 5649-3b, as amended in 1913 and 1914, is unconstitutional because of its provisions for the personnel of the budget commission; and that the acts amending section 5649-3b, insofar as they repeal original section 5649-3b of the Smith law, controls, and the prosecuting attorney of Hamilton county, who, as relator, claimed under said section 5649-3b, is entitled to sit as a member of the budget commission to the exclusion of the defendant, who was the acting city solicitor of the city of Cincinnati.

This conclusion, then, involves, of necessity, the holding that at all times, both before and after the amendment of section 5649-3b, there has been, under the law, a tribunal known as the budget commission; and that its members were officers (for quo warranto would not lie except on the theory that *ex officio* membership on the budget commission constituted an office). That is to say, the law providing for the existence of the budget commission, as such, was at all times a valid law; but the amendment with respect to the personnel of the budget commission, providing how one of its members should be by *ex officio* designation selected, was invalid.

In this connection it is worth while, I think, to note that under both the original Smith law and the (in this respect) Kilpatrick act, two of the members of the budget commission were the county auditor and the mayor of the largest municipality in the county, respectively. The change made by the unconstitutional amendment related to the third member of the commission, and to his membership, only.

My information is that nowhere in the state, outside of Hamilton county, at least, have prosecuting attorneys actively asserted the right to sit as the third member of the budget commission. In other words, since the Killpatrick law was passed, or rather since it went into operative effect, which did not occur until the year 1914, (State ex rel. Shreib vs. Milroy, 88 O. S., 301), and in every county in the state excepting Hamilton county, city solicitors or presidents of representatives of boards of education, as the case may be, have been sitting as members of the budget commission, and b udget commissioners so constituted have in many instances, as your questions disclose, completed their work and placed the stamp of final approval upon levies sub-

mitted to them and revised by them, without any attempt on the part of the prosecuting attorney to sit as a member of the budget commission, or in any way to challenge the right of the city solicitor, or president or member of the board of education, so to do.

The situation then affords a perfect example of a condition dealt with by the courts under what is known as the *de facto* doctrine. The condition may be abstractly described as follows: A certain office exists *de jure*, being the office of third member of the budget commission; an unconstitutional law fixes the manner of filling the office, and constitutes an amendment to a valid law providing a different manner for filling the same office; prior to the adjudication of unconstitutionality, the person fixed upon by the unconstitutional amendment assumes the duties of his office and without hindrance, acts as such officer.

I refer the commission, generally, to chapter 15 of Constantineau on the *de facto* doctrine wherein this situation is exhaustively described, and the rule is laid down that one acting under such circumstances possesses all the characteristics of a *de facto* officer. The Ohio cases of *ex parte* Strang, 21 O. S. 610, Gitsky vs. Newton, 17 C. C. 484, and Kirker vs. Cincinnati, 48 O. S. 507, which may be examined with profit, are cited by the author in support of his text.

Of course the rule is that the acts of a *de facto* officer are valid. This principle is founded on the fundamental consideration that the law contemplates that the office, as such, shall function and imparts to acts of the office, so to speak, validity in disregard of the mere official title of one or more incumbents of the office.

The same author has a chapter (26) on the subject of the application of the *de facto* doctrine to the acts of officials having to do with the assessment, levy and collection of taxes. He states the prevailing rule in the opening section of that chapter, which is section 322, and justifies the statement that he makes by discussing decisions from practically all the states including certain cases from Ohio. He states the prevailing rule to be that there is no distinction between the subject matter of taxes and other matters with respect to the application of the *de facto* doctrine.

This rule seems to me to be founded in reason, and to have peculiar application to the matter of *levying taxes*, as distinguished from that of assessing given property or collecting a particular tax. Government cannot exist without the making of tax levies; and if the validity of the tax levy is to depend upon such a consideration as the official title of the persons who make the levy, when such title may depend, in turn, on such facts as failure to take an oath or to give a bond, the ridiculous consequences of departing from the *de facto* doctrine in such cases, at once appear.

I am of the opinion, therefore, without further discussion, in answer to your first question, that where a given Budget Commission had completed its work, made its official certificate, and adjourned before the decision in state ex rel Pogue vs. Groom, above referred to, its acts must be regarded as, in all respects, valid, notwithstanding the fact that one of its members served as such by reason of an unconstitutional amendment to the law providing for such budget commission.

Indeed, I am not sure that the *de facto* doctrine need even be involved in such a case. The original Smith law which, under the court's decision is to be regarded as having been the law all the time, provided in section 5649-3b thereof, as to the budget commission, that; "two members shall constitute a quorum."

It is apparent, therefore, that the mayor and the county auditor, if they concurred in the determinations made by the budget commission, would have constituted a sufficient commission, and their concurrent action would have been the action of the commission under the Smith law regardless of the participation of the city solicitor or president or member of the board of education, and regardless, also, of the non-participation of the prosecuting attorney.

For both reasons, then, I am clearly of the opinion, in answer to your first ques-

tion, that tax levies certified to the county auditor, under the circumstances mentioned by you, are, in all respects, valid.

Your second question is more difficult of solution. Section 5649-3c, General Code, which was not involved in the case under discussion, provides in part that:

> "When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such * * * * taxing district, returned on the grand duplicate, and place it on the tax list of the county.

This statute is plain and unambiguous. The budget commission is not to fix *rates*, but amounts. Of course, in fixing amounts the budget commission must ascertain rates because it is the duty of the budget commission to enforce certain rate limitations. The purpose of having the budget commission determine the amounts instead of the rates is clear, when other provisions of the Smith law are taken into consideration. In all probability the amount of the duplicate in a given year will not be finally and absolutely fixed until after the time when the budget commission is supposed to complete its work. Therefore, a rate fixed by the budget commission might not produce the amount approved by the commission. In other words, the auditor is to figure such a rate as will produce the amount which the budget commission certifies.

So, if the tax commission, as you state in your second question, has before it tables showing tax rates which purport to have been determined by the budget commissions, as such, it is clear that this fact affords no criterion to what has actually been done. What the commission has is undoubtedly estimates made by the county auditor based upon the work of the budget commission. This point, however, is not so very material to the question at hand, and I mention it only in passing.

Section 5649-3b of the original Smith law (as well as the amended section which is not different in that respect), provides that:

> "The auditor shall be the secretary of the budget commissioners and shall keep a full and accurate record of their proceedings."

Section 5649-3c, already quoted, provides, in addition to what has already been mentioned, as follows:

> "The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount

or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law."

I call attention to the following facts:

(1) The budget commission is to revise the levies in the several taxing districts.

(2) It is to keep a record of its proceedings.

(3) Its certificate to the county auditor is to be made when the budget commission has completed its work.

Considering all these factors together I have arrived at the conclusion that the budget commission does not perform a single function, so that nothing is complete, in the legal sense, until the certificate has been made for all; but that there are different steps and processes in the work so that it is possible for final action to be taken on a given levy, for example, and a record of such a proceeding made before the final certificate is issued.

Therefore, in a given case if, prior to September 15th the budget commission had fixed the county levy, finally, such act would stand as a valid act of the budget commission. When the prosecuting attorney supplants the other third member of the commission, acting under the Kilpatrick law, the commission may, of course, reconsider any action by it taken prior to its certification and adjournment, and the prosecuting attorney is entitled to participate in such reconsideration. This consideration might go to the full extent of the commission's powers. That is to say when the prosecuting attorney takes his seat on the board he may, in conjunction with another member of the board, secure a reconsideration of all that has been done, if such two members are so disposed. But unless there is such a reconsideration I would be of the opinion that such levies as had been finally fixed prior to the prosecuting attorney's entrance into the board would stand as valid actions of the budget commission and could be certified as such to the county auditor.

Answering the various branches of your second question, specifically, then, I am of the opinion that the fact that the tax commission has a supposed table of tax rates or certificate respecting the work of the budget commission is not conclusive either way as to whether or not the work of the budget commission is so complete that the prosecuting attorney cannot, by securing reconsideration or otherwise, have any practical participation therein. If prior to the sending of the certificate to the commission the budget commission has made its certificate, under section 5649-3c, to the county auditor, and has adjourned, then if the tax commission finds no flaw in the levies, the prosecuting attorney can have nothing whatever to do with the work of the budget commission for this year. If, however, under such circumstances, the commission finds that excessive levies have been approved by the budget commission then, in my opinion, the certificate and adjournment of the budget commission have been premature and the commission has not "completed its work" within the meaning of section 5649-3c, for the reason that it has not discharged the positive duty cast upon it by that section. Under such circumstances the budget commission would have to reconvene for the purpose of correcting such levies as are shown to be excessive. When reconvened for that purpose the budget commission might unquestionably reconsider any other action that it had theretofore taken, but unless such other action were reconsidered, the work already done would stand as final.

If, on the other hand, the county auditor's certificate to the tax commission represents merely tentative figures adopted by the budget commission, and no certificate to the county auditor, under section 5649-3c, has been made, then, of course, the prosecuting attorney would be entitled to participate in such proceedings of the commission as might necessarily intervene before adjournment of the budget commission, even though all the levies, as tentatively determined upon, were approved by the tax commission. He could, therefore, whether the tax commission approved the tentative

figures of the budget commission or not, insist upon a reconsideration, if another member of the budget commission should join with him; and under such reconsideration could assert his right to participate in the fixing of all the amounts to be levied. But without such a reconsideration the action of the budget commission, insofar as it was final, preceding the certificate, would stand as such without his participation, and he would be entitled to sign the certificate to the county auditor as to work done by the budget commission prior to his assumption of membership therein.

I have tried to cover, in the above somewhat hastily prepared opinion, the various situations which you have in mind. I trust that no difficulty will be encountered by the commission and the local taxing officers in adjusting circumstances to the recent decision of the supreme court.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1158.

RIGHT OF MAYOR OF A CITY HAVING NO POLICE FORCE TO ISSUE A WARRANT IN A STATE CASE, DIRECTED TO THE SHERIFF OF A COUNTY—RIGHT OF THE SHERIFF, CALLED ON BY CHIEF OF POLICE TO ASSIST IN MAKING AN ARREST, TO A FEE—COMPENSATION OF ASSISTANTS USED BY CHIEF OF POLICE—AUTOMOBILE HIRE—POLICEMEN MAY RETAIN FEES RECEIVED IN STATE CASES.

The mayor of a city having no police force cannot legally issue a warrant in a state case directed to the sheriff of the county, for the reason that section 13500, General Code, makes special provision for a warrant issued by an officer of a municipal corporation. The same rule applies to an ordinance case.

If the chief of police called on the sheriff to assist in making an arrest in a state case the sheriff is not entitled to an assistant's fee, if the arrest was on view of the person violating such law. If not on view, the sheriff goes in his private capacity as assistant only, and would, therefore, be entitled to receive and retain the fee allowed for an assistant. The same rule applies as to ordinance cases.

If three assistants are used by the chief of police in the arrest of six people at the same time, the total amount of assistants' fees, to-wit: $4.50, must be divided among the defendants whose arrest made the employment of such assistants necessary.

If $6.00 was paid for the use of an automobile to bring into court said six persons arrested at the same time and place and for the same offense, the mayor cannot legally allow $6.00 in each case for transportation of prisoners, but is restricted to an allowance of such expenses only as are actually incurred, and because of such transportation, the amount should be divided among the six cases.

If $36.00 was collected of said six defendants, but only $6.00 disbursed for such transportation, recovery cannot be made by other than the party who paid the money.

The amount to be allowed for transportation of persons is one that rests within the discretion of magistrates, and it is not necessary that the chief of police or marshal use the cheapest, practical method of transportation, if the magistrate deems other method of transportation proper.

Policemen, which likewise include chief of police, are permitted to retain fees received for service in state cases. The rule is otherwise relative to ordinance cases by reason of section 4213, General Code.

COLUMBUS, OHIO, September 21, 1914.

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

GENTLEMEN:—Under date of May 15th, you request my opinion upon the following questions:

"*First.*—May the mayor of a city having no police court legally issue his warrant in a *state* case directed to the sheriff of the county? If said sheriff is required by law to serve said writ, would he be required to account to the sheriff's fee fund for the fees received for such service?

"*Second.*—May the mayor of a city having no police court legally issue his warrant in an *ordinance* case directed to the sheriff of the county, and if said sheriff is required by law to serve same, shall he account to the sheriff's fee fund for the fees received for such service?

"*Third*—If the chief of police calls on the sheriff to assist in making an arrest in a *state* case, is he entitled to an assistant's fee and must it be accounted for to the sheriff's fee fund if received?

"*Fourth*—If the chief of police calls on the sheriff to assist in making an arrest in an *ordinance* case, is he entitled to an assistant's fee and must it be accounted for to the sheriff's fee fund if received?

"*Fifth*—If three assistants are used by a chief of police in arresting six people at the same time, may $4.50 ($1.50 for each assistant) as assistants' fees be legally taxed against each defendant in case of conviction?

"*Sixth*—If $6.00 was paid for the use of an automobile to bring into court said six persons, arrested at the same time and place, and for the same offense, may the mayor legally allow $6.00 in each case for 'transportation of prisoners?'

"*Seventh*—If $36.00 was collected of said six defendants but only six dollars disbursed for such transportation, can finding for recovery be enforced against the parties receiving and retaining said moneys?

"*Eighth*—Is a chief of police, or marshal, required to utilize the cheapest practical method of transportation in conveying a prisoner from the place of arrest to the magistrate, or may he legally be allowed for a swifter and more expensive (automobile) method of transportation? If allowed by the magistrate, in the absence of a gross abuse of discretion on the part of said magistrate in fixing the amount, can recovery be made by defendant who has been assessed and paid for same?

"*Ninth*—If the city ordinances specifically permit all policemen to retain their fees (fixed same as constables') will that include the chief and permit policemen to tax costs in state and ordinance cases and retain same for their own use when collected of defendants?"

With respect to your first question, the following sections of the General Code have bearing:

"Section 13496. When an affidavit charging a person with the commission of an offense is filed with a justice of the peace, mayor or police judge, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.

"Section 13500. The warrant shall be directed to the sheriff or to any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law."

Section 13500 makes special and, therefore, exceptional provision for an officer of the municipal corporation by directing a warrant issued by such to be directed to the

marshal or other police officer of such municipal corporation. This provision is in keeping with the general plan of the statutes, to confine, as far as possible, the administration of such corporation. I am, therefore, of the opinion that a mayor is without authority to issue a warrant, in a state case, to the sheriff. If a sheriff has performed such services therefor, he is not legally entitled to any fee therefor.

Second Question. The answer to your second question follows from the argument applicable to the first question *a fortiori*. There is no authority, whatever, for the issuance of a warrant by a mayor to a sheriff in an ordinance case, and there is, nowhere, any provision for a fee for the performance of such a service.

Third Question. There is no statutory authority allowing any fee, whatever, to the sheriff, as such officer, for assisting another officer in making an arrest. A chief of police, however, is entitled, under section 4534 of the General Code, to the same fees as are allowed sheriffs and constables in similar cases, when such chief of police is acting for the mayor's court. This, by reference to section 3347 of the General Code pertaining to constables' fees, would entitle the chief of police to $1.50 per day for an assistant in making an arrest in a state case.

In this connection, section 13492, General Code, is of interest. This statute is as follows:

> "A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

It being the duty of a sheriff, officially, to arrest anyone found violating a law of the state, it follows, since the greater includes the less, as a necessary consequence, that it is the duty of the sheriff to assist any officer in making an arrest, on view of the perpetrated act, when such sheriff is present at the time. In brief, if a sheriff is obliged to make the arrest in such instance, when acting merely as an assistant, he is performing the same substantial duty, only in a less degree. I see no reason why, when the sheriff acts as such assistant, he should be excluded from receiving the fee prescribed for acting as an assistant, from the chief of police. It is fundamental that an officer may not receive compensation in excess of his prescribed salary, for an act clearly within the scope of his duties. I am, therefore, of the opinion, that the sheriff in such case would not be entitled to retain, as his own, the fee prescribed for acting as such assistant.

Section 2977 of the General Code requires all fees received by law, as compensation, for services by a sheriff, to be paid into the fee fund. Since such a fee would be received by the sheriff for compensation for a service enjoined upon him by law, I am of the opinion that in such instance, he should be required to pay such fee into the fee fund.

However, I find no authority in the statutes, anywhere, requiring a sheriff to respond to the call of a chief of police, when serving a warrant in a state case. There is no official duty resting upon the sheriff, to act as assistant to a chief of police, when making an arrest not committed within the actual view of the sheriff. When a sheriff, therefore, is called upon to act as an assistant to a chief of police in such case, he is responding, merely, to an obligation resting upon him as a private individual. In such a case, I am of the opinion that he would be entitled to receive and retain the fee allowed for an assistant.

Fourth Question. The same argument applies, in this connection, as I have presented in answer to your third question, section 13492 having equal application to ordinance cases as well as state cases. My answer to your fourth question is, therefore, the same as my answer to your third question, to wit, the sheriff is required to pay into his fee fund, the fee received for acting as assistant in a case of violation on actual view, but entitled to retain the fee when acting as an assistant in a case of vio-

lation which was not committed in his presence. The fees received for this service, however, must of course be prescribed by ordinance.

Fifth Question. A chief of police, by virtue of sections 4534 and 3347, above referred to, is entitled to $1.50 per day for each assistant used. By no mode of construction, therefore, in the case presented by you, could a chief of police be allowed more than $1.50 for each of the three assistants, and costs, in excess of this amount, in behalf of the chief of police, would be illegal. Each defendant, therefore, should be taxed that portion of the actual costs assessed, as may be proportionally attributed to him. In other words, the total amount assessed for assistants' fees, to wit, $4.50 must be divided among the defendants whose arrest made the employment of such assistants necessary. I have so stated, in an opinion on similar facts, rendered to the village solicitor of Lisbon, Ohio, under date of October 6, 1911, which opinion appears on page 375 of the annual report of the attorney general, for the year 1911. I am assuming, in answering this question, that each of the defendants was separately tried.

Sixth Question. The authorization of law for allowance by a mayor, of cost of transportation of defendants, by reference of section 4534 to section 3347 of the General Code, is as follows:

> "Section 3347. * * * Transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate. * *."

By this authorization, the magistrate is manifestly restricted to the allowance of such expense only as is actually incurred in transportation, it being left to his judgment to allow even less if he thinks the cost unnecessarily excessive. It is incumbent upon the mayor, therefore, to divide the actual cost of transportation, when he sees fit to allow the total amount incurred among the defendants making such cost necessary.

Seventh Question. If thirty-six dollars was collected against six defendants, when only six dollars was disbursed for their transportation, it is manifest that the amount, which was assessed in excess of that stated in your sixth question, was illegally assessed. Recovery can be had, of this excess amount however, only by the parties entitled to the same, to wit, the defendants against whom it was taxed, since no other party can establish a claim thereto. It has been suggested that section 286 of the General Code, authorizing recovery of public moneys illegally received by officials, and defining such public money to include all money received or collected, *under color of office*, under authority of law, ordinance or otherwise, has bearing as amounting to a possible authorization of recovery of such illegally received moneys as those in question. I am of the opinion, however, that such a construction of the definition of the term "public money," in the statute, would operate to disregard, entirely, the word "public," as herein used and that such is not the intention of this statute.

Eighth Question. The question of the amount to be allowed for transportation is one which rests within the discretion of the magistrate, and his judgment must be allowed to prevail, in the absence of a clear case of gross abuse of discretion on the part of such magistrate in fixing such amount. The question of whether or not an automobile is a proper method of transportation, in a particular case, therefore, is to be determined by that official, and his judgment must be exercised with reference to the particular facts and circumstances attending the case.

Ninth Question. In former opinions I have advised that policemen are permitted to retain fees received for services in state cases and this ruling, of course, included a chief of police, where that official himself performed the services. In ordinance cases, all fees received by either the chief of police or a patrolman must be paid into the city treasury by virtue of section 4213 of the General Code, providing that all fees pertaining to any office shall be paid into the city treasury.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1159.

RIGHT OF MEMBER OF THE BOARD OF SINKING FUND TRUSTEES TO SELL GOODS TO A CITY—RIGHT OF A PERSON WHO OWNS STOCK IN A CORPORATION TO SELL TO A CITY, TO ACT AS SINKING FUND TRUSTEE.

1. A member of a board of sinking fund trustees, who acts as agent of a corporation selling goods to the city, may or may not act in violation of section 12910, General Code, depending upon the special facts of the case.

2. It is a violation of law for a person who owns stock in a corporation that sells to a city, to act as sinking fund trustee.

3. This is also true with respect to a person who is a director in a corporation that sells to the city and at the same time is a member of the sinking fund trustees.

COLUMBUS, OHIO, September 21, 1914.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—Under date of July 20th, you request my opinion upon the following questions:

"1. Whether it is a violation of the law for sinking fund trustees to act as agents of a corporation selling goods to the city; and

"2. Is it a violation of the law for a person, who owns stock in a corporation that sells to the city, to act as a sinking fund trustee, without his being an active agent of the corporation; and

"3. Is it a violation of the law for a person who is director in a private corporation that sells to the city to act as a director of said corporation without his having any other official relationship to the corporation, and at the same time to act as a member of the sinking fund trustees of said city?"

Sections 12910 and 3808 of the General Code are as follows:

"Section 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

"Section 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money, or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

There can be no question that a member of the board of sinking fund trustees of a city holds an office of trust in a municipality. The statute in its terms has a very broad and sweeping meaning. The acts comprehended by it, however, were held invalid under common law rules, and there is some question as to whether or not the

provision is to be deemed much more than declaratory of the common law. Under the common law rule interests of a certain nature were deemed to be excepted as not presenting a situation which might be deemed contrary to public policy.

See 29 Cyc. 1435.
15 Amr. Eng. Enc. 977.

While to my mind there cannot be much doubt that a person who acts as agent of a corporation whilst occupying the position of sinking fund trustee must necessarily be pecuniarily interested in the sale of the goods, nevertheless, the word "interested" may cover such a range of shaded meanings, and the word "agent" being a term of such broad comprehension, I hesitate to give a definite and sweeping answer to your question without knowing the exact facts of the situation. If the agent in question has a pecuniary interest in the deal, your question clearly must be answered in the affirmative. If such is not the case, however, I would prefer to have the knowledge of the situation preliminary to drawing a definite conclusion.

In answer to your second question, I beg to say that this department has always held to the opinion that a stockholder in a corporation which sells to a city, has such an interest in the sale as amounts to a violation of section 12910, when said stockholder holds an office of trust in the municipality. I am, therefore, of the opinion that your second question must be answered in the affirmative.

A fortiori, since a director in a corporation must hold stock in a corporation, your third question must also be answered in the affirmative. I am also of the opinion that section 3808 would also be violated in each of the last two questions submitted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1160.

STATE AGRICULTURAL COMMISSION—RIGHT TO PURCHASE REAL ESTATE FOR THE PURPOSE OF REFORESTATION AND FOR ESTABLISHING GAME PRESERVES.

In the absence of an appropriation therefor, the state agricultural commission is without legal authority to purchase real estate for the purpose of reforestation and for establishing game preserves under the so-called agricultural commission act, and the hunters' license act, which said acts are found in 103 O. L., 304 and 117.

COLUMBUS, OHIO, September 21, 1914.

HON. BENJ. F. GAYMAN, *Secretary Agricultural Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of August 13th you submitted to this department for an official opinion, the following request:

"The agricultural commission of Ohio is working out a forest policy for the state of Ohio, and among other things it desires to do is to purchase land for the purpose of reforestation and for establishing game preserves under the so-called 'hunter's license law.'

"The agricultural commission act evidently intended to give the agricultural commission of Ohio authority to purchase lands for such purposes as

may be necessary in the development of the forest and agricultural resources of the state.

"Will you kindly give the commission an opinion at the earliest possible date whether it has legal authority to purchase real estate under the so-called agricultural commission act and the hunter's license act?"

Under date of April 15, 1913, the general assembly of Ohio passed the agricultural commission act. This act is found at page 304 of the 103rd volume of Ohio laws. Section 1 thereof provides that there shall be an agricultural commission of Ohio and provides the manner of the appointment of the members thereof. Section 11 of said act provides that the agricultural commission shall succeed to and be possessed of the rights, authority and powers now exercised by certain boards, as follows:

"The agricultural commission shall succeed to and be possessed of the rights, authority and powers now exercised by the state board of agriculture, the secretary of the state board of agriculture, the board of live stock commissioners, the board of control of the state agricultural experiment station, * * * the commission of fish and game * * *. The commission shall also succeed to and be in control of all records, land, moneys, appropriations and other property, real or personal, *now and hereafter held for the benefit of said respective departments of the state government*, the same to be held in trust for the state of Ohio * * *, and the commission is further authorized and empowered to establish such other bureaus and departments as it deems necessary."

Section 93 of said act provides for maintenance of the Ohio agricultural experiment station, as follows:

"The agricultural commission shall maintain a state agricultural experiment station for the prosecution of practical and scientific research in agriculture and forestry and the development of the agricultural resources of the state. It shall be known as the 'Ohio Agricultural Experiment Station.' "

Section 110 of said act provides that the agricultural commission shall investigate into and assist in the development of the forests of the state, as follows:

"The agricultural commission shall carefully inquire into the character and extent of the forests of the state, the causes of their waste and decay, and methods for their preservation and development. It shall conduct investigations in the several sections of the state, determine the species of valuable trees best suited to grow on the various kinds of soil, and ascertain the best methods and cost of the propagation, planting and cultivation of wood lots and plantations. It shall determine the average rate of growth of the various species of trees and the relative values of different kinds of timber for domestic and commercial purposes, and conduct experiments for the purposes of increasing durability of the various kinds of wood; determine the kind of trees and shrubs best suited to different localities for wind-breaks and shelter, and for beautifying grounds, and ascertain the best method of planting and managing them."

Section 111 of said act provides that the agricultural commission may co-operate with the department of agriculture of the United States as follows:

"The agricultural commission may co-operate with the department of

agriculture of the United States in conducting such portion of the work mentioned in section 110, as may be agreed upon by the agricultural commission and such department of agriculture."

For promoting any part of the public welfare that comes under the supervision and control of the agricultural commission, section 13 of said act provides as follows:

"The agricultural commission may accept and hold on behalf of Ohio any grant, gift, devise or bequest of money or property made to or for the use of the commission or for promoting any part of the public welfare that shall be under the supervision and control of the commission. The agricultural commission shall have full power to contract for and carry out the terms and conditions of any devise, grant, gift or donation that may be made for the purpose of carrying out the objects and purposes of this act."

Section 96 of said act provides that the title of all lands for the use of the experiment station shall be conveyed to the state in fee simple, as follows:

"The title of all lands for the use of the experiment station shall be conveyed in fee simple to the state, but no title shall be conveyed for such purposes unless the attorney general is satisfied that it is free from defects and incumbrances."

The foregoing quoted sections relate to the duties and power of the agricultural commission in the matter of making prosecutions of practical and scientific research in agriculture and forestry and the development of the agricultural resources of the state.

Section 1390 of the General Code, as amended in the act creating the agricultural commission of Ohio, above referred to, and found at page 329 of the 103 Ohio Laws, provides for the protection, propagation and preservation of birds, animals and fish as follows:

"The agricultural commission shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof. It shall enforce by proper legal action or porceeding the laws of the state for the protection, preservation and propagation of such birds, animals and fish; shall establish fish hatcheries and propogate fish therein or in any other manner for the waters of the state, and, so far as funds are provided therefor, shall adopt and carry into effect such measures as it deems necessary in the performance of its duties."

Section 3 of the hunter's license law, passed April 18, 1913, and found at page 717 of the 103 O. L., provides that the quarterly report of licenses issued, shall be made by those issuing the same to the commissioners of fish and game, and further provides as follows:

"* * * the moneys received as license fees other than the amounts paid to clerks as their fees, which shall be paid into the state treasury to the credit of a fund which is hereby appropriated for the use of the commissioners of fish and game in the preservation and protection of birds, game birds, game animals and fish. At least fifty per cent. of the money arising from all such licenses shall be expended by the commissioners of fish and game for the purchase and propogation of game birds and game animals to be used in re-

stocking sections where a scarcity of such birds exist and for establishing game preserves, and the commissioners of fish and game are hereby empowered with the consent of the owners, to organize such lands so bounded that the same may be conspicuously posted as such, into state game preserves under rules and regulations to be adopted by the said commissioners and employ on such preserves a keeper or warden at such salaries and with such duties as may be prescribed by the said commissioners. And it shall be unlawful for any person at any time on any such game preserves, conspicuously posted, or with knowledge that the same is a game preserve, to hunt, kill or pursue any game birds or game animals."

By way of summary, it is to be noted that the foregoing sections authorize the agricultural commission of Ohio to establish such bureaus and departments as it deems necessary for carrying out the purposes of the agricultural commission act. Two of the principal purposes of said act as specified in section 93 thereof, supra, provides for the prosecution of practical and scientific research in agriculture and forestry and the development of agricultural resources in the state. For carrying into effect such purposes, section 13, supra, of said act, distinctly empowers the commission to accept and hold any grant, gift, device or bequest made to or for the use of the commission for promoting any part of the public welfare that shall be under the supervision and control of the commission. Further, the agricultural commission shall have full power to contract for and carry out the conditions of any device, grant, etc., that may be made for carrying out the objects and purposes of this act. Section 96, supra, of said act, distinctly provides that the title of all lands for the use of the experiment station shall be conveyed in fee simple to the state, etc. Section 13, supra, specifically says that the commission may accept grants for the accomplishment of the purposes enumerated in the agricultural commission act. Section 1390 of the act, supra, relating to the protection, etc., of birds, animals and fish, does not carry any provision relating or looking to the accepting of grants or the taking of title of lands and likewise section 3 of the hunter's license act, which is above quoted, does not provide for acquiring any grants of or title to lands, but on the contrary, merely provides that privately owned lands may be organized into game preserves for the propogation and protection of wild game and wild animals.

However, coming to the matter of appropriations for the purchase of lands, I find that the legislature has failed to make any appropriation to the state board of agriculture for that purpose. Prior to the installment of the budget system, detailed appropriations were made for the purchase of land by the legislature to the respective state boards or departments, when such boards or departments were desirous of purchasing land. Now under the present budget system, such appropriations are made in bulk and as before stated, such appropriation has not been made by the legislature to the state agricultural board for the purchase of any land whatever, to say nothing concerning the matter of any appropriation for purchase of lands for the purpose set forth in your inquiry.

Therefore, in the absence of such appropriation, in answer to your specific question, I am of the opinion that the agricultural commission is without legal authority to purchase real estate under the so-called agricultural commission act and the hunter's license act referred to in your inquiry.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1161.

CONSTRUCTION OF WATER FILTRATION PLANT—BOARD OF TRUSTEES OF PUBLIC AFFAIRS—CONTRACT—PAYMENT OF ATTORNEY'S FEES BY VILLAGE—CONTRACTOR'S SURETY.

Where the board of trustees of public affairs of the village, acting under the authority of the village council entered into a contract for the construction of a water filtration plant, and where later an abandonment of the contract by the contractor, the board of trustees of public affairs entered into a contract with an attorney to pursue the rights of the village against the contractor's surety, that the fees of said attorney are to be paid out of the general funds of the village, and not out of the fund created by the issue of bonds for the construction of the water filtration plant.

COLUMBUS, OHIO, September 21, 1914.

HON. F. H. PELTON, *Solicitor for Village of Willoughby, Society for Savings Bldg., Cleveland, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of August 11, 1914, asking opinion of me on question stated by you as follows:

> "The village of Willoughby, through its board of public affairs, entered into a contract for the construction of a water filtration plant; the council giving the board full power to handle the entire matter. The board, because of the contractor throwing up the work was compelled to employ an attorney who rendered considerable service. Has the board authority to pay for these services out of the fund raised to build this plant, or must they be paid for out of the general fund of the village?"

By later communication from you I am advised that the money for the construction of the filtration plant, mentioned by you in the statement of the above question was raised by a bond issue authorized by a vote of the people. You also advise that an ordinance was then passed by the village council authorizing the board of trustees of public affairs to advertise for bids and enter into contract for and on behalf of the village for the construction of the plant, and the purchase of machinery and power therefor. Said ordinance further provided as follows:

> "and said board is hereby authorized to do all things necessary for and in the name of said village for the completion and operation of said water filtration plant."

With respect to the circumstances under which the attorney, the payment of whose fees is here in question, was hired, you say:

> "On August 1st, of last year, the general contractor drew his July estimate of several thousand dollars and left town between two days, leaving the work at a standstill, and immediately following which, about $6,000.00 of liens were filed against the funds in the hands of the village. The bonding company did not show any inclination to do anything until forced to do so by the attorney who was employed. These circumstances required the attorney to take over practically the entire account and payments of balances of money; participation in several suits growing out of the matter, in one of which a considerable sum of money was obtained from the bonding company because of the expenses incurred; the whole matter being so handled that the

village was put to no extra expense by reason of said abandonment of the contract by the contractor, except the fees of the attorney as aforesaid."

You state that there is no dispute or question about the amount of the attorney's fee, nor as I interpret your question, is there any question made with respect to the validity of the attorney's employment by the board of trustees of public affairs. This being so, it is not necessary for me to enter into any consideration of the question of the legality of such employment by the board, or concerning the power of the village council to delegate to such board the right which the council undoubtedly had to employ an attorney under the circumstances mentioned in your communication, under section 4220, General Code, which provides as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

The power of a municipality to construct a water filtration or purification plant is included within its power to construct water works generally, and in addition to statutory authority for the construction of water works, section 3939, General Code, provides that municipal corporations may issue and sell bonds for certain specific purposes, subdivision 11 of said section providing as follows:

"for erecting and purchasing waterworks for supplying water to the corporation and the inhabitants thereof."

The money raised and placed in the fund by the issue and sale of bonds under this section for any of the specific purposes therein mentioned, must be used solely for the particular and specific purpose for which the bonds were issued and sold. In this case the bonds were issued and sold for the specific purpose of raising money for the construction of a filtration plant and the purchase of machinery and power therefor

Section 3804, General Code, provides as follows:

"When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

It therefore follows, that if there is now any money in the fund created by the issue and sale of bonds for the construction of this water filtration plant, which has not been expended, and which is not needed for the primary purpose for which the same was raised, such unexpended balance should be turned over to the trustees of the sinking fund to be held by them and applied to the payment of the bonds. It follows from this, that there is no authority for paying the attorney's fees from the fund created by the issue and sale of bonds for the construction of this plant, and this conclusion likewise follows from a consideration that the board of trustees of public affairs is but an authorized agency of village government, and that the conditions which called for the employment of an attorney affected the interest of the village as a whole. That this is true, under circumstances of this kind, is a matter of legislative recognition in the provisions of section 4220, General Code, which authorizes the village council to appoint legal counsel for any department or official thereof.

I am of the opinion, therefore, that there is no legal warrant for paying the attorney's fees in question, other than out of the general fund of the village.

As before indicated herein, no opinion is here ventured as to the power of the board of trustees of public affairs to enter into the contract for the legal services rendered, nor as to the validity of said contract in any other respect, but assuming the validity of the contract, I am of the opinion that the fees of the attorney can only be paid out of the general fund of the village.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1162.

A PERSON APPOINTED AND ACTING AS HEALTH OFFICER IN A VILLAGE MAY BE APPOINTED SUPERINTENDENT OF WATER WORKS OF SUCH VILLAGE—RIGHT OF THE HEALTH OFFICER OF A VILLAGE TO BECOME SUPERINTENDENT OF PUBLIC WORKS ON TERMINATION OF HIS SERVICE AS HEALTH OFFICER.

1. A person who has been appointed and is acting as health officer in a village, is not ineligible because of that fact to appointment as superintendent of the water works of such village.

2. A health officer of a village is not precluded by the provisions of section 12912, General Code, from accepting an appointment as superintendent of the public works of said village immediately upon the termination of his service as such health officer.

COLUMBUS, OHIO, September 21, 1914.

HON. NEWTON O. MOTT, *City Solicitor, Geneva, Ohio.*

DEAR SIR:—I have your letter of August 1, 1914, in which you inquire whether C. D. Adams, who was appointed health officer of the village of Geneva January 1, 1914, may resign that office and accept appointment or employment as superintendent of the village waterworks under the board of public affairs.

In your opinion you call attention to section 12912, General Code, and State vs. Wichgar, 27 C. C., 743. Section 12912 reads:

> "Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars, nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

This section was formerly 6976, R. S., was under consideration in the Wichgar case, and my predecessor on January 21, 1910, (see opinions of attorney general, 1910-1911, page 1032) expressed himself as follows:

> "On the familiar grammatical principle that qualifying words and phrases should be regarded as modifying the next preceding word or phrase susceptible to qualification, it would have to be decided that the last mentioned phrase was the one to which the general assembly intended limitation as to time to

apply. In other words, the prohibition against acting as commissioner, architect, etc., is not limited to one year after the expiration of the term but it is against so acting in any work *undertaken within the year.*"

He further states: It is, therefore, my opinion that present section 6976 should be read as follows:

"An officer or member of the council of any municipal corporation * * * who is interested, directly or indirectly, in the profits of any contract * * * for a corporation shall be fined. And if such officer, etc., acts as commissioner, architect, superintendent or engineer in any work which, during the term for which the officer was elected or appointed, or for one year thereafter, is or has been undertaken or prosecuted by the corporation, he shall be fined."

There being no substantial change in the last codification and section 12912 being a substantial copy of 6976, construed by Mr. Denman, I can see no reason for reviewing his opinion especially as the construction given Mr. Denman seems to be in all respects correct. However, this does not specifically answer your question.

The first part of section 12912 cannot be considered as covering your query as it is limited to being interested in the profits of a contract, job, work or services for such corporation, and it is sufficient to say that this paragraph refers and refers only to an interest in profits of the character mentioned while acting as a municipal officer, and that the phrase "or for one year thereafter" has application to acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation during the term for which the office was held.

Attention is called to the language "undertaken or prosecuted," as applicable to the matter in hand. Assuming that the waterworks of the village of Geneva were installed and in operation prior to January 1, 1914, it cannot be concluded that they were either "undertaken" or "prosecuted" after that date. They were "operated" after that date; their construction had been undertaken and prosecuted prior thereto.

Again taking into consideration the objects of section 12912 and the relationship between a health officer and the village waterworks, or its management, and we can see no incompatibility between the two positions, no condition wherein the person holding the one office might arrange for the securing of the other to the injury or disadvantage of the city, and cannot conceive any reason why the holder of either of these offices should be precluded from taking or accepting the other for one year after the expiration of his term of office.

There being no reason for a law to cover this matter and the language used as above quoted not clearly covering the situation presented, as would have been the case had the word "operated" been used instead of "undertaken" or "prosecuted" or as an addition thereto, I am constrained to the conclusion that section 12912 does not prohibit Mr. Adams from resigning as health officer one day and accepting an appointment as waterworks superintendent immediately.

Believing this will answer your question, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1163.

A HIGH SCHOOL DIPLOMA IS NOT LEGAL IF THE PERSON WAS NEVER A MEMBER OF A HIGH SCHOOL OR NEVER PERFORMED THE WORK WHICH WOULD ENTITLE HIM TO A DIPLOMA.

A high school diploma is not legal which is granted to a person who was never a member of the high school which granted the diploma and if the person had never performed the work required by the curriculum of the said high school, or any part of it, or its equivalent, and never did any regular school work beyond the grade schools.

COLUMBUS, OHIO, September 21, 1914.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Under date of May 13, 1914, you submitted for an opinion the following request:

> "A situation has arisen in our county which appears to demand an opinion from your department, and inasmuch as I have been requested to present the matter for your consideration, will you kindly inform me if a regular high school diploma granted in this state under the following conditions is legal?
>
> "1. The person to whom the diploma was granted was never a member of the high school which granted the diploma, nor of any other high school.
>
> "2. This person had never done the work required by the curriculum of the high aschool nor any part of it, nor its equivalent, having done no regular school work beyond grade work.
>
> "3. The grantee was a member of the board of education which granted the diploma.
>
> "4. Two members of the board of education did not know of the granting of the diploma for more than a year and a half after it was granted.
>
> "5. The person to whom the diploma was granted must have been one of the three necessary for a quorum.
>
> "6. The person to whom the diploma was granted was clerk of the board of education at the time the diploma was granted, but the diploma does not have his signature as clerk, but that of another member who signed as clerk pro tem."

I take it for granted that your request concerns diplomas which were granted under the section of the General Code relating to the subject-matter of schools and attendance, as the same existed prior to the recently adopted school code. The sections of the General Code relating to the subject-matter of schools and attendance embraces sections 7644 to 7761 of the General Code, inclusive. Many of these sections were amended and supplemented by the general assembly at the special session thereof, commencing January 19, 1914, and are found in 104 O. L. Said amended sections, however, have not been in existence a sufficient length of time to have had any diplomas granted or issued thereunder, and I will therefore consider said sections as the same existed prior to their last amendment.

Section 7649 of the General Code, defines a high school as follows:

> "A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or

mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs."

Section 7656 of the General Code, prior to its last amendment in 104 O. L., provided as follows:

"A diploma must be granted by the board of education to any one completing the curriculum in any high school, which diploma shall state the grade of the high school issuing it as certified by the state commissioner of common schools, be signed by the president and clerk of the board of education, the superintendent and the principal of the high school, if such there be, and shall bear the date of its issue."

Section 7657 of the General Code provides that an additional certificate shall be issued to the holder of each diploma, as to the grade of the high school, etc., as follows:

"A certificate shall also be issued to the holder of each diploma in which shall be stated the grade of the high school, the names and extent of the studies pursued and the length of time given to each study to be certified to in the same manner as set forth for a diploma."

The case of board of education vs. State, 80 O. S., 133, throws some light on the subject-matter under discussion. In that action the relator, State ex rel. W. H. Wickam, sought to obtain a writ of mandamus to compel the board of education to promote a son of the relator to enter the 7th grade of the village schools and further sought to compel the teachers to receive said relator's son into said grade and to give him instruction in the prescribed work of that grade. The son of the relator held a certificate which promoted him to the 6th grade. As indicated, the relator sought to have his son skip the 6th grade and pass from the 5th grade to the 7th grade of the schools. One of the rules of the board of education relating to promotion of pupils from one grade to the next higher, or succeeding grade, provided as follows:

"Promotions shall be made on the basis of fitness only, and not on account of the size or age of the pupil, or the wishes of the parents. * * * Pupils will be promoted at the close of the school year if they have obtained an average of 75 per cent., with not less than 60 per cent. in any branch * * *.

"No pupil shall be promoted during the year except upon the approval of the board and with the recommendation of the teacher and superintendent."

As to pupils, the board of education had adopted the following rule:

"Pupils between the ages of 6 and 21 years, residing in the district, are entitled to attend the schools, receive like instruction and be promoted from grade to grade on the ground of merit and proficiency only."

Under the rules of the board above quoted, the court held in the 4th and 5th syllabus of said case, as follows:

"4. A pupil who has favorably passed examination, and been given a proper certificate authorizing him to enter the next higher grade, is without right, in the absence of authority, from the board of education, to omit such grade to which he has been promoted and passed to a higher one.

"5. Where, by direction of the parent of the pupil thus promoted, the pupil without authority of the board, enters the room of such higher grade for the purpose of remaining there, it is the right and duty of the superintendent to refuse to allow the pupil to remain and direct him to go to the room of the grade to which he has been promoted."

The rule to be drawn from the above case is that pupils are entitled to certificates which cover the work that such pupils have actually performed. The certificate of the pupil certified that he had completed the work of the 5th grade satisfactorily and that said certificate of promotion entitled him to enter the next higher grade which was the 6th grade, and that he was not entitled to enter the 7th grade because he had not completed the work required in the 6th grade.

These conclusions follow by virtue of the provisions contained in the rules adopted by the board. If a pupil cannot receive a certificate of promotion because he has not performed the school work of a certain grade, as required by the rules of the board, it would certainly seem to follow that a board of education would be without authority to grant a diploma to a person who has not completed the course of study in accordance with statutory rules. It is to be noted that said section 7656 of the General Code, containing provisions that a diploma must be granted to any one completing the curriculum in any high school, and you state in your inquiry that the person to whom the diploma in question was granted, was never a member of the school which granted the diploma and never did the work required by the curriculum of the high school, nor any part of it, etc.

Curriculum is defined by the century dictionary as follows:

"A fixed course of study in a university, college or school."

By Funk & Wagnall's dictionary:

"A course of study as in a college."

By Webster's dictionary:

"A specified fixed course of study, as in a university."

The curriculum or course of study of a high school must be based upon section 7649, supra, which said section specifies the subjects upon which instruction and training must be given. As stated in your inquiry, the person to whom the diploma inquired about was granted, was never a member of the high school which granted the diploma, and therefore could hardly come within the provision of said section 7657, which provides that a certificate shall be issued to the holder of each diploma, in which said certificate the grade of the high school shall be stated, together with the names and extent of the studies pursued and the length of time given to each study. If the party inquired about was never a member of such high school, he certainly could have given no time to the studies imposed in the curriculum or the course of study of said high school.

Bouvier's law dictionary, in speaking of the term "diploma" says:

"It is usually granted by learned institutions to their members or *to persons who have studied in them.*"

Certainly it follows that if the person to whom the diploma in question was granted was never a member of the high school which granted said diploma, then it follows that it could not possibly be said that he had studied in such high school.

You will notice that up to this point I have discussed only the first two conditions under which said diploma was granted, as set forth in your inquiry. In respect to the 3rd, 4th and 5th conditions under which said diploma was granted, section 7656 makes it mandatory upon a board of education to issue or grant a diploma to any one completing the curriculum in any high school, for the reason that said section specifically says that in such case a diploma must be granted by the board of education. This being true, the fact that the person who received the diploma was a member of the board of education which granted the same, would have no effect upon said diploma, provided he was otherwise entitled to receive such diploma, and it is not necessary that such diploma be granted by a quorum of the board, for as above stated, if a person is entitled to such diploma, then the board must grant and issue such diploma, as provided by said section 7656, supra.

For the foregoing reasons, I am of the opinion that a diploma granted under the conditions which you state in your request, is not legal.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1164.

DUTY OF CITY SOLICITOR TO REPRESENT CITY OFFICERS IN PROCEEDINGS TO RESTRAIN THE CERTIFICATION AND COLLECTION OF SPECIAL ASSESSMENTS—CITY SOLICITOR MAY NOT BE APPOINTED BY COUNTY OFFICERS TO REPRESENT THEM IN SUCH ACTION—COMPENSATION.

Where council has by resolution made it the duty of the city solicitor to represent the city auditor in a suit against the county treasurer, county auditor and city auditor to restrain the certification and collection of special assessments, the city solicitor cannot be employed by the county officials to represent them in such action. No additional compensation can be paid the prosecuting attorney for representing the county officials involved in such suit.

COLUMBUS, OHIO, September 21, 1914.

HON. G. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:—I have your letter of May 4, 1914, as follows:

> "After special improvements are made by a municipality, if the assessment levied therefor is not paid by the time fixed, the same is certified by the city auditor for collection by the county treasurer as a part of the general tax. In an action brought by a property owner, seeking to restrain the city auditor from certifying any further installments, and to restrain the county auditor from placing the same upon the books, and to restrain the county treasurer from collecting future assessments as well as those placed upon his books prior to the time of the bringing of such action, may attorney fees be paid by the county treasurer and county auditor to an attorney-at-law who is also solicitor of the municipality for defending the said officials in such suit?
>
> "May the prosecuting attorney receive compensation in such an action? From the opinion rendered by you under date of May 6, 1911, to the bureau

of inspection and supervision of public offices, department of state, I presume that in your judgement he may not."

Section 3905 of the General Code reads:

"The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified shall be placed upon the tax list by the county auditor and shall, with ten per cent. penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent. penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

In a letter under date of May 29, 1914, you suggest that section 5700, General Code, may authorize employment of counsel by officials of the county in defending these. This section reads:

"When an action has been commenced against the county treasurer, county auditor, or other county officer for performing or attempting to perform, a duty authorized or directed by statute for the collection of the public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

This section was formerly section 2862, Revised Statutes, and was originally part of an act passed April 8, 1881. On March 31, 1906, an act was passed amending section 1274 of the Revised Statutes, and this section as amended later, became section 2917, General Code, which now reads:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Section 2412, General Code, referred to in the above section, reads:

"If it deems if for the best interests of the county, upon written request

of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

From a reading of section 2917 which was passed after section 5700, it is clear that it is primarily the duty of the prosecuting attorney of your county to defend the county auditor and county treasurer in the suits referred to, but if he deems it for the best interest of the county, he may request the county commissioners to appoint counsel to assist him in these cases, and the commissioners may employ such counsel by virtue of section 2412. The prosecuting attorney himself may not receive any additional compensation for such services.

The next question is, since the county commissioners at the request of the prosecuting attorney may employ counsel in these cases to assist the prosecuting attorney, may the solicitor of the municipality involved in the action, be employed.

Section 4308, General Code, reads:

"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

This section makes it the duty of the city solicitor to defend such suits as you refer to, when council by resolution or ordinance so directs. I assume that in the case submitted the city solicitor will appear for and on behalf of the city of Elyria and the city officials named in the statutes referred to, and this, to my mind, would make it improper from the standpoint of public policy, for such official to receive further compensation for appearing in the same suits on behalf of the county. I am, therefore, of the opinion that the city solicitor of the city of Elyria may not be employed to defend county officials in the suits brought in the special assessment cases referred to.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1165.

CONSTRUCTION OF SECTION 4744-1, GENERAL CODE, WITH REFERENCE TO THE SALARY OF COUNTY SUPERINTENDENT OF SCHOOLS —RIGHT OF THE COUNTY BOARD OF EDUCATION TO FIX THE SALARY OF A COUNTY SUPERINTENDENT AT AN AMOUNT IN EXCESS OF $1,200.00—TO FIX THE SALARY AT AN AMOUNT GREATER THAN $2,000.00.

There is nothing in section 4744-1, General Code, which prohibits a county board of education from fixing the salary of the county superintendent at any amount in excess of $1,200.00 per year it may deem proper.

When the board of education fixes the salary of the county superintendent in an amount greater than $2,000.00, the county district is to pay the balance remaining after deducting the $1,000.00 to be paid by the state and such balance is to be apportioned and certified as provided in sections 4744-1, 4744-2, and 4744-3, General Code.

COLUMBUS, OHIO, September 21, 1914.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—On July 18, 1914, I gave you an opinion that under section 4744-1, General Code(104 O. L. 142), the salary of county superintendents could in no event exceed the annual sum of $2,000. This opinion was prepared in great haste, and, at the request of many members of the legislature, the superintendent of public instruction, and the prosecuting attorneys of different counties, I consented to reconsider the question.

Your original request, dated July 29th, was:

> "Section 4744-1 provides that the salary of a county superintendent shall be fixed by the county board of education; that one-half of such salary shall be paid by the state and the balance by the county school district, and that in no case shall the amount paid by the state be more than $1,000.
>
> "The question, therefore, arises whether or not section 4744-1, General Code, limits the salary to be paid the county superintendent to $2,000."

The answer to your request involves a construction of said section 4744-1, General Code, which is as follows:

> "The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

This statute provides, in substance:

(a) The salary of the county superintendent shall be fixed by the county board of education.

(b) Such salary shall not be less than $1,200.00.
(c) Such salary shall be paid out of the county board of education fund.
(d) Half of such salary shall be paid by the state.
(e) The balance shall be paid by the county school district.
(f) The amount paid by the state shall in no case be more than $1,000.00.
(g) The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district.

Taking the provisions from (a) to (e), inclusive, we have a rational statute; add provision (f) and ambiguity arises; add provision (g) and we have ambiguity, confusion and contradiction.

If it were the intent of the legislature that the salary should in no event exceed $2,000.00, why was this not said? A minimum is provided definitely, "the salary shall be fixed * * * to be not less than $1,200.00 per year." No maximum is named. It is provided that half the salary is to be paid by the state, the balance by the county school district. It is then provided that the amount to be paid by the state in no case shall be more than $1,000.00. This is in a separate sentence. Nothing is said about the amount to be paid by the school district except "the balance by the county school district." If the maximum salary is to be $2,000.00, then, as the legislature has not so said, after limiting the amount to be paid by the state to $1,000.00 it should also limit, in the same way, the amount to be paid by the county school district. This is not done. Can it be inferred that because the provision is for the state to pay one half of such salary, and in no case to pay more than $1,000.00, the salary is limited *by law* to $2,000.00. I do not think so; for the following reasons:

First. A definite minimum of $1,200.00 is provided.
Second. No maximum is provided.
Third. Limitation is expressly placed on the amount the state may pay.
Fourth. No limitation is placed on the amount to be paid by the county school district.

Thus, it is expressly provided for a minimum salary and for a maximum amount to be paid by the state. There is no provision for a maximum salary or for a maximum amount to be paid by the county school district. The maxim *expressio unius* applies, the minimum and maximum having been fixed in two instances, expressly, inference that they are fixed in the other instances is excluded.

It is contended that the provisions "half of such salaries shall be paid by the state," coupled with the limitation of $1,000.00 placed on the state by the next sentence, fixes the maximum salary at $2,000.00. The most obvious answer to this is that no maximum salary is fixed by the act, and, as a minimum is fixed, cannot be inferred.

Second. After the words "half of such salaries shall be paid by the state" occur the words "the balance by the county school district." If the salary in no event was to exceed $2,000.00, then this provision should have read: "the other half by the county school district, and in no case shall such salary exceed $2,000.00." In short, if it were the intent to limit the salary to $2,000.00, then such intent cannot be inferred from the limitation on the state to $1,000.00. This very sentence, "in no case shall the amount paid by the state be more than $1,000.00," necessarily imports cases in which half of the salary would amount to more than $1,000.00.

The first two paragraphs of the syllabus in the case of Slingluff et al. vs. Weaver et al. 66 O. S. Rep. 621, are as follows:

> "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history

of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.

"But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

The above syllabus is an excellent guide to statutory construction and, as stated by Judge Spear, both in the syllabus and in the opinion, "the question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

In the present statute the legislative body evidently meant to provide for the salary of the county superintendent, and that his salary in no event should be less than $1,200, and also that the state should pay half of such salary up to the amount of $1,000. That much is expressed with reasonable plainness. What is intended and meant in addition is in darkness.

It is contended, on one hand, that by providing that the state shall pay half of such salary, and in another sentence providing that in no case shall the amount paid by the state exceed $1,000, that the amount of the salary is limited to $2,000; on the other hand, as I have pointed out, no maximum salary is fixed by the act, and the language used in limiting the state to $1,000 necessarily recognizes cases in which, were it not for this limitation, the state's share would be more than $1,000. Therefore, the provisions of this statute, upon this subject, are exceedingly ambiguous and doubtful, and it is our duty, if we can, to give the statute the intent of the law-making body which enacted it.

The language used gives very little light as to the intent; that is, whether it was the intent of the legislature to limit the salary to $2,000; or to place no limitation on the amount of the salary except that the state was to pay not to exceed $1,000 on account of the same. It seems to me the reasonable interpretation to put upon the statute, in this regard is that the legislature did not intend to limit the salary to $2,000. If it had so intended it would have been a very simple matter to have so stated, and it is only by forced construction and by inference that such a meaning can be placed upon the statute. On the other hand, while there is a definite minimum amount of salary fixed, there is no express maximum.

Nor is there any reason, which has been suggested to me, which would impel the legislature to place a limitation of $2,000 on the salary. On the contrary, it is well known that in many counties of the state a satisfactory superintendent could not be obtained for a salary of $2,000.00.

From all the above, I feel compelled to give this statute a liberal construction; that is, as the legislature, itself, has refrained from saying that the maximum salary is to be $2,000.00, I cannot feel warranted in holding that the statute says this by inference.

In brief, my holding is that the salary of the county superintendent is to be not less than $1,200.00; that the state is to pay half of this salary so long as the same does not exceed $2,000.00.

That there is nothing in the act which prohibits a county board of education from fixing the salary of the county superintendent at any amount in excess of $1,200 per year it may deem proper.

Much difficulty is caused, as you suggest, by the last sentence of section 4744-1 which provides:

> "The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

The difficulty arises, as you show, in a case such as Cuyahoga county where the salary of the county superintendent has been fixed at $3,000.00, $1,000 of this to be paid by the state, leaving a balance of $2,000 to be paid by the county school district. This would be perfectly consonant with the provision in the act which provides:

> "Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars."

But the difficulty is occasioned by the last sentence of the section which I have quoted above. The half of the salary would be, of course, $1,500.00, and if that is all the county school district is to pay, instead of the balance of the salary, there would be a deficit of $500.00. These provisions are practically irreconcilable, and it seems to me, in case of conflict, the first provision, namely, that the balance of such salary shall be paid by the county school district, should control, which salary, as stated in the section, to be paid out of the county board of education fund. This fund is provided for by sections 4744-2 and 4744-3, General Code, which sections are as follows:

> "Section 4744-2. On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school districts, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents.
>
> "Section 4744-3. The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the "county board of education fund." The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

You ask "if 'the half paid by the county school district' shall be pro-rated among the village and rural school districts in proportion to the number of teachers employed in each district, means in this case two thousand dollars of the three thousand dollars, how is the county board of education to proceed against the village and rural school districts who refuse to pay more than one half of the salary, namely, fifteen hundred dollars?"

While in these sections, the only method of providing for this "county board of

education fund," is the amount retained by the auditor for paying the portions of the salaries of the county and district superintendents, still there must be other sources from which revenue can be made for this fund; for there are other expenses which must be paid out of the fund; for instance, the expenses of the county superintendent authorized by section 4744-1. It is not stated explicitly that these expenses are to be paid out of the "county board of education fund," but they are to be allowed by the county board and unless they can be paid out of this fund they cannot be paid at all. I think they can be paid from this fund.

Section 4734 provides that the expenses of the county board of education shall be paid from "the county board of education fund."

Therefore, if this fund consisted only of the amounts necessary to pay the salaries of the county and district superintendents there would be no fund out of which the expenses above noted could be paid. Section 5653 (104 O. L., p. 145) provides an additional source of revenue for this fund, namely, the excess, or surplus of what is called the "sheep fund." There may be other sources of revenue for this fund, but I do not find it necessary to determine this at this time. I have called attention to the fund and to other expenditures from it than for salaries of county and district superintendents, merely to show that it is in reality a fund at the disposal of the county board of education and not simply a lump sum from which only salaries can be paid.

Section 4744-1 provides that the salary of the county superintendent, as fixed by the county board of education, shall be paid from this fund. If there is sufficient money in the fund to pay the salary as fixed, the question you suggest would not arise.

Under section 4744-2 it is the duty of the county board of education to certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents, and under section 4744-3 it is the duty of the county auditor to retain the amounts so certified, for the purpose of paying the salaries of the county and district superintendents out of the school funds due to the various village and rural school districts when he makes his semi-annual apportionment.

As I view it, there is no necessity for any action against the village or rural school districts. If it is claimed that, by the last sentence of section 4744-1, only one equal half of the salary fixed by the board of education can be pro-rated among the village and rural school districts, and the "county board of education fund" is insufficient to pay the salaries in full unless the entire balance is pro-rated among said districts; then the question might be raised by an action in injunction against the county board of education from certifying to the auditor an apportionment greater than the exact equal one-half of the salary so fixed. Such action would depend entirely on the last sentence of section 4744-1—it may be suggested that the word "half" does not necessarily mean one of two exactly equal portions. It may mean simply a part; in this section there is a conflict in the language used by the legislature; but taking the section as an entirety and reading it in connection with sections 4744-2 and 4744-3, it seems to me the only reasonable construction is that, when the board of education fixes the salary in an amount greater than $2,000.00, the county district is to pay the balance remaining after deducting the $1,000.00 to be paid by the state, and that such balance is to be apportioned and certified as provided in sections 4744-1, 4744-2 and 4744-3.

In any event I cannot see that this alters the main question; that is, that the salary is not limited by the act, to $2,000.00. Even if it were true that not to exceed half of the salary is to be paid by the county district, the fact still remains that nowhere in this statute does it say that the half to be paid by the county school district is not to exceed $1,000.00.

As stated above, this statute is most troublesome and unsatisfactory; upon first reading it, one at once gains the impression that a limitation of $2,000.00 is placed upon the salary, but upon carefully considering it, from every angle, it is perfectly

plain that this is not the case, and whether it be by design or not, the statute carefully refrains not only from placing any maximum limit upon the amount of the salary of the county superintendent, but also from placing any maximum limit upon the portion of the salary which the county district is to pay.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney Oeneral.

1166.

RIGHT OF THE COUNTY TO MAKE A CHARGE AGAINST THE CITY FOR THE CARE AND TREATMENT OF A PAUPER IN THE COUNTY INFIRMARY, WHEN THE CORPORATE LIMITS OF THE CITY ARE IDENTICAL WITH THOSE OF THE TOWNSHIP.

When a city, whose corporate limits are identical with those of the township, sends a resident pauper to the county infirmary, it is not lawful for the county to make a charge against such city for the care and treatment of such pauper at such infirmary. It is also unlawful for such city to impose a charge against the county for food and lodging furnished a non-resident pauper by such city, after the officers of the county infirmary have refused to afford relief, since it is the duty of the director of public safety of a city to furnish all temporary outside relief to the poor.

COLUMBUS, OHIO, September 23, 1914.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—I have your letter of August 26, 1914, as follows:

"1. The city of Akron has no city infirmary. The county of Summit has a county infirmary located within Summit county. In the case of a pauper who has a permanent residence in the city of Akron, and who is sick; in the event that he is sent to the county infirmary is it lawful for a charge to be made against the city of Akron for the care of such pauper while he is at the county infirmary?

"2. In the case of a pauper who is a non-resident of the city of Akron, being provided with two or three meals or a night's lodging, and assuming further that the county infirmary refuses to receive such pauper, is it lawful for the city to impose a charge against the county for the care furnished such pauper?

"The total tax duplicate of Summit county is about $212,000,000.00. Of this amount $133,000,000.00 is the city's share. It appears then that the city's duplicate is 60 per cent. of the entire county. Of course, you are aware of the fact that this county infirmary is supported by a general levy on the entire county. It seems a curious situation that after the city is taxed to the extent I have indicated, to support the infirmary, that it should be called upon to pay an additional sum for every poor patient sent to that institution. Will you please bear these facts in mind in coming to your conclusion?"

Section 2544 of the General Code reads as follows:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person

complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

This section seems to relate only to the duties of the township trustees with reference to the poor, but section 3512, General Code, provides that when the corporate limits of a city or village become identical with those of the township, all township offices are abolished and the duties thereof shall thereafter be performed by the corresponding officers of the city or village and that "all rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

Section 4089, General Code, designates the public safety director as the officer of the municipal corporation, whose duty it is to care for the interests of the poor, so that if the city of Akron has no township trustees because of the fact that the corporation limits are identical with the limits of the township, then the duty prescribed in section 2544, General Code, to be performed by the township trustees, will fall upon the director of public safety. It is equally clear, from a reading of this section, that after the destitute person is received by the county infirmary, the liability of the municipality for the support of such person is at an end.

I am therefore of the opinion, in answer to your first question, that when a resident of the city of Akron is being cared for in the county infirmary, no charge can be made against the city by the county authorities for such care.

Sections 3476, 3480 and 3481, General Code, read as follows:

"Section 3476. Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it.

"Section 3480. When a person in a township or municipal corporation requires public relief, or the service of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance, to such poor, the physician called or attending shall immediately notify such trustees or officer, in writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time, may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered.

"Section 3481. When complaint is made to the township trustees or to the proper officers of a municipal corporation that a person therein requires public relief, or support, one or more of such officers, or some other duly authorized person, shall visit the person needing relief, forthwith, to

ascertain his name, age, sex, color, nativity, length of residence in this county, previous habits and present condition and in what township and county in this state he is legally settled. The information so ascertained shall be transmitted to the township clerk, or proper officer of the municipal corporation, and recorded on the proper records. No relief or support shall be given to a person without such visitation and investigation, except that in cities, where there is maintained a public charity organization, or other benevolent association, which investigates and keeps a record of the facts relating to persons who receive or apply for relief, the infirmary directors, trustees, or officers of such city shall accept such investigation and information and may grant relief upon the approval and recommendation of such organization."

These sections make it the duty of the director of public safety to furnish all temporary outside relief to the poor and for this relief the municipality is liable. It is therefore my opinion that when the city of Akron furnishes temporary relief to a needy non-resident, such city cannot impose a charge against the county for such relief so furnished.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney Geueral.

1167.

UNDER THE PROVISIONS OF SECTION 3585, GENERAL CODE, A PLAT OF GROUND SUBDIVIDED FOR SALE WHEN RECORDED BECOMES A SUFFICIENT CONVEYANCE TO VEST IN A MUNICIPAL CORPORATION THE FEE OF THE GROUNDS DESIGNATED FOR STREET OR OTHER PUBLIC WAYS.

Where a proprietor of grounds subdivides the same for sale and causes an accurate map or plat of such subdivision, designating therein the grounds laid out for streets and other public ways, and causes the same to be recorded in the office of the recorder of the county in conformity to the provisions of section 3584, General Code, by virtue of the provisions of section 3585, General Code, such map or plat when recorded becomes a sufficient conveyance to vest in the municipal corporation wherein such grounds are located, the fee of the grounds so designated for streets or other public ways, yet said streets and other public ways so designated and dedicated do not become public streets or ways under the care and control of the council of the municipality, unless the dedication is accepted and confirmed by an ordinance especially passed for this purpose, in conformity with the provisions of section 3723, General Code.

COLUMBUS, OHIO, September 23, 1914.

HON. F. H. PELTON, *Solicitor for Willoughby, Society for Savings Building, Cleveland, Ohio.*

DEAR SIR:—Under date of August 11, 1914, you wrote asking my opinion as to whether or not it is necessary for a village to accept a street otherwise than by accepting recorded plat under section 3585, General Code.

As pertains to the question here presented, sections 3584 and 3585, General Code, provide as follows:

"Section 3584. A proprietor of lots or grounds in a municipal corporation, who subdivides or lays them out for sale, shall cause to be made an accurate

map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons or other public uses. Lots sold, or intended for sale shall be numbered by progressive numbers, or described by the squares in which situated, and the precise length and width shall be given of each lot sold, or intended for sale. Such map or plat shall be subscribed by the proprietor or his agent, duly authorized by writing, acknowledged before an officer authorized to take the acknowledgment of deeds, who shall certify the acknowledgment of the instrument, and recorded in the office of the recorder of the county.

"Section 3585. The map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended."

However, section 3723, General Code, provides as follows:

"No street or alley dedicated to public use by the proprietor of ground in any corporation, shall be deemed a public street or alley, under the care or control of the council, unless the dedication is accepted and confirmed by an ordinance specially passed for such purpose."

On a consideration of sections 3585 and 3723, General Code, with respect to the question here presented, I am unable to see any inconsistency in the provisions in these sections, nor do I know any reason why full force and effect cannot be given to the provisions of both sections. Section 3585 provides that the map or plat recorded in the provisions of section 3584 shall be sufficient conveyance to vest in the municipal corporation the fee of the land designated or intended for streets, etc. The map or plat providing for the dedication of land for streets and other public uses like any other instrument of conveyance is not effective to vest title to the land conveyed until it has been accepted. The procedure outlined in section 3584, General Code, is one of the provided means of statutory dedication and like a common law dedication such statutory dedication is not effective until acceptance by the municipality through corporate authority.

Armstrong vs. village of St. Mary's, 21 C. C., 16, 17.
Railroad Company vs. Roseville, 76, Ohio State, 108, 116.

In the case of Wisby vs. Bonte, 19 O. S. 238, it was held that the intent and purpose of the provisions of this section (3723) is to prevent proprietors who may lay out land into lots within the corporation from vesting in the corporation the title to streets and alleys and thus charge the corporation, without its consent, with the duty of keeping them open and in repair.

In the case of Lough vs. Machlin, 40 O. S., 332, it was held that a plat dedicating certain land as a public way was not effective for the purpose until an acceptance thereof by the municipality in the manner provided by the provisions in this section.

On the consideration before noted, I am of the opinion that the filing and record of the plat provided for by section 3584, General Code, although it is a sufficient instrument of conveyance without more to convey to the municipality land thereby dedicated to the municipality for public uses, does not become effective for such purpose until it has been accepted by the municipality in the manner provided by section 3723 General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1168.

ANNEXATION OF A VILLAGE TO A CITY—EFFECT OF PLUMBERS' LICENSES ISSUED BY THE VILLAGE ANNEXED.

When a village is annexed to a city, plumbers holding licenses issued by the village will not be able to operate in the city until licensed as required by the city.

COLUMBUS, OHIO, September 23, 1914.

HON. WALTER M. SCHOENLE, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—Under date of July 28, 1914, you write this department as follows:

> "I wish to inquire if you have rendered an opinion covering the following:
>
> 1. "Can plumbers holding licenses issued by a village now annexed to a city continue their work within the former corporate limits of such village during the term for which their license is granted without undergoing an examination for a master plumber's license?
>
> 2. "Can such plumber carry on work without the corporate limits of such former village and within the limits of the city to which such village is annexed without undergoing an examination for a master plumber's license?
>
> "I ask if your office has rendered an opinion upon these subjects in order that the ruling in Cincinnati may be in accordance with the ruling of your department, but if no such opinion has been previously rendered by you, I would request one at your earliest convenience."

The annexation of a village to a city is governed by sections 3566 to 3574, General Code. Of these provisions, section 3574 is as follows:

> "When the annexation is completed, the two former corporations *shall be governed as one,* embracing the territory of both, and the inhabitants of all such territory *shall have equal rights and privileges.* The annexation shall not affect any rights or liabilities existing at the time of annexation, either in favor of or against the corporations, and suits founded on such rights and liabilities may be commenced, and pending suits prosecuted to final judgment and execution, as though the annexation had not taken place."

Under this provision the annexed territory becomes part of the city and all the inhabitants thereof must be governed in the same manner, having purely equal rights and being subject to equal obligations. Such an import operates against the practice of permitting individuals of different qualifications from exercising privileges of the same nature. Thus it is clear that a plumber, who had registered under the rules operating in a village and received his license from a show of qualification less exacting in its nature than that required of plumbers receiving a license from the city, might surely be pointed to as an individual who is enjoying rights and privileges not accorded to less fortunate followers of the same trade who happen to reside within the limits of the city previous to the annexation of the village.

In brief, the permission of one individual to exercise the privileges conferred by a plumber's license under terms less rigorous and less arduous than those imposed upon former residents prior to annexation, or future residents of the city within the limits after annexation, which license confers the same privileges on one and all, cannot be regarded as a distribution of equal rights and privileges.

The right of government in the exercise of its police power to revoke or rescind a license to engage in a particular profession or occupation, and to impose generally

upon all parties alike new and different obligations for the procurance of a future license of like nature, is well settled. 8 L. R. A. n. s., page 1272.

Such an exercise of the police power is justified. I am of the opinion, therefore, that the clear provisions of section 3574, of the General Code, above quoted, require all licensees within the limits of the city as it exists to procure their licenses upon equal terms. The licensees of the village received their license subject to the law as it existed, which contemplated a right on the part of the two corporations to annex and thereby require the annullment of the village licenses and the procurement of a new license under the regulations prescribed by the city government. In so providing the statutes are clearly within the police power of the state and city.

This view makes a categorical answer to your questions unnecessary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1169.

APPOINTMENT BY PROBATE COURT OF A WOMAN AS SPECIAL PROBATION OFFICER TO CONVEY A GIRL TO THE GIRLS' INDUSTRIAL SCHOOL AT DELAWARE, OHIO—COMPENSATION.

When the probate court commits a girl to the girls' industrial school at Delaware, Ohio, the court may appoint a woman as special probation officer to convey such girl to such institution and the court may allow such woman so appointed such compensation as it sees fit within the limits provided by section 1662, General Code.

COLUMBUS, OHIO, September 24, 1914.

HON. H. C. WILCOX, *Probate Judge, Elyria, Ohio.*

DEAR SIR:—I have your letter of August 4, 1914, as follows:

> "Will you kindly inform me at your earliest convenience the fees to be paid persons appointed by the court, for conveying girls to the Girls' Industrial Home at Delaware, and also who should be appointed for this purpose.
>
> "Section 2108 of the General Code provides that the court must appoint a suitable woman for this purpose, and section 2109 provides that the costs incurred in the proceeding shall be the same as are paid in similar cases. If conveyance of boys to Lancaster might be considered similar proceedings, section 2093, which provides for the compensation of delivering youth to that school, might apply; however, by the law passed April 29, 1913, and found at pages 864 to 914, in volume 103, Laws of Ohio, sections 2108 and 2109 referred to, are repealed, and I find no other provisions therein designating who should be appointed to convey girls to the Delaware Industrial Home, and the fees for the person in whose custody they are taken."

Sections 2108 and 2109, General Code, to which you refer, read as follows:

> "At the time named in the order, the probate judge shall hear the testimony presented before him in the case. If it appears to his satisfaction that the girl is a suitable subject for the industrial home, he shall commit her thereto, and issue his warrant to some suitable woman to be appointed by him, commanding her to take charge of the girl and deliver her without delay

to the superintendent of the home. If the judge deems it advisable so to do, he may designate the sheriff or other male person to accompany such girl and her custodian. This section shall be construed to apply to all courts having authority to commit to the Girls' Industrial Home."

"Section 2109. The fees of the probate judge, sheriff, and other costs incurred in the proceedings shall be the same as are paid in similar cases, and be paid by the proper county in the same manner."

These sections were repealed by senate bill No. 18, passed April 28, 1913 (103 O. L., p. 864 to 913), defining the powers and duties of the juvenile courts relative to delinquent and dependent children.

Section 1662 of the General Code was amended by this act referred to (103 O. L., 874) to read as follows:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character; one or more of whom may be women, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as probation officer and there may be first, second and third assistants. Such chief probation officer and the first, second and third assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed thirty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum, each payable monthly. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

Section 1663 of the General Code, defining the duties of a probation officer, reads in part:

"Section 1663. * * * He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person arrested pending the issuance of the warrant, *and perform such other duties incident to their offices as the judge directs.* * * *"

Since section 1662, General Code, as amended in 103 O. L., p. 874, authorizes the appointment of a woman as probation officer and provides that probation officers shall serve "during the pleasure of the judge," it is clear that the judge may appoint a woman as probation officer to serve the period of time required in conveying a girl to the Girls' Industrial School at Delaware; and since under section 1662, General Code, it becomes the duty of a probation officer to "perform such other duties incident to their offices as the judge directs," it is equally clear that the court may, by an order to such specially appointed woman officer, make it her duty to convey to the Girls' Industrial School a girl sentenced to that institution by the court.

It is therefore my opinion, that when a girl has been sentenced to the Girls' Industrial School at Delaware, the juvenile judge may appoint some suitable woman as special probation officer, to convey such girl to the Girls' Industrial School, and such probation officer may receive such compensation for such service as the court sees fit within the limits provided by section 1662, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1170.

A RESIDENT OF THE STATE OF OHIO, WHO IS APPOINTED TRUSTEE UNDER A WILL OF A DECEDENT OF ILLINOIS, MUST LIST SHARES OF STOCK FOR TAXATION IN THE OHIO COUNTY IN WHICH HE RESIDES, THOUGH CERTIFICATES THEREOF ARE KEPT IN MICHIGAN.

An individual resident of the state of Ohio, who is appointed trustee under a will of a decedent of Illinois, the estate of whom was administered in that state, and holds stock in a Michigan corporation, for the purpose of paying the income therefrom to certain beneficiaries, one of whom resides in Ohio, without general power to re-invest, must list the shares of stock for taxation in the Ohio county in which he resides, though the certificates thereof are kept in Michigan.

COLUMBUS, OHIO, September 24, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of July 27, 1914, you requested my opinion upon the following question:

> " 'A' is a trustee under the will of 'B,' who at his decease was a resident of Chicago, Ill., and whose estate was there administered. 'A' is a resident of Ohio. The terms of the trust are that the trustee shall pay the annual income of the estate up to a certain amount to one beneficiary who lives at Chicago, and the surplus to another beneficiary who resides in Ohio. The corpus of the estate so held in trust consists of stock in a certain Michigan manufacturing corporation, and the income consists of dividends on such stock (although the stock is at present not paying any dividends whatever).
>
> "*Question.* Should 'A' as trustee list the shares of stock belonging to the trust for taxation in the Ohio county in which he resides?"

Having been referred to counsel for the trustee I addressed a letter to them on August 5th, inquiring with respect to possible facts in addition to those submitted by you, but have received no answer.

Therefore, the answer which I shall give to your letter, in order to avoid further delay, will cover more than one possible state of facts.

The statutes which are applicable to the situation are phrased in very general language, viz.:

> "Section 5370. Each 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 * * *. The property of * * * person for whose benefit property is held in trust (shall be listed) by the trustee.

"Section 5328. All real or personal property in this state * * * and all moneys, credits, investments and bonds, stocks or otherwise, of persons residing in this state shall be subject to taxation, except only such property as may be expressly exempted therefrom."

On the face of these statutes a serious question seems to arise, whether intangible property, such as stocks, bonds, moneys and credits, held by a resident of this state for the use and benefit of a person residing outside of the state, is subject to taxation in Ohio at all. However, this question seems to be settled by the decision in Tafel vs. Lewis, 75 O. S., 182, wherein it was held in the language of the syllabus that:

"Bonds coming in this state into the possession of a resident executor who derives his authority under the will by appointment of the probate court of the county of his residence, are taxable in this state, notwithstanding that the will was executed and probated in a foreign country and the testator was at the time of his decease a non-resident of this state, and all beneficiaries are likewise non-residents."

This decision is authority for the proposition that a resident executor having possession of bonds must return them for taxation, although neither the decedent nor the beneficiary were residents of the county or state. No distinction was made, nor could have been made in that case between the duty of an executor to list and the duty of any trustee in the premises, although the language of section 5370, supra, with respect to the duty of executors and administrators is somewhat clearer than that with respect to the duty of trustees. I think, therefore, that all questions arising out of the fact that the decedent was a non-resident, and that one of the beneficiaries, whose rights are preferred to the rights of a resident beneficiary, is also a non-resident, may be eliminated.

In Tafel vs. Lewis, however, the record shows two facts which may have been material, one of which does not exist in the present case, and the other of which does not appear from your statement, viz.:

1. The executor in Tafel vs. Lewis acquired his authority to act as such in Hamilton county from the probate court of that county.

2. The executor had actual physical possession of the bonds in Hamilton county.

Of course, in the case submitted by you no Ohio court has any direct jurisdiction or control over the trustee; but it does not appear whether or not the trustee has actual and physical possession of the shares of stock in the Ohio county in which he resides, or elsewhere in Ohio. This is one of the facts concerning which I wrote to his counsel.

There is still another fact which may be gleaned from the record in Tafel vs. Lewis, which does not appear in your statement. It appeared that by reason of his office as executor the plaintiff in Tafel vs. Lewis had possession and control of the bonds in question with a view to administering the estate in a managerial way, i. e. the court, which was a Hamilton county tribunal, could order the executor to dispose of the estate and convert it into other forms which might seem best for the beneficiaries under the will. This fact did not seem to be regarded by the court as material (and, in fact, neither of the other two facts which I have noted were commented upon in the court's opinion), but it may serve to create distinction between Tafel vs. Lewis and the case which you submit, as well as to emphasize whatever importance may attach to the fact that no Ohio court exerts any direct control over the trustee which has already been mentioned. The distinction might arise should it appear that the terms of the trust are such as to vest in the trustee or the court no discretion with respect to the re-

investment of the trust funds, that is, the trustee is merely to hold the actual shares of stock and to pay the dividends thereon to the designated beneficiaries, under no circumstances being empowered to convert the estate into other forms or kinds of property. Should that be the case there would be a difference between the facts which you present and those presented in Tafel vs. Lewis. Counsel for the trustee relied upon the case of Hawk vs. Bonn, 6 C. C., 452. The syllabus of the case (though not official) amply states the facts and the conclusion of the court therein as follows:

> "H, a resident of New York, died in that state testate, having appointed four executors of his last will and testament, who were also to some extent made testamentary trustees. Three of the persons so appointed lived in New York. One had domicile in Erie county, Ohio, though spending about two-thirds of his time, his family with him, in New York, where he had business interests. One executor failed to qualify, one qualified and subsequently resigned on account of ill health—leaving the other two, who duly qualified, in charge of the estate—one residing in New York and the other in Ohio, as aforesaid. The property of the estate was all held in New York by the executors, none of it being brought into Ohio.
>
> "The executors qualified before, and reported to the Surrogate's court of New York.
>
> "Under these circumstances the auditor of Erie county, Ohio, claimed the right, and attempted to place at least one-half of the personal property of the estate, consisting of bonds, stocks and securities, upon the tax duplicate of said county, for taxation.
>
> "*Held:* That he could not rightly do so.
>
> "*Held, also.* That plaintiff had a remedy by injunction to prevent him from doing so."

In the oral opinion of Judge Haynes, liberal quotation is made from numerous authorities from other states, among them,

Lewis vs. Chester County, 60 Pa. State 235, 119 N. Y. 137, 50 Md. 379.

In these decisions, as quoted by Judge Haynes, I find intimations to the effect that a state has no jurisdiction to tax property in the hands of a trustee answerable to a court of another jurisdiction, the reason being that such a trustee is not really a "trustee" under the law of the state of his residence at all. But Judge Haynes further comments upon the case of Grant vs. Jones, 39 O. S. 506, and particularly certain language of the opinion in that case, as follows:

> "Our statute clearly adopts that rule. Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee or agent. If they are held within the state *in either capacity*, they are within the—jurisdiction of the state for purposes of taxation."
>
> (The italics are those of Judge Haynes.)

Referring again to the Pennsylvania case, Judge Haynes says:

> "It will be perceived that the supreme court of that state held that where the trustee (who derived her power from a will probated in the state of New York and under the laws of New York, and none whatever from Pennsylvania), had brought the property within the state, had loaned it and held the notes and mortgages in her own name, that the property was so far under the jurisdiction

of its laws that it should be taxed within the state and the property not brought within the state was not subject to taxation."

From this language it would seem that the pivotal point in the case in the judgment of Judge Haynes was not that the trust estate was created under the laws of the state of New York, and that the trustees were answerable to the courts of that state, but rather that, as stated in the syllabus, "the property of the estate was all held in New York by the executors, none of it being brought into Ohio."

Judge Hayne's conclusion, as stated in the opinion, is as follows:

"In the case at bar, the facts of the case clearly show that the evidence of indebtedness, stocks and bonds, were never brought into the state of Ohio, never came within its jurisdiction in any manner or form, never came within its jurisdiction and laws. Mr. Moss does not hold the property by virtue of the laws of Ohio, never brought it here for investment, never invested it here in any manner or form, and we think that there is a broad distinction between a party who holds property in his own right, invested in personal securities in another state, and thereby subjects it to the laws of his domicile, and a party who holds property *in trust*, which is situated or invested in another state and is under the control of the laws of the other state. It would seem to be unjust to an estate of this kind, to subject it to the rule of taxation of this state.

"Mr. Hawk became acquainted with Mr. Moss in the state of New York, Mr. Moss residing there at least half of the time—perhaps more than half of his time—he kept house there, his family was there; he spent his winters in New York, his summers here. For purposes of his own, either as a matter of taste, or because it was his birthplace, or something of that kind, he chose to consider Ohio as his residence, and voted there. He might, without any change of situation, as far as he was concerned, have elected to vote in New York; if he had chosen to have New York as his domicile, he could have done it by saying so and acting accordingly.

"Under this condition of affairs, Hawk appointed him as one of his executors. I suppose it is the last thing he thought of doing to place his property within the jurisdiction of the state of Ohio for any purpose whatsoever, and it seems to us that the true law, the case, the equities of the case, the right of the case is with the plaintiffs in this action, and we therefore hold that the plaintiff is entitled to his injunction.

"It is said that the property was not taxed to the full value of the property within the state of New York. We think that makes no difference in regard to the question that is to be decided here. The property is, as we hold, subject to taxation in the state of New York. If they do not tax it to the full amount they ought to tax it, or to the full amount to which they have the right to tax it, it is the fault of the authorities there and does not at all vary or change or alter the question of jurisdiction over the property or the right to tax it, or the place where it should be taxed."

Another case relied upon by counsel for the trustee is Goodsite vs. Lane, 139 Fed. 593. While the facts in this case are somewhat similar to those in Hawk vs. Bonn, a careful examination discloses that certain distinctions between the two cases exist. In Hawk vs. Bonn, the resident of Ohio through whom the right to tax was claimed, was one of two *executors*, and in that capacity and under the direction of the New York court, was acting at the time the litigation arose with his co-executor,

and maintained an office in the city of New York on behalf of the estate where the affairs of the estate were managed in every way.

In Goodsite vs. Lane, the resident of Ohio, through whom the right to tax was asserted, was one of two testamentary trustees acting under the will of a resident of the state of Connecticut for the benefit of a citizen of New York and a citizen of Ohio, who were the joint beneficiaries. As such trustees they were appointed by a probate court in Connecticut to fill vacancies in the trusteeships occurring some nineteen years after the death of the testator.

Subsequent to their original appointment an arrangement was made whereby the two trustees resigned their joint trust, the trust estate was divided and each was appointed for one-half the estate, the resident of Ohio being trustee for the beneficiary who had originally resided in Ohio, but at the time the litigation arose had removed to Connecticut and there resided. The *corpus* of the estate consisted of stocks and bonds in Connecticut and New York corporations. These securities were kept deposited in a bank and trust company in the city of New York. The trustee had power under the will to reinvest, but as a matter of fact, never made any reinvestment except, after personal consultation with the beneficiary or her agent in the city of New York or at her home in Connecticut. No part of the estate or its income had ever been brought into the state of Ohio.

The reasoning of Judge Richard's opinion is succinctly stated in the following paragraph:

> "As stated in the leading case of state tax on foreign held bonds, 15 Wall. 300, 319, 21 L. Ed. 179, 'the power of taxation * * * is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business.' The question here is, was either this Connecticut estate, or its trustee, as such, within the jurisdiction of Ohio? The statute of Ohio provides that 'all property, whether real or personal, in this state * * * and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation,' section 2731, Revised Statutes, 1890. As construed by the supreme court of Ohio, 'the first clause evidently embraces the tangible property, real or personal, situated in this state, irrespective of the residence of the owner, and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated.' Myers vs. Seaberger, 45 Ohio St. 232, 235; 12 N. E. 796. Applying the rule mentioned, supra, the state of Ohio taxes tangible property located in the state, because of its jurisdiction of the property; and it taxes intangible property located without the state, because of its jurisdiction of the persons residing in the state who hold it. The property involved in this case had never been brought within the state of Ohio, and, therefore, could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. Kirtland vs. Hotchkiss, 100 U. S., 491, 498; 25 L. Ed. 558. The exaction must find its justification in the privileges and protection enjoyed in the state, under its laws, by the person taxed, in the capacity in which taxed. The person taxed must therefore be in the jurisdiction of the state not only personally, but officially, in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the cases will show that,

where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits from the state, for which it was only fair the trustee should pay. Price vs. Hunter (C. C.), 34 Fed. 355, 356; borough of Carlisle vs. Marshall, 36 Pa. 397, 402; Lewis vs. county of Chester, 60 Pa. 325, 330; Guthrie vs. Ry. Co., 158 Pa., 433, 439, 27 Atl. 1052; Mayor of Baltimore vs. Stirling, 29 Md., 48; Appeal Tax Court vs. Gill, 50 Md., 377, 396; Mackay vs. San Francisco, 128 Cal., 678, 61 Pac., 382; Trustees vs. City Council, 90 Ga., 634, 17 S. E., 61, 20 L. R. A., 151. But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee within the state, the tax was not sustained. Hawk vs. Bonn, auditor, 6 Ohio Cir. Ct. R., 452; People ex rel. Darrow vs. Coleman, 119 N., Y. 137, 23 N. E., 488, 7 L. R. A., 407. In the case of Gallup vs. Schmidt, 154 Ind., 196, 56 N. E., 443, an estate was held taxable in Indiana, where the trustee was appointed, although he was a resident of New Hampshire; the court holding that, having been appointed in Indiana, he was to be regarded, in his capacity of trustee, as a resident of that state. Page 200 of 154 Ind., page 443 of 56 N. E. In the present case neither the trust estate nor the beneficiary nor the trustee in any proper sense, was within the jurisdiction of the state of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio."

This case being compared with Hawk vs. Bonn and Tafel vs. Lewis, *supra*, suggests certain other distinctions. It will be noted that Judge Richards does not decide whether shares of stock (of which the case before him consisted) are tangible property, so that if the certificates thereof are physically present in a state, the jurisdiction to tax them attached. He does not decide whether a trustee, as such, must be appointed by or under authority of a tribunal of the state in order to be a "trustee" within the meaning of the statute. He does not decide whether, in a given case, a trustee appointed by a court of another state, and executing his trust for the benefit of a non-resident beneficiary, would become amenable to the taxation laws of the state in which he resides, should he actually act as trustee in that state, i. e., manage and control the estate from his residence in the state.

Judge Richards does not decide whether or not the residence of the beneficiary is a material fact upon which the jurisdiction of the state may depend. He merely decides that where none of the conditions just discussed exist, i. e., where the certificates of stock are not brought within the state, the beneficiaries do not reside within the state, the trustee does not perform any of his official functions in the state, the jurisdiction of the state does not attach to the trust estate merely by reason of his residence in the state.

Goodsite vs. Lane, then is like Hawk vs. Bonn, in that all jurisdictional elements found lacking in the former by Judge Richards were likewise lacking in the latter, as a comparison of the facts will show. It was unlike Tafel vs. Lewis in that three elements of jurisdiction, presented in the latter, were lacking in Goodsite vs. Lane, viz.: the jurisdiction of an Ohio court; the physical presence in Ohio of the securities constituting the estate, and the activity of the executor in his official capacity in the state of Ohio.

Goodsite vs. Lane is unlike either of the other cases discussed in that the person to whom the jurisdiction of the state asserted in the two cases as an executor, whereas in Goodsite vs. Lane, he was a testamentary trustee.

One other fact remains to be noticed before these decisions, for the moment, are left, viz.: although the jurisdiction and control of the court were the facts commented

upon in Hawk vs. Bond, nothing is said about this matter in Goodsite vs. Lane. This was because, principally, the trustee in that case, although appointed by the probate court of Connecticut, was governed primarily by the will rather than the court with respect to the management of the estate, having power to invest and re-invest at his discretion.

These three cases themselves do not furnish a satisfactory answer to the question submitted. They do no more than suggest the tests for determining whether, in a given instance, a state acquires jurisdiction to tax a trust estate, or any part of it, by reason of the fact that the trustee is a resident of the state. The test must be furnished by considering the existence of certain facts additional to the mere residence of the trustee, which I venture to state as follows:

1. The physical presence of the evidences of indebtedness or muniments of title in the taxing estate.
2. The nature of the property held by the person.
3. The jurisdiction of the court appointed or having authority over the person who acts in a representative capacity.
4. The capacity in which the representative acts, i. e., whether as administrator, executor, trustee, receiver, etc.
5. The residence of the beneficiary.
6. The actual investment of the trust estate, or any part of it, in the taxing state.
7. Whether or not the representative acts in his official capacity in the taxing state, i. e., conducts the business of the estate, or otherwise manages its affairs at his residence.

The first two of these possible criteria may be considered together. As stated in the above opinion of Judge Richards in Goodsite vs. Lane, *supra*, the physicial presence of trust property in the taxing state is a material fact, when that property is such as to possess a *situs* of its own for purposes of taxation independently of the residence or domicile of the legal owner thereof. Thus, if the property in question (as it is not) were tangible, personal property, and it were present in the state of Ohio it would be taxable here; and its absence from the state of Ohio would be sufficient to defeat Ohio's jurisdiction to tax it, even though other jurisdictional facts might exist. The distinction between tangible and intangible property, for purposes of taxation, is rather clearly drawn, especially so under the Ohio statutes. I think Judge Richards has correctly concluded that moneys, credits and investments in bonds, stocks or otherwise, are to be regarded as intangible property and distinct from other species of personal property under our laws.

As to such intangible property, the general rule is that it is taxable at the residence of its owner on the maxim *"mobilia sequntur personam,"* but where such property is held in trust for the use and benefit of another, this maxim does not universally operate as to fix the *situs* of such property in accordance with the residence of the mere legal owner, as the cases already discussed disclose. In such cases it may be questioned as to whether or not the physical location of the tangible evidences of the intangible rights represented by stocks, bonds and securities, is material. Upon examination of numerous authorities, I am of the opinion that this fact is immaterial. It is true the question is mooted in Goodsite vs. Lane and Hawk vs. Bonn, *supra*, and that a suggestion along this line is found in Tafel vs. Lewis. That is to say, in all of these cases the presence or absence, as the case may be, of the credits sought to be taxed from the state of Ohio, was commented upon, but in none of them was this fact made determinative. On the other hand, authorities quoted with approval in the cases already cited clearly establish the opposite conclusion. Thus in Mackay vs. San Francisco, 128 Cal., 678, the subject of the taxation consisted of certain bonds, which at the time of the assessment, were kept in New York City. The supreme court of California held that that state might lawfully impose a tax upon the interest in such

bonds of one of two trustees who was a resident of that state, the other trustee being a resident of the state of Nevada. In Guthrie vs. Railway, 158 Pa., St. 433, the Pennsylvania trustee of the estate of a decedent of the District of Columbia kept the securities belonging to the state, consisting of certain railway bonds, in the District of Columbia, but was nevertheless held taxable on their account in the state of Pennsylvania.

I think a careful reading of the decision in Hawk vs. Bonn, *supra*, will disclose that when Judge Haynes speaks of property being "brought within the jurisdiction of the state," he means something more than merely transferring the physical things that constitute muniments of title or evidences of indebtedness to a location within the territory of the state. At any rate, whatever may be the true rule, I am satisfied that the mere *absence* of such evidences of title or indebtedness from the taxing state will not defeat the jurisdiction of that state, other circumstances sufficient to confer jurisdiction being present.

Nor have I any doubt that shares of stock, or rather certificates of such shares are to be classed with other kinds of intangible property, such as moneys, credits and investments in bonds, for the purpose of the present question. Much might be said as to the exact nature of a share of stock and that of a certificate thereof. It is sufficient to state however, that a share of stock in a corporation is personal property, and is more than a mere interest in the capital and property of the corporation itself; so that it constitutes a distinct subject of taxation.

Lee vs. Sturgis, 46 O. S., 153.

But as personal property, it is intangible, i. e., it is a right, or rather, a bundle of rights consisting of the right to participate in the management of the corporation, in its dividends and in the distribution of the corporate property upon the dissolution of the corporation. This right exists upon subscription and payment of the amount prescribed, whether a certificate has been issued or not. The right, however, is an assignable one, and in order to facilitate assignment certificates are issued. These certificates are not negotiable, as in the case of bonds, nor are they evidences of indebtedness, as in the case of bonds, notes and credits, but in my opinion they sustain the same relation to the substantive right which they represent as is sustained by such securities as notes and bonds.

It is probably true that certificates of stock, as such, are subject to certain process *in rem*, but for purposes of taxation I do not see how any distinction can be drawn between such certificates and other securities. All are alike and should be classed as intangible property, and I am of the opinion, notwithstanding the intimations found in the decision already made (and which may be explained on other reasons which I shall hereinafter point out) that mere physical possession of certificates of stock is of itself neither sufficient, on the one hand, to confer upon Ohio jurisdiction to tax them in the hands of a trustee, nor, when lacking, is that fact alone sufficient to defeat the jurisdiction of the state.

Therefore, I have reached the conclusion that, in the case mentioned by you, it is immaterial whether the actual certificates of stock, representing the shares constituting a trust estate, are held in Ohio or not.

The next two points likewise may be considered together. It seems that a different rule with respect to the significance of the jurisdiction of the court who appoints the person who acts in a representative capacity, may obtain in the case of executors and administrators on the one hand, and that of testamentary trustees on the other hand. This distinction is exemplified in the two cases of Lewis vs. County of Chester, referred to in Hawk vs. Bonn, *supra*, and Guthrie vs. Railway, *supra*. It is also found very sharply drawn in Mackay vs. San Francisco, *supra*. The rule as exemplified in these authorities is that where the estate of a deceased person is still in process of administration, it may be regarded as in the custody of the court of probate; so that

unless under the direction of that court a part of the estate is before settlement invested in another state and there managed by the executor or administrator who resides in such other state, the *situs* of the intangible assets of the estate is fixed by the jurisdiction of the appointing court.

See also Gallup vs. Schmidt, 154 Ind., 196.

But as to testamentary trustees deriving their authority to act from the will and taking as distributees from the executors or administrators, they are not regarded as officers of the court in the same sense as are such executors or administrators. The estate coming into their possession is no longer regarded as in the custody of the court, but is in their custody, and subject to their management and control, and this too although the approval of the court may be required to certain of their official acts. In such cases the testator is deemed to have intended that the estate should come into the full possession of the trustee during the life of the trust, and if the trustee happens to reside in a foreign state, his intention is deemed to be tantamount to transferring the estate from the state of probate to that of the trustee's residence. This rule, however, must be qualified as is at once apparent when Goodsite vs. Lane, *supra* is considered. The mere residence of the trustee, or one of them, if there are more than one, is not to control if the estate as such does not actually come into the foreign state. So where, as in that case, the beneficiary resided in Connecticut and the trustee actually conducted all the business of the estate in Connecticut or New York, and the corpus of the estate in a physical sense never came into Ohio, it was held that this state possessed no jurisdiction to tax the resident trustee.

I am of the opinion, therefore, that in the case of a trustee, as distinguished from an executor, jurisdiction of the court of probate is immaterial as affording a criterion by which to test the power of a given state to tax the estate in the hands of a trustee.

Is the residence of the beneficiary over a criterion of jurisdiction? It is clear upon the authorities already cited, and especially Tafel vs. Lewis, *supra* that the non- residence of a beneficiary is not sufficient to defeat jurisdiction, whether the officer is an executor or trustee, if securities are in his possession, and he derives his authority from an Ohio court, but in the opinion of Richards J., he mentions the residence of the beneficiary as being a possible ground of jurisdiction. This fact was regarded seemingly as material, although not necessarily controlling, in Guthrie vs. Railway *supra* as it is especially mentioned by the court in its statement of facts and referred to again in the opinion. It is, of course, true that the residence of a beneficiary in Ohio does not render the beneficiary, as such, liable for taxes on account of his beneficial interest in the estate. It is the trustee who is liable if anyone is liable. However, the fact that a trust is created for the benefit of an Ohio beneficiary, and vested in an Ohio trustee, is some ground, at least, upon which to found the jurisdiction of Ohio to tax the estate in the hands of the trustee.

In this connection I point out that in Guthrie vs. Railway, *supra*, the terms of the trust were quite similar to those stated by you with respect to the residence of the beneficiary, that is to say, the first or preferred was a non-resident, and the other beneficiaries were residents of Pennsylvania, while in the case you submit the preferred beneficiary was a resident of Illinois, and what might be termed the residuary beneficiary resides in Ohio. So that to the extent that the residence of some beneficiaries in Pennsylvania was material in the Guthrie case, the residence of one beneficiary in Ohio is material in the case submitted by you.

While I am not entirely clear as to the significance of the fact of the beneficiary's residence, I incline to the view that it may be considered in connection with other facts hereinafter to be commented upon as tending to establish Ohio's jurisdiction in the case you submit.

I have mentioned the actual investment of the trust estate or part of it in the taxing state, because this is a circumstance dwelt upon in all of the authorities which

I have cited. For example, in Lewis vs. County of Chester, *supra*, the actual investment of part of the trust estate in Pennsylvania by the executrix was held sufficient to confer upon Pennsylvania jurisdiction to tax that part, although as to the remainder of the estate the jurisdiction was held to be lacking on account of the fact that the estate was in probate in the state of New York. But, under the facts as you submit them, I take it that this question is immaterial. I gather that the trust estate was created in and to certain shares of stock, and that the trustee has no authority to invest and reinvest. That being the case, the question of business *situs* as exemplified in the decision already cited, and in cases like,

Grant vs. Jones, 39 O. S. 506.
Hubbard vs. Brush, 61 O. S. 252.
Catlin vs. Hull, 21 Vt. 152.
Walker vs. Jack, 88 Fed. 576.

and other similar decisions, is not present. That is to say there being no "investment" whatever the question as to the jurisdiction of the state to tax growing out of the investment of the trust fund within its borders, is absent from the case. There remains one element which I think is material, and which is made so by reason of the nature of the securities of which the estate consists. I refer to the fact that regardless of where the shares of stock are kept, all that could be done with reference to them by the trustee must be done in the state of Ohio. That is to say he is not the trustee of the fund, but rather the trustees of certain shares of stock. To be sure these shares of stock are in a Michigan corporation, and stockholders' meetings are doubtless held in that state, but lacking the power to dispose of the stock, or having it and not exercising it, his function with respect to the shares is precisely that of any resident of Ohio who might have shares in the same corporation. That is to say, as trustee, he is entitled to draw the dividends on the stock whenever they are declared; in his person he holds legal title to the shares. The laws of Ohio protect him in the ownership of such shares to the same extent that they protect any other citizen in the ownership of the shares of stock in a foreign corporation. Therefore, it is reasonable to hold that his obligation to the state as trustee growing out of his legal title to the shares and his residence in Ohio should be the same as that of any other owner of stock in a foreign corporation, especially since he is acting as trustee, and not as executor; since he is not required to discharge any managerial duties or functions with respect to the fund represented by the shares, but merely to act as the legal custodian of them, and since one of the beneficiaries for whom the estate was created is a resident of Ohio.

In short, then, I find the case to be more nearly like that of Guthrie vs. Railway, *supra* than it is like any of the other cases above cited and discussed. The only element which that case possesses, which is absent in the case you present, is the fact that the bonds which comprised the estate therein were those of a Pennsylvania corporation; but the court did not consider this fact material.

Even if the trustee in the case cited by you does possess the power of re-investment (though obviously he has not exercised it) the jurisdiction of Ohio to tax the estate in his hands could not be defeated except upon a showing of facts fully equivalent in importance to Goodsite vs. Lane, *supra*, viz.: that the stocks had never been brought into Ohio, that the business of managing the estate had always been carried on outside of Ohio, and that the beneficiary was a non-resident of the state.

For all the foregoing reasons, then, I am of the opinion that upon any interpretation of the facts which you submit "A" should pay taxes upon the stock held by him in trust in the Ohio county in which he resides.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

Since preparing the above opinion I have received an answer to the letter which I addressed to counsel for the trustee in question, from which it appears that the stock certificates representing the stock held by the trustee are located at Detroit, Mich., and that the trustee does not have power under the will to convert the shares of stock into money and to reinvest the fund, except in the event of the termination of the corporation, in which case, of course, he is empowered to invest the share of the corporate assets which would come into his hands as the legal owner of the shares of stock.

On these facts I am of the opinion, for reasons already stated, that the trustee should list these shares of stock in the county of his residence in Ohio.

1171.

HOW PROSECUTIONS BY STATE BOARD OF HEALTH FOR VIOLATION OF STANDING ORDERS MUST BE INSTITUTED—ENFORCEMENT OF SANITARY RULES AND REGULATIONS OF STATE BOARD OF HEALTH—PROSECUTION OF OFFENDERS FOR VIOLATION OF RULES AND REGULATIONS OF THE BOARD.

A prosecution by the state board of health for the violation of standing orders or regulations made by it must be instituted by the secretary of the state board of health on the direction of the president thereof.

Under the provisions of section 1238, General Code, local boards of health, health authorities and officials, police officers, sheriffs, constables and other officers and employes of the state, or of the county, city or township, are required to enforce the sanitary rules and regulations of the state board of health, the local officers and authorities named in said section are likewise authorized to prosecute offenders for violation of the sanitary rules and regulations of the board.

COLUMBUS, OHIO, September 24, 1914.

HON. CLARE CALDWELL, *City Solicitor, Niles, Ohio.*

DEAR SIR:—Under date of August 12, 1914, you ask opinion of me as follows:

> "I wish to submit for your opinion the following case which bears upon the rules and regulations of the Ohio state board of health, governing the construction, installation and inspection of plumbing and drainage, as adopted July 23, 1913:
>
> "Contrary to sections 18, 67 and 102, 'A' installs certain plumbing fixtures in his house. The work shows for itself that in violation of section 18 joints are not wiped, and contrary to section 67 a sink trap has no vent pipe. The local board of health has appointed the sanitary policeman to inspect plumbing work, but contrary to section 102 he had no notice from 'A' to inspect the job until after a part of it had been covered over.
>
> "The local board of health has never regularly adopted rules to govern work of the above nature. However, it has received copies of the state board's rules and regulations and has gone on record as a board to respect said rules and regulations.

"As to the authority of the state board to pass such rules and regulations, I believe this is properly acquired through section 1237 of the General Code of Ohio. The question then arises as to the manner of enforcing and punishing for violations.

"In the case above cited can any person make complaint against 'A' as in ordinary cases of misdemeanor, or is the action confined to the state board through its proper officers making complaint?

"Where the local board has adopted a code of rules and regulations covering these requirements, the question above would not arise because action would properly be brought for a violation of the local rules."

By section 1237, General Code, the state board of health is given power to make special or standing orders for such sanitary matters as it deems best to control by a general rule, and undoubtedly it was in the assertion of this power that the regulations mentioned in your communication were adopted by said board. However, no question is made by you as to the power of the state board of health to adopt the regulations mentioned, nor as to their validity in any other respect. The sole question presented is as to the proper person or authority to file complaint and institute prosecution for the violation of the regulations.

You state that the local board of health has never regularly adopted rules to govern work of the above nature, but that it has, however, received copies of the state board's rules and regulations and has gone on record as a board to respect the same. It is plain that this action on the part of the local board of health with respect to the rules and regulations of the state board is in no wise effective to make the same regulations of the local board. This conclusion follows from the consideration that section 4413, General Code, provides with respect to local boards of health that orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified, as are ordinances of a municipality, and it follows that regulations of local boards of health intended for observance by the general public can be made effective in no other way than as directed by this section of the General Code.

As pertinent to the question presented section 1247 provides:

"* * * The laws prescribing the modes of procedure, courts, practice, penalties or judgments applicable to local boards of health, shall apply to the state board of health and the violation of its rules and orders. * * *"

Applicable to the violation of orders and regulations of local boards of health, section 4414, General Code, provides as follows:

"Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a second or repeated offense."

By the provisions of section 1247, General Code, above quoted, the penalties provided in section 4414 apply in cases involving the violation of the orders and regulations of the state board of health, and with respect to prosecutions for such violations, said section 1247 further provides as follows:

"All prosecutions and proceedings by the state board of health for the violation of a provision of this chapter which the board is required to enforce, or for the violation of any of the orders or regulations of the board, shall be instituted by its secretary on the order of the president of the board. * * * All fines or judgments collected by the board shall be paid into the state treasury to the credit of such board."

It, therefore, follows from a consideration of the provisions of this section that the only person authorized to institute a prosecution on behalf of the state board of health for a violation of the regulations mentioned in your communication, is the secretary of said board, and he is only authorized to do so on the order of the president of the board. However, the state board of health is not the only authority charged with the duty of enforcing rules and regulations adopted by it, and in this behalf section 1238 of the General Code provides as follows:

"Local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables and other officers and employes of the state of any county, city or township, shall enforce the quarantine and sanitary rules and regulations adopted by the state board of health."

It is not apparent how the local officers and authorities named in this section can in all cases effectually enforce the rules and regulations of the state board of health without the right to institute prosecutions for violations of said rules and regulations, and I am, therefore, of the opinion that the local authorities of your city charged with and assuming the duty of enforcing the regulations of the state board of health noted in your communication, have the authority to institute the prosecution for its violation. By virtue of the provisions of section 1247, General Code, such prosecutions should proceed as to the court and procedure in like manner as if the prosecution were for a violation of an order of the local board of health.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1172.

A DEMAND UPON A COUNTY AUDITOR AND TREASURER FOR ADVANCE PAYMENT OF MUNICIPAL TAXES, BEFORE SETTLEMENT, MAY BE MADE ONLY BY THE CITY TREASURER.

Demands upon the county auditor and treasurer for advance payment of municipal taxes before settlement, may be made only by the city treasurer. No board or officer whatever has authority to control the distribution among the several municipal funds so drawn from the county treasury and placed in the municipal treasury; such moneys belong, pro rata, to the several funds in the proportion determined by the municipal levies. The county commissioners have no function whatever to discharge with respect to such advance drafts; the trustees of the sinking fund of the city have no authority to make demand upon the county auditor and treasurer for advance payments on account of the city sinking fund levies.

COLUMBUS, OHIO, September 24, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of August 5th, requesting my opinion upon the following question:

> "1. Who are the proper local authorities to represent the city in making a demand upon the county auditor for municipal funds, particularly as to the distribution of such advances between municipal funds?
>
> "2. If a board of county commissioners, by resolution, make distribution of such advance, giving to the sinking fund commission of a city its proportionate share of said advance, may such action of the county commissioners be disregarded by the city auditor and city treasurer, and the sinking funds of the city be denied any portion thereof?
>
> "3. Have the trustees of the sinking funds of a city the authority under section 2692 to make demand upon the county auditor, by passing the proper resolution, for an advance due to the sinking funds?
>
> "4. May the county auditor, or city auditor and city treasurer credit to any municipal fund more than its proportionate share (as shown by the levy) of the amount collected at the time the advance payment is made "

Section 2692, General Code, properly interpreted furnishes, I think, a complete answer to all of your questions.

It is as follows:

> "When the local authorities so request, the county auditor may draw, and the county treasurer shall pay on such draft to township, city and village treasurers, and the treasurer of any board of education, from June twentieth and December twentieth to the date of the semi-annual distribution, each year, any sum not exceeding two-thirds of the current collection of taxes for such local authorities, respectively, in advance of the semi-annual settlements."

It is obvious that this section is ambiguous. The term "local authorities" as therein used seems to designate the "township, city and village treasurers" who are the only such authorities mentioned in the section, but this conclusion is by no means certain.

Regarding the section then as ambiguous and tracing its legislative history, I find that the term in question has been in the statute since it was incorporated in

the Revised Statutes of 1880 as section 1123 thereof. Looking to the code of 1880, I find that the section 70 O. L., 183, is given as the source of that section.

The said act is in full as follows:

"Be it Enacted by the General Assembly of the State of Ohio:

"Section 1. That the treasurer of each county in this state shall, between the fifteenth and thirtieth days of December, and fifteenth and thirtieth days of June, annually, pay, upon the warrant of the county auditor, to each township treasurer, city treasurer, treasurer of incorporated village. and treasurer of each city or village board of education in his county, a sum equal, as near as may be, to two-thirds of the current collection of taxes assessed and collected for and in behalf of these several corporations, townships or boards, which shall be held and treated as advance payment in behalf of the several township, city, village and school funds.

"Section 2. That the county auditor of each county in this state shall, upon demand being made by the several township treasurers, city treasurers, treasurers of incorporated villages, and treasurers of school boards, issue his warrant upon the county treasurer in favor of such officers, for a sum as aforesaid of two-thirds, as near as may be, of the current collections in behalf of said townships, cities, villages and school boards, specifying in said warrant the amount belonging to each of the several funds.

"Section 3. The auditor and treasurer of each county shall keep a just and accurate account of the money paid to each township, city, village and school board, for final adjustment of the semi-annual and annual settlements with the same officers."

It is apparent from an examination in the foregoing act that the legislative intention was that the proper authorities to make demand upon the county treasury for advancements should be the treasurers of the local subdivisions.

Of course, the verbal changes made merely in process of codification are presumed not to have evinced an intention to change the law. Accordingly, I am of the opinion that what little evidence of intention is actually apparent on the face of section 2692, General Code, in its present form is borne out by the legislative history of the section and that the local treasurers are proper local authorities to make demand upon the county auditor for advancements on account of local tax distribution.

Therefore answering your first question in part, I am of the opinion that the proper local authority to represent the city in making a demand upon the county auditor for municipal funds is the city treasurer.

But your first question also asks as to where authority is lodged to distribute such an advancement between municipal funds.

This question assumes that there is authority to make at will a given distribution of an advancement. I am not so sure that this is the case, and shall first, therefore, examine the question as to whether or not any officer has authority, or discretion, to control the distribution of advance payments as among the several municipal funds.

Section 2692, General Code, in its present form is almost perfectly ambiguous on this point, unless presumptions are indulged in. Putting it in another way, there is ground for the conclusion that section 2692 is simply silent on this point; and that the question must be answered upon the assumption that it is so silent.

Let this angle of view then be developed. The proceeds of the collection of taxes in the hands of the county treasurer constitute an undivided fund. When a tax payer, pays his taxes to the county treasurer, he is contributing pro rata to all

the governmental purposes for which levies have been made. This is true, I think, without statutory provisions, but in the case of real property taxes, it is made plain by the provisions of section 2655, General Code, which is as follows:

> "If a person desires to pay only a portion of a tax charged on real estate otherwise than in such installments, such person shall pay a like proportion of all the taxes charged thereon for state, county, township or other purposes, exclusive of road taxes. No person shall be permitted to pay one or more of such taxes without paying the others in like proportion, except only when the collection of a particular tax is legally enjoined."

Now the money comes into the possession of the county treasurer, it is held by him before settlement or advance payment in a commingled mass, which consists of the fruits of the several levies. The relation of the levy to the fund is well understood, the one being the source to the other. Inasmuch as the undivided tax fund consists of a conglomeration of the proceeds of the collection of all levies, it follows that the money in it at a given time to the extent that any portion thereof may be said to belong to a municipality as the fruit of its levies, may likewise be said and to the same extent to belong equitably to the several municipal levies themselves. That is to say if at a given time there is in the undivided taxes in the hands of the county treasurer money which by calculation can be ascertained to belong to the municipality in an amount of say ten thousand dollars, it must be equally true that of that ten thousand dollars, three thousand dollars, for example, belongs to the sinking fund, three thousand dollars to the general fund, etc.

It will be borne in mind that I am discussing the hypothesis that the statutes are absolutely silent with respect to any power to apportion an advance payment as among the several municipal funds. Without elaborating the discussion further, I may say that I am of the opinion that if the statutes are silent in this particular, there is no such power, so that if the city treasurer makes demand upon the county auditor for an advance tax warrant, he has no right to specify that the draft shall be credited to a particular municipal levy, but must take on account of the municipality generally, and the money which he receives must be divided in proportion to the municipality's levies among the funds created thereby, unless a statute can be found expressly authorizing some other distribution.

What has been said rests upon two hypotheses:

1. That section 2692 is impossible of interpretation so as to furnish an answer to this part of your question.

2. That no other section of the General Code supplies an answer thereto.

The legislative history of section 2692 does furnish an answer which is quite consistent with the statement of the law, as it would exist in the absence of express provision of statutes, as I have above outlined it. It will be observed that section one of the original act in 70 O. L., 184, provided that the sum paid by the county treasurer to the city treasurer should be "held and treated as advance payment in behalf of the several * * * city * * * funds."

Furthermore, section two of the original act provided that the county auditor's warrant should specify "the amount belonging to each of the several funds" without conferring upon the city treasurer, or any other officer, or board, any power to control this specification. Of course, the county auditor in this transaction clearly acts in a ministerial capacity; so that any specification of the amount belonging to the several funds, which he would be required to make, would be on the basis of a mere mathematical calculation.

I am clearly of the opinion then that under the original law, which has in this respect never been amended, save in process of codification, no city authorities had any power or right to control the distribution among the city funds of advance

payments from the tax collections, but that such advance payments were required to be credited pro rata to the several municipal funds for which levies had been made.

I think then that when the legislature omitted this machinery which was found in the original statutes in codifying the statute law of the state in 1880, the omission must have been due to the belief that such machinery was unnecessary because the automatic proportional distribution of advance payment among the several funds would be required by necessary implication in the absence of any express provision of statute.

I am, therefore, of the opinion that having regard to its legislative history, the necessary implication from present section 2692, General Code, is that there is no authority on the part of any one to control the distribution of advance payments of taxes to the city treasurer as between municipal funds.

Of course, section 2692, which is an old statute, would yield in this particular to more recently enacted provisions should this implication prove inconsistent with such other statutes, but I find no such inconsistent provisions. One would expect to find them, if at all, in the Municipal Code. They are not there, but on the contrary the following provisions and considerations consistent with what has already been said are found:

> "Sec. 3795. The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council.
>
> "Sec. 3797. At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from 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 from and within such appropriations and balances thereof.
>
> "Sec. 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 3795, supra, makes the city treasurer a mere ministerial officer with respect to the distribution of taxes of the corporation among the several funds. Sections 3797 and 5649-3d which provide for appropriations do not lodge in the council any authority to control the distribution of money belonging to the several funds,

because appropriations are made from funds in the city treasury and not from the undivided taxes. In fact, the moment the tax moneys reach the city treasury they are automatically distributed to the several funds therein and council cannot act with respect to them at all until this distribution takes place.

This fact is further emphasized by the provisions of section 3799, General Code, which formerly authorized the transfer of one fund or part thereof to another fund. This section has been so amended as somewhat to limit its scope (see 103 O. L., 522), but in its present, as well as in its original form, it presupposes an automatic distribution in the first instance.

With respect to the sinking fund to which some of your questions relate, no distinction is observable. Section 4512, General Code, defines the relation of the sinking fund trustees as custodians of the sinking fund to the municipal treasurer in this respect which is as follows:

> "Sec. 4512. Upon demand of the board, the city auditor or village clerk shall report to it balances belonging to the city or village, to the credit of the sinking fund, interest accounts, or for any bonds issued for or by the corporation, and all officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select."

It is obvious that the sinking fund trustees have the right to have paid to them only such balances as belong "to the credit of the sinking fund," etc. The city auditor could then only certify as being to the credit of the sinking fund such portion of an advance demand on account of municipal levies as belongs to that fund.

I may mention that the bookkeeping with respect to the several municipal funds devolves upon the city auditor, or village clerk, as the case may be. His function in the premises is prescribed by section 4276, which provides as follows:

> "The auditor shall keep the books of the city, exhibit accurate statements of all moneys received and expended, and of all property owned by the city and the income derived therefrom, and of all taxes and assessments."

It is obvious that the auditor has no discretion in the premises.

From all these considerations then, I am of the opinion that no authorities either of the county or of the city have any discretionary power with respect to the distribution of advances between municipal funds.

Your remaining questions are perhaps answered by the discussion already indulged in.

As to your second question, I may remark:

1. That the county commissioners have absolutely nothing to do with the matter of advance drafts, so that their resolution would have no effect in the case.

2. That the city auditor and city treasurer have no authority to deny to the sinking fund of the city its proper proportion of an advance draft.

As to the third question which you ask, I am of the opinion that the trustees of the sinking fund have no authority to make demand upon the county auditor for an advance due to the sinking funds. The demand must be made by the city treasurer, and the payment of him belongs proportionally to all the funds. When payment has been made, then the trustees of the sinking fund under section 4512, General Code, may demand the sinking fund's share as therein provided.

Your fourth question may be generally answered in the negative upon the basis of the previous discussion.

I may add that your question does not require me to consider whether or not the city treasurer, who alone can be recognized by the county auditor in making a demand for advances on behalf of the city, could be compelled to make such a demand at the behest of the council on the theory that such control of the treasurer's acts is implied from council's power to "have the management and control of the finances * * * of the corporation," except as may be otherwise provided (section 4240, General Code); or at that of the trustees of the sinking fund, on the theory that the power to order the treasury to make an advance draft results from the power of such trustees to "have the management and control of such sinking fund." Accordingly, I express no opinion on this question, contenting myself with the statement, sufficient for the purposes of your communication, that at all events the council, or the trustees of the sinking fund, as the case might be, would have to reach the county officers through the city treasurer.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1173.

NUMBER OF TIMES THAT A TEACHER'S CERTIFICATE COVERED BY SECTIONS 7845 AND 7846, GENERAL CODE, AS AMENDED, MAY BE RENEWED.

Under the provisions of section 7845, and 7846, General Code, as amended, 104 O. L., 108, constituting a part of the recently adopted school code, the certificates covered by said sections may be renewed more than twice for the reason that there is no limitation in said sections as to the number of times such certificates may be renewed.

COLUMBUS, OHIO, September 24, 1914

HON. W. D. FULTON, *Member of House of Representatives, Newark, Ohio.*

DEAR SIR:—Under date of March 24th, you submitted the following request:

> "I am writing at the request of a number of teachers of this city in regard to the new school law, sections 7844, 7845 and 7846.
>
> "I understand that our superintendent here has told the teachers that no certificate could be renewed more than twice, even if the teacher has had five years' experience of successful teaching. They seem anxious for your opinion and I would greatly appreciate it if you will write me; I have my own views about it and think there is no question."

In reply thereto section 7844, as amended 104 Ohio Laws, page 108, provides as follows:

> "Each city board of school examiners may grant teachers' certificates for one year and three years from the first day of September following the examination, which shall be valid within the district wherein they are issued. But certificates granted for one year or three years must be regarded as provisional certificates and shall be renewed only twice each."

Section 7845 of the General Code, as amended 104 Ohio Laws, page 108, provides as follows:

> "All five year and eight-year certificates now granted shall continue in force until the end of their terms and shall be renewed by the superintendent of public instruction upon proof that the holders thereof have taught successfully until the time of each renewal. Each application for renewal shall be accompanied by a fee of fifty cents and shall be filed in the office of the superintendent of public instruction."

Section 7846 of the General Code, as amended 104 Ohio Laws, page 108, provides as follows:

> "All two-year and three-year primary, elementary and high school certificates now granted shall continue in force until the end of their terms and may be renewed by the city boards of examiners on proof of five years' successful teaching experience."

It will be noted, under the above provisions, that all five-year and eight-year certificates now granted shall continue in force until the end of their terms and shall be renewed by the superintendent of public instruction upon proof that the holders thereof have taught successfully until the time of each renewal. This provision is contained in section 7845, General Code, supra. There is no limitation in said section as to the number of times that such certificates may be renewed, such as the limitation contained in section 7846, General Code, supra, to which I will later refer.

Section 7846, General Code, supra, provides that all two and three-year primary, elementary and high school certificates *now granted* shall continue in force until the end of their terms and may be renewed by the city board of examiners on proof of five years' successful teaching experience. There is, likewise, no limitation, in this section, as to the number of renewals that may be granted under such certificates.

Section 7844, supra, refers to certificates which may be granted by a city board of school examiners for one year and three years from the first day of September following the examination. Said section specifically says that these certificates are to be regarded as provisional certificates and shall be renewed only twice each. If the legislature had intended to apply this same limitation as to the number of times other certificates could be renewed, then surely the legislature would have specifically provided for such limitation by expressly stating same in section 7845 and 7846, supra.

In answer to your question I am of the opinion that the certificates covered by sections 7845 and 7846 may be renewed more than twice for the reason, as above stated, that there is no limitation as to the number of such renewals that may be granted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1174.

ROAD IMPROVEMENT BONDS—SUPPLEMENTED TRANSCRIPT OF THE PROCEEDINGS FOR AN ISSUANCE OF BONDS BY THE COUNTY COMMISSIONERS, LORAIN COUNTY, OHIO, IN THE SUM OF $17,000 AND $20,000.

Supplemented transcript of the proceedings of an issuance of road improvement bonds by the board of county commissioners of Lorain county, Ohio, in the sum of $17,000 *and* $20,000, *respectively, shows that said proceedings are in all respects in conformity to law, and said bonds would constitute a legal and valid indebtedness of Lorain county, subject to payment as therein provided.*

COLUMBUS, OHIO, September 25, 1914.

The Industrial Commission of Ohio, Majestic Bldg., Columbus, Ohio.

GENTLEMEN:—I transmit to you, herewith, supplemented transcripts of the proceedings for the issuance of bonds by the board of county commissioners, Lorain county, Ohio, for the improvement of two roads, one of which lies in Avon township of said county and the other of which lies within Sheffield township thereof, the amounts of said issues being, respectively, $20,000 and $17,000.

I have examined the said transcripts, and upon facts thereby disclosed, as well as certain inquiries respecting tax rates made of the taxing officer, I am of the opinion that the said proceedings are, in all respects, in conformity to law, and that said bonds, if accepted by the industrial commission, would constitute a valid and legal indebtedness of Lorain county, subject to payment as therein provided, in accordance with law.

I may add that upon a previous examination I felt obliged to recommend the amendment of the resolution of issuance. This amendment necessitated making certain alterations and interlineations on the face of the bonds. This, I am advised, has been done, and I am told that the treasurer of state now holds the bonds amended as aforesaid.

I hereby certify, therefore, that said bonds have been issued in accordance with the provisions of law, and that the same constitute a good and valid legal obligation against the county of Lorain, to be paid in accordance with the terms specified therein.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1175.

TORRENS LAND ACT—EXAMINERS NOT SUBJECT TO CIVIL SERVICE REGULATIONS.

Under the provisions of section 8572-3, General Code, the examiners authorized by section 3 of the Torrens land act, are not in the service of the state, counties or cities thereof, within the meaning of the civil service act, and are not subject to civil service regulations.

COLUMBUS, OHIO, October 1, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of July 16, 1914, you inquire whether or not the examiners authorized by section 3 of the act of 103 Ohio Laws, 914, the Torrens land registration act, are in or out of the classified service.

Section 3 of said act, section 8572-3, General Code, provides:

> "The common pleas court in each county shall appoint, subject to removal at any time by and at the will of said court, one or more examiners of title who shall be officers of the court and who shall be competent attorneys at law with skill and experience in the examination of titles to real estate, each of whom before entering on the discharge of his duties shall give a bond payable to the state of Ohio for the use of whom it may concern in an amount and with such sureties as shall be approved by a judge of said court, but in no case less than one thousand dollars, conditioned for the honest and faithful performance of his duties and the faithful accounting for and turning over of all papers, documents, money or property which may come into his possession by virtue of his appointment, which bond shall be filed with the clerk of said court and duly recorded and shall then be deposited with the treasurer of the county who shall receipt to the clerk therefor by endorsement on the record of such bond. Said examiners shall have authority to administer oaths, take testimony and other evidence and generally to exercise all powers and perform all duties of masters in chancery. No examiner of titles shall in any way act as attorney for or represent any party or person in interest, in any matters in any way relating to proceedings to register title to land or any interest or estate therein or lien or charge thereon or in any suit or proceeding relating to registered land."

These examiners are officers of the court and generally have all the powers and duties of masters in chancery.

The compensation of these examiners is not paid from state, county, or other public funds. They are paid by fees and these are chargeable as costs against the parties to the action for registration of title as the court may determine.

Section 112 of said act, section 8572-112, General Code, prescribes and fixes the fees to be paid. Said section provides in part:

> "Examiners of title shall receive for examining title on original reference and making report on all matters arising under the application, including final certificate as to all necessary parties being made and properly brought before the court and to the proceedings being regular and legal, $5.00 for each separate and distinct parcel or body of land included in the

application appraised for taxation at $2,000.00 or less, and on such parcels so valued at from $2,000.00 to $5,000.00 one-half of one per centum of such value, and where the court for special reasons, may so order, an additional one-tenth of one per centum in the excess value above $5,000.00 up to $30,000.00, the fee in no case to be in excess of $50.00 nor in ordinary cases in excess of $25.00 for each separate body or parcel of land although made up of more than one tract.

* * * * * * * * * * * *

"Costs as herein provided may in any case be taxed and by the court ordered to be paid by the parties in such manner as to it may seem just and reasonable."

In section 1 of the civil service act, section 486-1, General Code, the term "civil service" is defined:

"1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof.

"2. The 'state service' shall include all offices in the service of the state or the counties thereof, except the cities and city school districts."

It will be observed that the statute does not fix the number of examiners to be appointed. This is left entirely within the discretion of the court, and such examiners are subject to removal at the will of the court.

The statute further provides that these examiners "shall have authority to administer oaths, take testimony and other evidence and generally to exercise all powers and perform all duties of masters in chancery."

The nature of the office of master in chancery is defined at page 429 of volume 16 of Cyc., where it is said:

"There were in the English chancery, and there are still in most American jurisdictions, officers known as masters in chancery, who act as assistants to the court, performing both judicial and ministerial functions."

The examiners in question are in effect assistants to the court and are required to take the evidence on cases referred to them and report their findings to the court as is required of a master in chancery.

Section 19 of the Torrens act, section 8572-19, General Code, reads in part:

"If, in any case, an answer is filed raising an issue, the cause shall be set down for hearing on the motion of either party. The court may refer the cause or any part thereof to one of the examiners of titles as master, to hear the parties and their evidence, and make report thereof and his findings thereon to the court. * * *"

It is my conclusion, therefore, that the examiners authorized by the Torrens land registration act are not in the service of the state, or of the counties, cities or city school districts thereof, within the meaning of the civil service law, as above defined, and such examiners are not subject to civil service regulations.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1176.

CHIEF OF POLICE IN THE CLASSIFIED SERVICE, UNDER THE NEW CIVIL SERVICE LAW—RIGHT OF MAYOR TO APPOINT CHIEF OF POLICE—PROMOTIONAL APPOINTMENT.

The chief of police of a city is in the classified service under the new civil service law.

The mayor cannot make a permanent appointment to fill a vacancy in the position of chief of police without notifying the civil service commission and securing from them names from the eligible list to be secured by examinations.

In promotional appointments, all examinations shall be competitive, and only one name is certified by the civil service commission for appointment.

COLUMBUS, OHIO, October 1, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of August 28, 1914, Hon. George. J. Carew, city solicitor of Youngstown, Ohio, submits the following inquiries:

> "First. Are the chiefs of police under the civil service law?
>
> "Second. If they are, has the mayor the right to make a permanent appointment without the civil service commission holding examinations for the position?
>
> "Third. If it is necessary to hold examinations, should they be the competitive for promotion? What I mean by that is, does the civil service commission certify one name only to the appointing power?"

The chief of police of a city is in the classified service under the new civil service act. It has been so held in a former opinion to you.

When a vacancy occurs in that position, no valid permanent appointment can be made except in the manner provided by the civil service act.

Section 13 of the civil service law, section 486-13, General Code, reads in part:

> "The head of a department, office or institution in which a position in the competitive classified service is to be filled shall notify the commission of the fact, and the commission shall, except as provided in section 15 hereof, certify to him the names and addresses of the three candidates standing highest on the eligible list, for the class or grade to which said position belongs. * * * The appointing officer shall notify said commission of each position to be filled separately, and shall fill such position by appointment of one of three persons certified to him by the commission thereof."

Section 15 of the act, section 486-15, General Code, which is referred to in section 13, provides for promotions, as follows:

> "Vacancies in positions in the competitive class shall be filled as far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the competitive classified service, and for making promotions in the competitive classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service; and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest

of the service so to fill such vacancies. All examinations for promotion shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing power only the name of the person having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations."

By virtue of this section vacancies in position "shall be filled so far as practicable by promotion." It is further provided that the civil service commission "shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission it shall be for the best interest of the service so to fill such vacancies."

By virtue of this provision the civil service commission is to determine what positions shall be filled by promotions. Examinations for promotions are required to be competitive.

It is further provided in this section that "In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing power only the name of the person having the highest rating."

By virtue of this provision only one name is certified to the appointing power where vacancies are filled by promotion.

In answer to the specific question:

First. The chief of police of a city is in the classified service under the civil service law.

Second. The mayor cannot make a permanent appointment to fill a vacancy in the position of chief of police without notifying the civil service commission and securing from them names from the eligible list to be secured by examinations.

Third. In promotional appointments all examinations shall be competitive and only one name is certified by the civil service commission for appointment.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1177.

MEMBERS OF THE COUNTY BOARD OF SCHOOL EXAMINERS NOT SUBJECT TO THE CIVIL SERVICE LAW.

The members of the county board of school examiners authorized by section 7811, General Code, as amended, 104 O. L., 102, are not subject to the civil service law.

COLUMBUS, OHIO, October 1, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Your letter of September 12, 1914, is received, in which you inquire:

"The state civil service commission desires your opinion as to whether or not county school examiners under the recent school legislation are in or out of the classified service."

Section 7811, General Code, as amended in 104 Ohio Laws, 102 provides for the appointment of the county board of school examiners as follows:

> "There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. * * *"

The county superintendent is one of the examiners by virtue of his office and the county board of education appoints the other two examiners.

County school districts have been created by section 4679, General Code, as amended in 104 Ohio Laws, 133. This section reads:

> "The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts."

Section 4684, General Code, as amended in 104 Ohio Laws, 133, provides:

> "Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural school district is situated in more than one county such district shall become a part of the county school district in which the greatest part of the territory of such village or rural district is situated."

Each county is to have a county board of school examiners and these examiners are appointed by the county board of education. This board acts for the county school district. Certificates issued by these examiners are valid in all village and rural school districts of the county wherein they are issued.

Section 7821, General Code, as amended in 104 Ohio Laws, 104, reads in part:

> "County boards of school examiners may grant teachers' certificates for one year and three years which shall be valid in all villages, and rural school districts of the county wherein they are issued. * * *"

These certificates are not valid in city school districts.

The civil service act applies only to city school districts. It does not apply to village, rural or county school districts.

Section 1 of the civil service act, section 486-1, General Code, reads in part:

> "The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof."

The county school examiners are not, therefore, subject to the civil service act.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

1178.

RIGHT OF ONE PENSIONED BY THE PEDERAL GOVERNMENT TO DRAW BLIND RELIEF—OHIO BLIND RELIEF LAWS.

The words "and such relief shall be in place of all other relief of a public nature," as found in section 2967, G. C., do not preclude a pensioner of the federal government from drawing blind relief, nor does the drawing of a federal pension affect the right of a blind person to relief under the Ohio blind relief laws.

COLUMBUS, OHIO, October 1, 1914.

HON. THOS. L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of September 19, 1914, in which you inquire whether the language of section 2967, G. C. (103 O. L., p. 60), where it reads, "and such relief shall be in place of all other relief of a public nature," will preclude its recipient from receiving a soldier's pension from the federal government?

Ordinarily, as a matter of law, a pension is classed as an allowance of money granted by the government for services rendered in the past, and while in some instances based on indigency, cannot be classed as relief.

I am of the opinion that two reasons exist why the drawing of a soldier's pension or widow's pension from the federal government may not affect the right of such person to receive blind relief, or the receipt of blind relief cannot affect the right to receive such pension. They are:

1st. The federal pension is not "relief" in the sense of the language used in section 2967.

2nd. The language of 2967 has no application to relief furnished by another government than the state of Ohio, or some of its subdivisions.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1179.

RIGHT OF AUDITOR OF STATE TO ISSUE WARRANTS TO PAYMASTERS OF THE RESPECTIVE STATE DEPARTMENTS FOR EMPLOYES THEREIN.

Under sections 242 and 243, General Code, the auditor of state may issue warrants to paymasters of the respective state departments to whom has been assigned the pay of the employes therein.

COLUMBUS, OHIO, October 1, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 7, 1914, wherein you state:

> "Enclosed you will find a certificate that I desire to employ and attach to the pay rolls issued by this department to the several boards and commissions of the state.
>
> "I wish you would render me an opinion as to whether this certificate is sufficient and will fully protect the auditor of state and be a substantial compliance with sections 242 and 243 of the General Code."

The certificate, so called, enclosed in your letter, is a form of assignment by the employes of a state department to a person named as paymaster of the department, of their pay, and contains the authorization of such employes to the paymaster to receive and receipt for warrants in his own name in the amount of the pay roll, or one or more warrants for the aggregate, as to the paymaster may seem convenient and be satisfactory to the auditor of state. There is also space for the writing in of the names and titles of the employes of the department, and their signatures.

Sections 242 and 243, General Code, provides as follows:

> "Sec. 242. The auditor of state shall keep an account of all appropriations made by law and of the warrants drawn on and moneys paid out of them. No money shall be drawn from the treasury except on his warrant and he shall keep an account of the number, date, and amount of each warrant, in whose favor it was drawn, on what fund, and on what account, and his books shall at all times show the exact amount of money which should be in the treasury, the amount thereof belonging to each particular fund, the balance remaining of each appropriation and the amount of bonds, stocks, securities and other property which should be in the treasury.
>
> "Sec. 243. The auditor of state shall examine each claim presented for payment from the state treasury, and, if he find it legally due and there is money in the treasury duly appropriated to pay it, he shall issue to the person entitled to receive the money thereon a warrant on the treasurer of state for the amount found due, take a receipt on the face of the claim for the warrant so issued, and file and preserve the claim in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appro priated to pay it."

I am of the opinion that said form is in substantial compliance with sections 242 and 243. The requirement of section 243 that the auditor shall issue warrants to persons entitled to receive the money on them, is met by the issuance of warrants in favor of the paymaster, because by virtue of the assignment to him he becomes the person entitled to receive the money on the pay roll voucher.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1180.

CIRCUMSTANCES UNDER WHICH A CHANGE IN THE PLANS AND SPECIFICATIONS OF A BRIDGE SUBSTRUCTURE INVOLVING ADDITIONAL COST MAY BE MADE—AGGREGATE COST OF STRUCTURE MAY NOT BE EXCEEDED.

A change in the plans and specifications of a bridge substructure, involving an additional cost, exceeding in the aggregate the amount in the estimate for such substructure, may not lawfully be made. In the event that the necessity to make an addition arises in the course of construction, the necessary addition must be regarded as a separate improvement, and the additional materials and labor must be furnished and performed under plans, specifications and estimates with advertising and competitive bidding in the manner provided by law for the making of changes to county bridges.

COLUMBUS, OHIO, October 1, 1914.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Your letter of September 19th, previously acknowledged, requests my opinion as to whether or not changes in the plans and specifications of a bridge substructure can be made during the course of construction, in such manner as to cause the total cost of the work to exceed the original estimate.

Section 2358, General Code, provides as follows:

"No contract shall be made for a public building, bridge or bridge substructure, or for any addition to, change, improvement or repair thereof, or for the labor and materials herein provided for, at a price in excess of the estimates required to be made by the preceding sections."

Section 2343, General Code, provides as follows:

"When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: Full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

"Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

Section 2350, General Code, provides as follows:

"If the plans, drawings representations, bills of material, specifications of work and estimates relate to the building of a bridge, they shall be submitted to the commissioners, county auditor and county surveyor. If ap-

proved by a majority of them, a copy thereof shall be deposited with the county auditor and kept for the inspection of parties interested."

It will not be necessary to quote other provisions of the related statutes. Suffice it to state that they contain on the one hand, no express authority, and on the other hand, no explicit prohibition relative to making changes in the plans and specifications after the work has been begun, which, of course, would necessarily involve a change in the total cost of the improvement.

Similar provisions with respect to municipal and state contracts do provide for such cases. With respect to said contracts, the provision is that of section 2320, General Code, which is as follows:

"After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increase or decrease the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specification of work and bills of material shall be filed with the auditor of state as required with original plans."

With respect to municipal contracts, the provision is that of sections 4331, et seq., General Code, the first of which sections provides as follows:

"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be made of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

The question, then, is as to power to make a change in the specifications so as to increase the total cost in the absence of explicit authority, and in the face of a statute limiting the original contract to the estimate.

On the one hand it appears that the statutes relative to the making of changes or modifications in state and municipal contracts are not grants of power, rather they are limitations upon the exercise of a power, the existence of which seems to be assumed.

I am, therefore, of the opinion, as a matter of statutory interpretation, as well as upon the principle which is discussed in Dillon on Municipal Corporations, volume 2, section 813, that the power to contract for an improvement implies the power to stipulate in that contract for the making of changes in the specifications, and for the manner in which such changes shall be authorized.

So, in a sense, it follows that work done under changed plans and specifications is virtually work done under the contract, where the right to make such change is reserved in the contract.

The question then arises as to the effect of the first of the above quoted sections, viz., 2358, General Code. Primarily, of course, this section operates upon the contract itself and prohibits it from being entered into at a price in excess of the estimates. Nevertheless, I think it operates also upon the power to order changes in the plans and specifications involving an increase in the cost of the improvement, especially where that power exists by implication and may be effectively exercised only through stipulations of the contract itself. Indeed, the statute is at least, sus-

ceptible to an interpretation which would practically forbid such changes, the question being dependent upon the meaning of the word "change" as used in the statute.

It appears that the change considered necessary is to leave the sheeting around the concrete piers in the bed of the river to remain in place instead of being removed as originally contemplated. This sheeting is valuable to the contractor and he will not consent to leaving it in place except in consideration of the payment of a sum so much in addition to the contract price as to cause the estimate to be exceeded.

To obviate the difficulty I would suggest that the placing of the sheeting be looked upon as a separate improvement and that all proceedings as upon such a separate improvement be gone through with. Inasmuch as the sheeting is in place, so that what is really to be done is the purchase of it, and inasmuch too as the county surveyor is in position to know how much the contractor who is doing the work will require to leave the sheeting in place, his estimate, and the surrounding conditions would doubtless be such as in effect to preclude bidding upon the separate contract except by the contractor who is now prosecuting the main work. The result arrived at would be the same as if the additional material were furnished merely under an order for a change in the specifications, and the only disadvantage would be the length of time required to advertise the letting of the separate contract.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1181.

DUTY OF THE INSPECTOR OF BUILDINGS IN THE CITY OF COLUMBUS TO APPROVE THE PLANS OF BUILDINGS OF THE OHIO STATE UNIVERSITY AND TO ENFORCE THE STATE BUILDING CODE WITH REFERENCE THERETO—APPLICATION OF COLUMBUS ORDINANCE RELATING TO THE CONSTRUCTION OF BUILDINGS OF THE OHIO STATE UNIVERSITY.

An ordinance of the city of Columbus requiring the issuance to the owner or his agent of a permit for the construction of a building involving the installation of sanitary plumbing is not applicable to construction work at the Ohio state university. It is the power and duty of the inspector of buildings in the city of Columbus to approve the plans of buildings of the Ohio state university, and to enforce the state building code with respect thereto.

The ordinance of the city of Columbus for licensing master and journeyman plumbers and prohibiting work at the trade of plumbing in the city of Columbus by unlicensed plumbers, is applicable to persons working on the installation of plumbing at the Ohio state university, whether employes of the university or not.

COLUMBUS, OHIO, October 1, 1914.

HON CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 18, enclosing the letter addressed to you by Hon. Joseph Dauben, inspector of buildings of the city of Columbus and requesting my opinion as to the application to Ohio state university

building work of two ordinances of the city of Columbus, the ordinance numbers being 23,377 and 25,356, respectively.

You also inquire generally as to the authority of the inspector of buildings of the city of Columbus to supervise building operations at the University.

Ordinance No. 23,377, of the city of Columbus which is published in pamphlet enclosed in your letter provides, generally speaking, that it shall be unlawful for any person, persons, firm or corporation to construct or repair any sanitary plumbing within the city of Columbus, without first obtaining from the inspector of buildings, of the city, a permit and paying certain fees therefor. The ordinance further provides that before work of construction or repair affecting sanitation shall be begun, plans shall be filed in the office of the inspector by the "owner or agent of the owner," such plans to be drawn upon blank forms furnished by the inspector and to be accompanied by specifications. If the inspector approves the plans, a permit to do the work shall be issued, which permit expires by limitation within six months of the date of approval, unless work is begun within that time. Changes in plans or specifications must be submitted to and approved by the inspector as in the case of original plans and specifications. When the plumbing work is installed, it must be left uncovered and convenient for examination until its installation is approved.

The original ordinance then specified in detail numerous regulations relative to the installation of sanitary plumbing. These regulations were to have been enforced by the inspector in approving plans and inspecting the installed work, but they are not printed in the pamphlet submitted to me, for the reason that they are covered by the state plumbing code.

The state plumbing code, so called, consists of a set of regulations applicable to all sanitary plumbing and adopted by the state board of health on July 23, 1913, under authority of sections 1237 and 1238, General Code, which may be quoted here as follows:

> "Sec. 1237. The state board of health * * * may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. * * *
>
> "Sec. 1238. Local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables and other officers and employes of the state or any county, city or township, shall enforce the quarantine and sanitary rules and regulations adopted by the state board of health."

In this connection, I cite section 1247, General Code, which provides as follows in part:

> "* * * The laws prescribing the modes of procedure, courts, practice, penalties or judgments applicable to local boards of health, shall apply to the state board of health and the violation of its rules and orders. * * *"

The statute referred to in the section which is quoted is quite evidently section 4414, General Code, which provides as follows:

> "Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or im-

prisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense."

Returning now to ordinance No. 23,377 of the city of Columbus, I observe that it further provides that any person, firm, or corporation violating any of the provisions of the ordinance, or failing to comply with any of the requirements thereof, shall be deemed guilty of a misdemeanor and upon conviction be fined.

Inasmuch as some at least of the requirements of the ordinance relative to the securing of permits, etc., enjoin duties upon the owners or builders, it is obvious that these penalties would be visited upon them.

Still in connection with ordinance No. 23,377, I beg leave to point out that the so-called state plumbing code, which may properly be described as the standing orders of the state board of health, does not constitute the sole, or controlling state legislation applicable to the question. I refer you to the so-called state building code, being sections 12, 600-1, et seq., General Code, and having been enacted 102 O. L., 586. The act establishing the state building code is entitled as follows:

"An act, establishing a building code, regulating the construction of, repair of, alteration on and additions to public and other buildings and parts thereof; regulating the sanitary condition of public and other buildings providing for fire protection and fire prevention, and providing for the construction and erection of elevators, stairways and fire escapes in and upon public buildings."

Generally speaking, the state building code so far as completed and enacted into legislation comprises a set of specifications for the construction of buildings used for the assemblage or betterment of the people, i. e., public buildings, or private assembly buildings. Part two, title three, of this code beginning with section 12600-44 as found on page 619, 102 O. L., is entitled "school buildings," and the classification is defined as follows:

"Under the classification of school buildings are included all public parochial and private schools, colleges, academies * * *"

I may say at this point that there seems to be no doubt whatever that this classification of the state building code applies to the Ohio state university.

Section 22 of this title of the state building code designated as 12600-65, General Code, relates to the subject of sanitation of what are designated as "school buildings." This is supplemented, however, in the state building code by a general title called "sanitation," section 12600-137, et seq. This is part four of the code, and it relates to all buildings to which the building code relates, among them, of course, "school buildings" as defined under the proper classification. I have not carefully examined the so-called state plumbing code promulgated presumably by the state board of health to see whether it is identical in specifications with that part of the state building code enacted by the general assembly, which is entitled "sanitation." It is certain that the two sets of regulations are substantially, if not actually the same. The purpose of the promulgation of these specifications by the state board of health as its orders or regulations is obvious; namely, to extend their scope to buildings not covered by the state building code. As to the buildings actually covered by the state building code including those of the Ohio state university, the statute governs, and not the rules of the state board of health, unless the rules of

the state board of health contain regulations additional to and not inconsistent with those of the statutes themselves.

The situation then with respect to the substantive regulations or specifications relative to the installation of plumbing at the Ohio state university as distinguished from the sanctions by which such regulations are to be enforced is as follows:

There are detailed statutory regulations especially applicable to the Ohio state university and embodied in the so-called state building code, enacted by the legislature.

There is a general standing order of the state board of health substantially identical with the state building code and popularly known as the state plumbing code. In so far as the latter applies to sanitation, the provisions additional to those of the state building code, found in the state plumbing code unquestionably apply to the Ohio state university.

There is ordinance No. 23,377, of the city of Columbus, which seems to make no substantive requirements not embodied in the state plumbing code. This being the case, then, it would seem clearly to follow that the substantive requirements of the ordinance, in so far as their subject-matter is covered by the state building code, and the state plumbing code, respectively, have no application to the Ohio state university, or indeed to any building work.

Coming now to the sanctions by which these several distinct regulations are to be enforced, I note the following:

The state building code is enforced by the sanction of sections 12,600-274, 12,600-275, 12,600-279 and 12,600-280, General Code, as enacted 102 O. L., 586, as follows:

> "It shall be unlawful for any owner or owners, officers, board, committee or other person to construct, erect, build, equip or cause to be constructed, erected, built or equipped any opera house, hall, theater, church, school house, college, academy, seminary, infirmary, sanitorium, childrens' home, hospital, medical institute, asylum, memorial building, armory, assembly hall or other building used for the assemblage or betterment of people in any municipal corporation, county or township in this state, or to make any addition thereto or alteration thereof, except in case of repairs for maintenance without affecting the construction, sanitation, safety or other vital feature of said building or structure, without complying with the requirements and provisions relating thereto contained in this act.
>
> "It shall be unlawful for any architect, builder, civil engineer, plumber, carpenter, mason, contractor, subcontractor, foreman or employe to violate or assist in violating any of the provisions contained in this act.
>
> "Whoever being the owner or having the control as an officer, or as a member of a board or committee or otherwise of any opera house, hall, theater, church, school house, college, academy, seminary, infirmary, sanitorium, childrens' home, hospital, medical institute, asylum, memorial buildings, armory, assembly hall or other building for the assemblage or betterment of people in any municipal corporation, township or county in this state, violates any of the provisions of the foregoing act or fails to conform to any of the provisions thereof, or fails to obey any order of the state fire marshal, chief inspector of workshops and factories or building inspector or commissioner in cities having a building inspection department, or the state board of health in relation to the matters and things in this act contained shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars and stand committed until said fine and costs be paid or secured to be paid or until otherwise discharged by the due process of law.
>
> "Any architect, civil engineer, builder, plumber, carpenter, mason, con-

tractor, subcontractor, foreman, or employe who shall violate or assist in the violation of any of the provisions of this act or of any order issued thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars and to stand committed until said fine and costs are paid or secured to be paid or until otherwise discharged by due process of law."

It will be observed that an officer whose power and duty it is to construct a public building and who constructs, or permits the same to be constructed, added to, or altered in violation of the substantive requirements of the building code is punishable as for the violation of a state law constituting a misdemeanor, in common with the architects, builders, and other workmen who may contribute to such violation.

The state building code further provides as follows:

"It shall be the duty of the state board of health or building inspector or commissioners, or health departments of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

It will thus be seen that the intention to make the health or building department of the city the proper agency to enforce the state law is very clearly expressed; but if any doubt should exist, the same would be resolved by consideration of section 12,600-278, Genral Code, which is as follows:

"The provisions of this act shall not apply to the construction or erection of any public building or to any addition thereto or alteration thereof, the plans and specifications of which have been heretofore submitted to and approved by the chief inspector of workshops and factories. The provisions of this act shall not apply to the construction, erection or equipping of any public building, addition therto or alteration thereof, the contract for the construction, erection or equipping of which has been let or entered into prior to the date at which this act takes effect."

It is clear that the legislature contemplated that in certain cases the effect of the state building code act would be to transfer from the state inspector of workshops and factories to some other authorities (in this case, if such a transfer is effected, the municipal health or building department) the duty and power to see that the state laws are enforced.

Inasmuch then as the state building code clearly applies to the state university and is to be enforced in the city of Columbus by the proper municipal authorities, it is apparent at once that if the city building inspector is under the ordinances and regulations of the city the proper authority to enforce sanitary law, he has the power, and it is his duty to enforce the state building code in its application to construction work at the Ohio state university.

As to such orders of the state board of health embodied in the so-called state plumbing code which may (if this is the case) be in addition to the requirements of the state building code, the statutes of the state already cited show that the violator is subject to prosecution as for a misdemeanor.

As to the city ordinance, should it have any application, it appears that it prescribes no penalty whatever for a violation of the substantive provisions which must be held applicable. The sanction of the municipal ordinance is the indirect one

of license or permit, and the ordinance punishes the "owner" for failing to comply with its requirements by taking out a permit.

But proceeding further with the discussion, I should consider, I think, section five of the state building code therein denominated section 12,600-277, General Code, which provides in part as follows:

> "Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions in this act contained nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act."

The question might be mooted as to whether or not the "further and additional regulations" of municipalities which are preserved by the section, contemplate anything more than substantive regulations, i. e., specifications as to the quality and manner of installation of sanitary plumbing. I am by no means certain that this proviso is intended to preserve such requirements as the taking out of a permit for the doing of work covered by the state building code, inasmuch as the state building code itself contains ample provision for the enforcement of its substantive regulations, but I do not deem this question material here and express no opinion upon it. On the contrary, I assume for the purpose of the argument that such requirements of municipal ordinances as are embodied in the provision of the Columbus ordinance relative to the taking out of permits, are intended to be preserved by the section now under discussion.

But it is clear to me that section five is not operative to add to a city building code any force, which it would not otherwise have. The provision is that nothing contained in the building code shall limit, modify, or repeal existing municipal codes, or impair the right of municipal corporations to adopt consistent and additional regulations; but if an existing building code does not apply to a given subject-matter, or if a municipality in the absence of the building code would not have power to legislate with respect to that subject-matter, I do not believe that section 12,600-277, General Code, extends the scope of the municipal building code so as to comprise subjects not theretofore within it, or gives to the municipality as such the power to make future regulations which it would not theretofore have been authorized to make.

This being the case then, I am of the opinion that in so far as the Columbus ordinance adds requirements to those of the state legislation and in part requires the issuance of a permit and the payment of a fee, the application of such provisions and requirements to construction work at the Ohio state university is to be tested by principles operating without reference to the state building code. That is to say upon the question, as to the right of the city of Columbus to require the trustees of the Ohio state university, or any state officer to take out a building permit, the state building code exerts no influence whatever. This question then must be answered in the light of statutes and principles which have not yet been cited or discussed.

In the first place, it is not clear to me that the ordinance itself purports on its face to apply to installation of plumbing work at the Ohio state university. It provides that it shall be unlawful for "any persons, firm, or corporation" to do certain things without first obtaining a permit. It also provides that the "owner or agent of the owner" shall before commencing the work file plans and specifications upon the basis of which the permit is to be issued. Therefore, it appears that the permit issues to the owner, or his agent, as such.

It will thus be seen that the ordinance directly attempts to compel the owner to

act and visits upon him penalties should he fail to do so. Now the owner of the buildings at the Ohio state university is the state of Ohio, or in a liberal view, the board of trustees of the state university having custody and management of the state's property. The ordinance being penal, it might be asserted against its application to state officers, that phraseology appropriate to that end has not been incorporated in the ordinance. Not being certain, however, that the ordinance is to be given a strict interpretation, I pass this question with the remark that there is in my opinion grave doubt as to whether or not the ordinance on its face even attempts to apply to the officers having the management and custody of state buildings and the duty to provide for their construction.

This question being put aside, the more fundamental question as to the city's power to license the construction of a state building by requiring the issuance of a permit, therefor is encountered. Let it be borne in mind that the license is not under the ordinance to be issued to the contractor or plumber, but to the owners, or his agent, and the license fee which is required to be charged is payable so far as the ordinance itself is concerned by the owner, although as a matter of contract between the owner and the builder, this burden might in practice be shifted to the latter.

I am of the opinion that under the statutes as they exist, the city has no authority, or at least had none when this ordinance was passed in 1907, to license the construction of state buildings within its corporate limits.

I am mindful of the general municipal power conferred in sections 3636 and 3639, respectively, General Code. The first of these two sections provides in part as follows:

> "To regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, and to provide for the inspection of buildings or other structures, and for the removal and repair of insecure buildings.
>
> "Sec. 3639. To regulate by ordinance, the use, control, repair and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof; to compel the owners of such buildings to alter, reconstruct or modify them, or any room, store, compartment or part thereof, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, and to prohibit the use and occupancy of such building or buildings until such rules, regulations and provisions have been complied with."

Of these two sections, the latter may be, I think, eliminated from consideration. Manifestly, it applies to residences only and authorizes the regulation of housing conditions. It could have no application to buildings used for assembly purposes, such as university buildings.

The first section above cited must be considered with respect to its scope and effect in connection with other statutes which might operate within the same field, the question being as to whether or not it authorizes a municipal corporation to regulate the sanitary condition of state buildings, that question must be resolved by observing whether or not there are other statutory provisions (aside from the state building code, which has already been determined not to be a factor in the situation) which throw light upon the question.

I think there are other such statutes and beg leave to point them out as follows:

> "The board of trustees (of the Ohio state university) shall have general supervision of all lands, buildings, and other property belonging to the

university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly of the state."

This statute is of itself unimportant, save in so far as it discloses the nature of the control exercised by the board of trustees of the Ohio state university over the lands and buildings belonging to the university. It does not, of course, operate to vest in the board of trustees exclusive power with reference to the manner in which the buildings shall be constructed and maintained, particularly the power to prescribe sanitary regulations, as against any paramount legislative power.

Section 2314, 2315, 2320 and 1031 *are other statutes which relate to the public health and safety and are as follows*:

"Sec. 2314. Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: Full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed; showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof.

"Sec. 2315. The plans, drawings, representations, bills of material, specifications of work and estimates of cost in detail and in the aggregate, required by the preceding section, shall be submitted to the governor, auditor of state and secretary of state for their approval. If so approved, a copy thereof shall be deposited and safely kept in the office of the auditor of state.

"Sec. 2320. After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans.

"Sec. 1031. The chief inspector of workshops and factories shall cause to be inspected all school houses, colleges, opera houses, halls, theaters, churches, infirmaries, childrens' homes, hospitals, medical institutes, asylums and other buildings used for the assemblage or betterment of people in the state. Such inspection shall be made with special reference to precautions for the prevention of fires, the provision of fire escapes, exits, emergency exits, hallways, air space, and such other matters which relate to the health and safety of those occupying, or assembled in, such structures.

"Sec. 1035. The plans for the erection of such structure, and for any alterations in or additions to any such structure, shall be approved by the inspector of workshops and factories, except in municipalities having regularly organized building inspection departments, in which case the plans shall be approved by such department.

"Sec. 1036. Whoever, being an architect, builder or other person, alters

the plans so approved or fails to construct or alter a building in accordance with such plans without the consent of the department that approved them, shall be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned in the county jail not less than thirty days nor more than one year, or both.

"Sec. 1037. Whoever, being a person, firm or corporation or member of a board, and being the owner or in control of any building mentioned in section ten hundred and thirty-one of this chapter, uses or permits the use of such building in violation of any order prohibiting its use issued as provided by law, or fails to comply with an order so issued relating to the change, improvement or repair of such building shall be fined not less than ten dollars, nor more than one hundred dollars, and each day that such use or failure continues shall constitute a separate offense."

It seems to me that these sections in and of themselves provide a complete scheme for the preparation of plans and specifications for state buildings, their inspection with regard to sanitation, and the manner of enforcing compliance with their object. Under them it is the duty of the board of trustees of the Ohio state university to secure the approval of the governor, auditor and secretary of state, and of the building inspector of the city of Columbus, before engaging in any work of construction, whether the same affects sanitation or not. It is the duty of the building inspector to pass upon the plans so submitted to him without charging any fee for his services. It seems to me that these provisions are inconsistent with the idea that the municipality under its power to regulate the construction of buildings may authorize the building inspector to charge a fee for the inspection of plans and the issuance of the permit, when his duty to inspect the plans is fixed by statute and when he is required to approve or disapprove of them without issuing any license or permit.

I concede that the question, if regarded as purely one of statutory interpretation, is involved in a great deal of doubt; but the statutes are such in my opinion to give rise to the operation of a principle, which I find in certain decisions of courts of other states, which principle whether or not it operates as a rule of constitutional law, at least may be accepted as a guide in statutory interpretation.

In Kentucky Institution, Education for Blind, vs. Louisville, 8 L. R. A., n. s., 553, the court of appeals of the state of Kentucky, held that a municipality was without power to compel the erection and the maintenance of fire escapes on state buildings located within the corporate limits of the city, although the city had undoubted power to legislate generally upon the subject of fire escapes on buildings. The reasoning of the court per O'Rear, J., goes further than I find it necessary to go in the discussion of this question, but on one point it is directly applicable. I quote the portion of the opinion which I have in mind.

"The state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds * * *. The principle is, that the state when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control."

As I have intimated, I accept this principle with reservation. In order that it may apply, I think it must appear that the state has committed to some agency other than the municipal corporation the exercise of police power with respect to the *subject-matter* in question as well as the mere custody and management of the

state's property, but as has been seen the state has provided fully by legislation for the exercise of police regulatory power with respect to sanitation and installation of sanitary plumbing in its own buildings of the character now under discussion, and also with respect to the inspection and approval of plans for the erection of such buildings. It is inconceivable to my mind that when the state has provided agencies for the protection of public health against improper conditions which might exist in the sanitation of its own buildings, the city can assume the power to legislate generally on similar subjects and can exercise similar regulatory power by way of exacting the issuance of a license. For example, section 3636, General Code, under which the city's power is claimed provides that the city may "regulate the erection of buildings" whether with respect to their sanitary condition or not (although the particular ordinance relates only to sanitary plumbing). Suppose the city should attempt to exert its power to regulate the erection of buildings within its corporate limits under this section and claim the right to inspect the plans of state buildings and to make changes in them either before or after they had been approved by the governor, auditor of state and secretary of state. Certainly it would appear that no such right could be asserted. The case is not different with respect to the regulation of the sanitary conditions of buildings where the power to regulate is asserted through the medium of a license, and where it appears that the state has fully provided for safeguarding the public health against dangers arising from unsanitary plumbing in its buildings, both by direct legislation and by laws providing for the submission of plans to and for the approval of the building inspector.

These considerations then make it unnecessary for me to distinguish further the cases of Pasadena School District vs. City of Pasadena, 47, L. R. A., n. s., 892, and Palmer vs. District of Columbia, 1, L. R. A., n. s., 878. In neither of these cases did it appear that jurisdiction of the subject-matter involved had been committed to any tribunal or authority other than the municipality seeking to exercise the power.

It is, therefore, unnecessary, as I have stated, to lay down any broad and general principle respecting the power of a municipality to restrain officers of the state with respect to their management and control of property entrusted to them, in the exercise of the local police power. It is sufficient to state that where the evil sought to be remedied is dealt with by direct legislation of the state, the city may not under the guise of exercising the police power condition the action of the state officers by requiring them to take out a license.

It is not even necessary, therefore, to go to the extent of holding that the municipal regulations involved here are inconsistent with those of the general law governing the state officers. If they were so, the question would be plain; but even if they are not inconsistent, the license requirements of the city ordinance must fail of application to the state officers and the property under their custody, because the license not being necessary to enforce as to the state officers and buildings, any substantive requirement of law, becomes simply an unwarranted interference by the city with the state officers in the discharge of their duties.

In other words, the substantive requirements of law being those of the statutes, it follows that the requirement of the ordinance, if it be held to be applicable to the state university, that the "owner" secure a permit rests upon no substantial foundation and becomes a mere demand upon the funds of the university not related to the accomplishment of any public purpose.

Without discussing the matter further, I am of the opinion that ordinance No. 23,377, of the city of Columbus in so far as it requires the taking out of a plumbing or building permit does not and cannot apply to work done at the Ohio state university; but that the building inspector of the city of Columbus has the right to inspect the plans of all buildings of the college, used for ordinary college purposes and must approve them before construction work begins; also that the building in-

spector of the city of Columbus has power to see that the building code of the state is enforced and for this purpose may inspect construction work while it is in progress and may prosecute any member of the board of trustees of the university, or any other person guilty of violating or contributing to the violation of the provisions of that law.

Lest my opinion be misunderstood, I beg leave to call attention to 1261-1, et seq., General Code, providing for the office of state inspector of plumbing under the direction and supervision of the state board of health. Without deciding the question, I may say that these sections appear to repeal by implication so much of section 1031, et seq., General Code, above cited as relate to the continuing power of inspection of public buildings with regard to their sanitary condition by the chief inspector of workshops and factories. The state inspector of plumbing seems to have exclusive power in this field. I observe that section 1261-3, General Code, provides that

> "Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted by the proper authorities regulating plumbing or prescribing the character thereof."

As already stated, I do not think the legislation of the city of Columbus does regulate plumbing or prescribe the character thereof in buildings of the Ohio state university and in my opinion, therefore, the above quoted provision does not operate to deny to the state plumbing inspector authority to inspect such plumbing. Be that as it may, however, the question which you submit relates to the taking out of a permit for original construction work, or repair work, in the buildings of the Ohio state university; whereas the power to be exercised by the state inspector of plumbing is a continuing one, not contingent upon the making of any contemplated repairs, or the doing of any particular construction work. That is to say the building inspector's functions are to be exercised when the plans are prepared and the work is about to be undertaken; whereas the plumbing inspector's duty is to inspect plumbing that has already been installed. Inasmuch then as practically the only portion of ordinance No. 23,377 of the city of Columbus which is left, when the matters covered by the state laws and regulations of the state board of health are eliminated, is the part relating to the obtaining of a permit, I conclude that practically this ordinance has no application whatever to the installation of plumbing in the buildings of the Ohio state university.

As to ordinance No. 25,356, I beg to state that this ordinance requires the licensing of master and journeymen plumbers, but prohibits the doing of any plumbing work in the city of Columbus by unlicensed plumbers. The municipality has undoubted power to pass such legislation under section 3637, General Code, which I need not cite. No legislation of the state serves to withdraw work on state university buildings from the application of such legislation. The requirement that plumbers are licensed in no wise conflicts or interferes with the board of trustees of the Ohio state university, or any other state officer in the management of the state property; in fact the ordinance does not seek to impose any duty or restraint whatsoever directly upon the university authorities. In my opinion this ordinance applies as well to the doing of work upon the university buildings as to the doing of any other plumbing work within the corporate limits of the city of Columbus; and as well to regular employes of the university, as to those who contract with it independently.

Closing I may say that I have not considered the affect of article eighteen, section three of the amended constitution upon the question at hand, for the reason that the ordinances of the city of Columbus involved here were both passed prior

to January 1, 1913. My conclusion then is that the ordinance of the city of Columbus requiring the owner of a building to take out a permit for its construction, or repair, covering the installation of sanitary plumbing therein, does not apply to the doing of work at the Ohio state university; but that the building inspector of the city of Columbus under the general law of the state must approve plans for buildings on the university campus used for ordinary university purposes and must enforce the state building code which applies to the university buildings; though as to the correction of unsanitary conditions if any, and the power to order the installation of different or additional fixtures, such power is lodged in the state inspector of plumbing. I am further of the opinion that the ordinance of the city of Columbus providing for the licensing of plumbers is effective to prohibit any person working as a plumber on construction or repair work on buildings of the Ohio state university, unless he is licensed as therein required.

I am indebted to the city solicitor of Columbus for a copy of his opinion to the inspector of buildings of this city relative to this matter and regret that I am compelled to disagree partially with him.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1182.

AUTHORITY OF SINKING FUND TRUSTEES TO REFUND SPECIAL ASSESSMENTS ERRONEOUSLY CHARGED AND PAID.

Sinking fund trustees have no authority to refund special assessments erroneously charged and paid.

COLUMBUS, OHIO, October 1, 1914.

HON. E. M. BELL, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—Your letter of August 12th, previously acknowledged, requested my opinion as to the power of the trustees of the sinking fund to refund special assessments erroneously certified to the county auditor.

Waiving the question of voluntary payment which is encountered at the threshold of the consideration of your query, I am of the opinion that the sinking fund trustees are without authority to refund such assessments. As is made clear by section 4517, General Code, trustees of the sinking fund, who have undoubted control of the moneys in that fund, without appropriation by council, may, nevertheless, not pay out any moneys except in the payment of bonds issued by the corporation, the interest maturing thereon, and in the payment of judgments final against the corporation. The grant of power to the sinking fund trustees will be strictly construed.

Of course, any assessment, on account of which bonds have been issued, when paid into the municipal treasury goes into the sinking fund by virtue of statutes which need not be quoted. Furthermore, the sinking fund, as a fund, is the proper source of payment of municipal liabilities for which no appropriation is made, but the manner in which it shall be drawn on is clearly indicated by the section just cited which shows that a claim must be reduced to final judgment before it can be presented to the sinking fund trustees, and honored by them.

I may add that the statutory provisions for the levying and collection of special assessments do not cover the case of payment of erroneous assessments and re-

covery thereof from the city. Therefore, the general principles above stated apply, and one who has paid such an erroneous assessment stands in no different relation to the city from any other person who has a claim against it.

If the claim amounts to a legal or moral obligation, council may make a direct appropriation to pay it, which, however, must come from the general funds of the city other than the sinking fund, that not being subject to appropriation by council. If the claim is, in every sense, a legal obligation, as distinguished from a mere moral obligation, council may, instead of appropriating money to pay it, authorize the city solicitor to confess judgment in a suit brought by the holder of the claim, which procedure will have the effect of making the claim payable from the sinking fund; or if the council refuses to act, and the claim is a legal one, as distinguished from a moral obligation, the owner of it may sue the city and secure judgment, which will entitle him to be paid out of the sinking fund; but he cannot have payment from the sinking fund without judgment, and he cannot have payment from the city, otherwise, without action of council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1183.

TRANSCRIPT OF THE PROCEEDINGS OF COUNTY COMMISSIONERS OF TRUMBULL COUNTY RELATIVE TO THE ISSUANCE OF BONDS OF SAID COUNTY IN THE SUM OF $160,000.

The proceedings for the issuance of bonds by the county commissioners of Trumbull county are in accordance with the law, and said bonds are a legal and valid obligation of said Trumbull county, to be paid in accordance with the terms thereof.

COLUMBUS, OHIO, October 1, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners of Trumbull county relative to the issuance of bonds of said county in the amount of $160,000.00 for the payment of the county's assumed portion of the total cost and expense of improvement of part of intercounty highway Number 322, situate in said county; such portion being all of said cost and expense, excepting five hundred dollars ($500.00) thereof to be paid by the state.

I hereby certify that in my opinion the proceedings for the issuance of said bonds are in all respects in accordance with the law and that said bonds are a valid and legal obligation of said county of Trumbull to be paid in accordance with the terms thereof.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

1184.

TRANSCRIPT OF PROCEEDINGS OF THE COUNCIL OF THE VILLAGE OF WEST CARROLLTON, OHIO, IN THE MATTER OF THE ISSUANCE OF BONDS FOR THE IMPROVEMENT OF CERTAIN STREETS THEREIN.

COLUMBUS, OHIO, October 2, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have examined the transcript of proceedings of the council of the village of West Carrollton, Ohio, in the matter of the issuance of bonds for the improvement of certain streets therein, as follows:

One bond for the sum of $450.00, due September 15, 1916, interest at 5½% payable semi-annually, for the improvement of Smith street. (Ordinance No. 254.)

One bond for the sum of $550.00, due September 15, 1918, with interest at 5½%, for the improvement of Burns avenue. (Ordinance No. 255.)

One bond for the sum of $400.00, due September 15, 1920, with interest at 5½%, for the improvement of Locust street. (Ordinance No. 256.)

One bond for the amount of $425.00, due September 15, 1919, with interest at 5½%, for the improvement of Cottage avenue. (Ordinance No. 257.)

One bond in the sum of $300.00, due September 15, 1919, with interest at 5½%, for the improvement of Elm street. (Ordinance No. 258.)

One bond in the sum of $125.00, due September 15, 1917, with interest at 5½%, for the improvement of Poplar street. (Ordinance No. 259.)

One bond in the sum of $350.00, due September 15, 1921, with interest at 5½%, for the improvement of Rusby street. (Ordinance No. 260.)

I hereby certify that the issue of these bonds is in accordance with the laws of Ohio governing the issue of bonds for the purpose for which said bonds purport to have been issued and that the proceedings taken by the council of the village of West Carrollton are in accordance with the provisions of the statutes of Ohio in such case made and provided, and that the same constitute a good and valid legal obligation against the village of West Carrollton to be paid in accordance with the terms specified therein.

Transcript of proceedings to which is attached the financial statement of the village of West Carrollton, and a blank form of bond are transmitted herewith.

Very truly yours,

CHARLES FOLLETT,
First Assistant Attorney General.

1185.

TRANSCRIPT OF THE PROCEEDINGS OF COUNTY COMMISSIONERS OF HURON COUNTY, OHIO, IN THE MATTER OF THE ISSUANCE OF CERTAIN BONDS UNDER THE PROVISIONS OF THE STATE HIGHWAY LAW.

COLUMBUS, OHIO, October 2, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under separate cover I hand you herewith transcripts of the proceedings of the county commissioners of Huron county, Ohio, in the matter of the issuance of the following bonds, all under the provisions of the state highway law, section 1223, General Code, as amended 103 O. L., 459:

"One issue in the sum of $28,000 for the improvement of intercounty highway No. 142 in Hartland and Fitchville townships, in said county.

"One issue in the sum of $9,000 for the improvement of intercounty highway No. 455, Peru township in said county.

"One issue in the sum of $6,500 for the improvement on intercounty highway No. 290 in Wakeman township in said county.

"One issue in the sum of $14,500 for the improvement of intercounty highway No. 290 in Townsend township in said county.

"One issue in the sum of $10,000 for the improvement of intercounty highway No. 289 in Ridgefield township in said county."

The bonds themselves have not been submitted to me. I have seen fit to require as a conditon of the acceptance of the first two issues of bonds above referred to, the amendment of the resolution of issuance in certain particulars.

Supplemental transcripts have been furnished showing that my recommendations have been complied with. In this connection, however, the bonds themselves should be corrected by the commissioners on their respective faces so as to refer to the amended resolutions as being the resolutions under which they were respectively issued, before being accepted by the commission.

This statement does not apply to the other three bond issues, viz., Wakeman, Townsend and Ridgefield townships. The proceedings for the issuance of these bonds do not present the question referred to.

Subject to the foregoing qualifications I am of the opinion, and hereby certify, that all of said bonds have been issued in accordance with the provisions of law and that the same constitute good and valid obligations against the county of Huron, to be paid in accordance with the terms specified therein respectively. A certificate of the prosecuting attorney is attached to the transcript in each case.

Yours very truly,

CHARLES FOLLETT,

First Assistant Attorney General.

1186.

COMPLIANCE WITH THE LAND REGISTRATION LAW IN ACTIONS IN PARTITION INSTITUTED ON OR AFTER JULY 1, 1914—COMPLIANCE WITH THIS LAW WHEN AN ELECTION HAS BEEN MADE.

In an action in partition, instituted on or after July 1, 1914, *it is necessary to have title to the realty registered under the land registration act,* 103 *O. L.,* 914, *when one of the parties elects to take the real estate at the appraised value. Section* 64 *of said act requires the registration of titles before any order of partition shall be entered, and such order must be entered before any of the parties can elect to take. This compels compliance with the registration act when there has been such election.*

COLUMBUS, OHIO, October 5, 1914.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Under date of August 26, 1914, you submit the following:

> "I write you at the request of the county recorder relative to the fact that there was a deed presented to him by a party who had secured the same from the sheriff in an ex parte petition case and the county recorder refusing to accept and record said deed, unless said real estate was registered as provided in section 64, page 945 of 103 Ohio Laws.
>
> "It appears that on August 24, 1914, a partition suit was filed and on the same day the answer, *praecipe* for writ, writ of partition and entry were also filed.
>
> "When appraisement was made of the real estate involved, a report was made that no partition could be made of said real estate; whereupon one of the parties in the proceeding elected to take the real estate and the sheriff of the county made a deed to the party electing to take said real estate, which was ordered by the court of common pleas.
>
> "The county recorder is of the opinion that this is a judicial sale or a sale made through court procedure as defined by your letter of July 15, 1914, and therefore he insists that said real estate be registered, but the attorney presenting the deed demands that it be recorded without being registered and insists that this is not a proceeding that comes within section 8572-64."

Section 64 of the land registration act, 103 O. L., 945, provides:

> "In all suits to sell an estate in fee in the whole of unregistered land, brought by an assignee * * * and in all suits to partition unregistered land held in fee, proper allegations and parties necessary to a decree for original registration of the title to said estate, shall be made in the petition * * * and said title, *before any order of sale or partition shall be made or entered in the case, shall be registered, as provided in this act.* * * *"

Section 12029, providing for the partition of real estate, provides among other things that if the court finds that the plaintiff has a legal right to any part of the estate, *it shall order partition thereof* and appoint commissioners to make such partition. This writ is directed to the sheriff. When the commissioners are of the opinion that the estate cannot be divided without manifest injury, they return that fact to the court together with an appraisement of the estate. If the court approves of the return, one or more of the parties may elect to take the estate at such an

appraised value, whereupon it is adjudged to him upon his paying the amount of the appraisement.

From your statement it is apparent that a report, showing that no division of the realty could be made, was filed, whereupon one of the parties elected to take the realty at the appraisement. It is, therefore, manifest that the writ and order of partition were issued, because it was only by virtue of this that the commissioners made their return that there could be no division without manifest injury to the estate. Under such circumstances it seems to be clear that the fact of election to take in no way prevents the application of the land registration act. You will observe that before any order of sale or partition can be made the title must be registered. From this it must follow that there could not be a valid election and deed without registration, as there is no question that there could have been no election until the order was made, under the state of facts set out by you. It is, therefore, my judgment that the county recorder is correct in his position that the action comes within the purview of section 64 of the land registration act, which is mandatory, and, therefore, the title should be registered as provided in said act.

You do not ask whether such discretionary power is vested in the recorder as to authorize him to refuse to receive for record an instrument purporting to be a deed made under the order of court, and hence this question is not answered. I would suggest, however, that the matter be taken up with the court before the instrument is received.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1187.

RULES APPLICABLE TO COUNTY COMMISSIONERS TO FURNISH BLANKS TO APPLICANTS TO REGISTER LAND TITLES.

The county commissioners should not furnish to applicants to register titles, at the expense of the county, blanks designed solely for the convenience of such applicants. They may supply at the county's expense such blanks as are provided for use by the officials charged with the administration of the law.

COLUMBUS, OHIO, October 5, 1914

HON. HUGH H. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of September 21, 1914, you ask the following question:

> "Under the Torrens land law may the county pay the cost of blanks purchased by the probate judge and county clerk, to be used in proceedings in their respective courts under such law?"

Under section 91 it is the duty of the county commissioners to furnish, at the expense of the county, all books, blanks, papers and other things necessary for the purpose of carrying out the provisions of this act, but it does not seem to me that this section should be so broadly construed as to authorize the county commissioners

to put the county to the expense of furnishing blanks which are solely for the benefit of the applicants for registration. There is, I think, a distinction between those blanks which are for the office use of the various officials charged with the administration of the registration law, and blanks by virtue of which those desiring to take advantage of the act invoke court procedure.

It would extend this opinion to an unreasonable length if I were to specify what particular blanks should be furnished by the county and those which should not. Consequently, I will herein endeavor to lay down a general rule which may be applied to the situation as it arises.

You will observe that many of the forms pertain to the clerical work of officials and others are provided as part of the court machinery after the proceeding has been filed; and in this class of cases it may properly be said that they are necessary for the purpose of carrying out the provisions of the act and come properly within the classification of office supplies, and are in the nature of official instruments. This, however, is not true of petitions and such other forms as are to be prepared by suitors. This is especially true of petitions which, I agree with you, should not be supplied by the county or any of its officers at public expense. As you suggest, there is no more reason for furnishing these than there would be to furnish blank petitions for any civil action.

Trusting that this answers your inquiry, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1188.

PROPERTY PURCHASED BY CHURCH NOT EXEMPT FROM TAXES WHERE A CONTRACT WAS ENTERED INTO FOR THE PURCHASE, PRIOR TO THE DATE ON WHICH A TAX LIEN ATTACHES, BUT NO ACTION TAKEN THEREON.

Where a church society is in need of a larger building and seeks to acquire a vacant lot adjacent to that on which its existing building is situated, with a view to building an addition to the present structure, and a contract of purchase entered into prior to the day preceding the second Monday in April, 1913, *but no action taken thereunder until May,* 1913, *when a deed was executed to the church; under these facts the property is exempt from taxation, the lien of which attached in April,* 1913.

COLUMBUS, OHIO, October 5, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of July 25th, requesting my opinion upon the following question:

> "The Central Congregational church of Toledo was the owner of an improved church property in the residential section of the city, and such property was at the time hereinafter mentioned used for church purposes. The First Congregational church of Toledo was originally the owner of a church property in the business section of said city.

"The two churches consolidated, and an order of court was taken authorizing the sale of the down town property and the purchase of a vacant lot immediately adjacent to the property in the residential district for the purpose of constructing an addition to the Central church building which would make it adequate to accommodate the consolidated congregation.

"In the month of January, 1913, and in pursuance of the authority above mentioned, the consolidated church entered into an agreement with the owner of the vacant lot in question for the purchase and conveyance to the church of said lot. The examination of the abstract and the execution of a deed by the grantor, who was a non-resident of the city, consumed so much time that the actual transfer of title, by the execution and delivery of the deed, did not take place until May, 1913.

"Was the property exempt from taxation on the day preceding the second Monday of April, 1913?"

I am indebted to Messrs. Doyle & Lewis of Toledo, for a full and complete statement of the facts concerning which you inquire and an able presentation of some of the law questions involved.

I find myself in accord with counsel upon a proposition of law which may be stated thus:

Where a house of public worship is inadequate in size to accommodate its congregation, and adjacent vacant land owned by the church society is held with a view to the immediate erection of an addition to the building, which will rest upon said land theretofore vacant, the additional land becomes thereby "attached to such buildings necessary for the proper occupancy, use and enjoyment thereof," within the meaning of section 5349, General Code.

But I am not so sure that this proposition is decisive of the question presented. In my opinion, the ground does not become attached to a house used exclusively for public worship within the meaning of the statute at least until some degree of title, either legal or equitable in and to such ground, is vested in the proprietor of the church building. For example, to use the facts of the case as an illustration, the ground in question did not become attached to the building at the instant of time when the necessity arose for its acquisition; because at that time it did not appear that the owner of the additional ground would be willing to part with it; and should he have proved unwilling to do so it would have been impossible for the trustees of the church ever to make use of the ground for any purpose whatever.

I think, therefore, that the attachment of which the statute speaks does not take place until the church society, or the proper representative thereof, acquires at least some degree of dominion over the property to be attached. What degree of dominion, then, is necessary under the law? The statutes relative to the assessment of real property for taxation as they existed in the year 1913 furnish, in my opinion, an answer to this question. The scheme then in vogue provided, generally, for the quadrennial appraisement of real property, and the last such appraisement was made in the year 1910 under the following statutes:

"Sec. 5348. The auditor of each county * * * in every fourth year * * * shall make and deliver * * * to the board of assessors of each city in the county, an abstract *from the books of his office* containing a description of each tract and lot of real property * * * *with the name of the owner thereof* * * * as it appears on his books. * * *

"Sec. 5554. The assessor, in all cases, from actual view, and from the best sources of information within his reach, shall determine as near as practicable, the true value of each separate tract and lot of real property in his district, according to the rules prescribed by this chapter for valuing real property. He shall note in his plat book, separately, the value of all dwelling houses, mills, and other buildings, which exceed one hundred dollars in value, or any tract or plat of land not incorporated, or on any land or lot of land included in a municipal corporation, which shall be carried out as a part of the value of such tract. He shall also enter therein the number of acres of arable or plow land, meadow and pasture land, and wood and uncultivated land, in each tract, as near as possible.

"Sec. 5570. The assessor at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, and public buildings and property used exclusively for any public purpose, with the lot or tract of land on which such house, institution or public building is situated, and which are exempt from taxation. He shall value such houses, buildings, property and lots and tracts of land at their true value in money, in like manner as he is required to value other real property, designating in each case the township, city or village, and number of the school district or the name or designation of the school, religious society, or institution to which each house, lot, or tract belongs. If such property is hold and used for other public purposes, he shall state by whom or how it is held."

The property in question, then, under these statutes, must have been listed and valued by the joint action of the county auditor and the board of assessors on the general tax list and not on the exempt list.

In order to be placed on the exempt list through correction of the duplicate, as provided in section 2568, General Code, or otherwise, such property must be shown to the proper officer, in this case the county auditor, to have suffered a change of status in some manner or other. It is clear, of course, that where the property is necessary for the proper use and occupancy of a church building and has actually been purchased for such use and legal title taken involving a transfer on the tax books, as provided in section 2573, General Code, that such a change of status would take place, and the auditor in making the transfer, should take the property from the tax list and place it on the exempt list.

Of course it is not necessary that in order that property of this kind may become exempt from taxation, such a change in the legal title as I have referred to should take place. Thus, property held under a lease by a church society, and so used by it as to be either a house used exclusively for public worship, or grounds attached thereto, would be exempt from taxation notwithstanding the ownership of the legal title thereof.

Church of the Epiphany vs. Raine, 21 Bull., 180.
New Jerusalem Society vs. Richardson, 10 N. P., n. s., 213.
Kenyon College vs. Schnably, 8 N. P., n. s., 160.

But use for the favored purpose is after all the ultimate criterion of exemption from taxation. In order that ground may become so attached to a house used exclusively for public worship as to be entitled to exemption, there must be such dominion over the ground under color of title or right to use as will constitute that degree of user which is implied from the employment in the statute of the word "attached."

The facts presented to me by you and Messrs. Doyle and Lewis fail to show that what I regard as the necessary degree of dominion over the property in question existed in April, 1913. It is not claimed that at that time the church had leased the ground in question; it is not claimed that the church had in any way entered into possession of the ground prior to the day at which the lien for taxes attached. For aught that appears, then, the original owner of the ground, notwithstanding the contract of sale, retained perfect and exclusive dominion thereof until the delivery of the title deed and at least until after the month of April, 1913.

The church not possessing the legal title to the property or any leasehold interest therein at the time stated, I cannot reach the conclusion that the land which had theretofore been properly regarded as taxable had changed in character by reason of use or dominion to such an extent in April, 1913 as to justify its removal from the tax list.

I am, therefore, of the opinion that on the day preceding the second Monday in April, 1913, the vacant lot, subsequently acquired by the First Congregational church of Toledo, and described in the above statement of facts, was not exempt from taxation, and that the lien of the state having attached on that date, the same can be discharged only by the payment of the taxes charged against the entry on the tax list.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1189.

TRANSCRIPT OF PROCEEDINGS OF COUNCIL OF THE VILLAGE OF WEST CARROLLTON, OHIO, FOR BOND ISSUE FOR CONSTRUCTION OF STORM SEWERS.

COLUMBUS, OHIO, October 8, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I hereby certify that I have examined the transcript of the proceedings of council of the village of West Carrollton in the issuance of bonds in the amount of $3,200.00 for the construction of storm sewers, and that such bonds have been issued in accordance with the provisions of law, and that the same constitute a good and legal obligation against the village of West Carrollton, to be paid in accordance with the provisions therein.

My apologies to you on this behalf are due because this transcript was examined at the time another transcript from the same village was examined, and the certificate given to you at that time should have covered both issues, but through inadvertance mention was not made therein of the issue concerning which the present opinion is given.

Yours very truly,
CHARLES FOLLETT,
First Assistant Attorney General.

1190.

CONDEMNATION OF A SCHOOL BUILDING BY THE STATE BUILDING INSPECTOR—LEVIES FOR THE NECESSARY REPAIRS ARE NOT ENTITLED TO EXEMPTIONS.

In case of the condemnation of a school building by the state building inspector, levies for the necessary repairs are not entitled to exemption from all limitations under sections 7630-1 *and* 5649-4, *General Code, unless bonds are issued by a vote of the people, in which event the interest and sinking fund levies will be exempt from the limitation. Simple repair levies made under these circumstances are subject to all the limitations of law.*

COLUMBUS, OHIO, October 8, 1914.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your letter of August 28th, previously acknowledged, requests my opinion upon the following facts:

> "Some three years ago the Central school building of London was condemned and its use prohibited by an order of the chief inspector of workshops and factories, and it became necessary to build a new building, and bonds were issued by a vote of the people for that purpose, and the building is nearing completion but the board lacks about $6,000 of having sufficient funds to complete and equip said building.
>
> "I desire to know whether or not under section 7630-1, G. C., the taxing authorities of said district may levy a tax amounting to $6,000 in order to complete and equip said building, irrespective of the limitations placed upon said taxing authorities by statute. In other words, in preparing the budget can a levy of $6,000 be made in addition to the ten mills?
>
> "The same question also arises in the West Jefferson school district, and in preparing their budget they have levied a tax of $1,500 to repair the school building which has also been condemned by the inspector of workshops and factories."

Section 7630-1, General Code, as enacted in 103 O. L., 527, and its companion section, 5649-4, as amended by the same act are as follows:

> "Sec. 7630-1. If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds, and on the bonds heretofore issued for the purposes herein

mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law.

"Sec. 5649-4. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

It is to be observed that section 7630-1 requires the issuance of bonds upon the approval of the electors in order that the special levy which it authorizes may be made. In other words, the levy is an interest and sinking fund levy and not a general repair levy. The mere fact that a school house is wholly or partly destroyed by fire or other casualty, etc., is not sufficient to authorize the levy which section 7630-1 mentions. The only levy provided for therein is the levy for the payment of the principal and interest on bonds issued by a vote of the people under the circumstances mentioned.

It will also be observed that the casualty need not have occurred after the act referred to was passed in order to entitle bonds issued on that account to the benefit of the special levy referred to in the section.

I am of the opinion that section 5649-4 referring as it does to section 7630-1 means and embraces the special levy referred to in the latter section and that only. It is not any levy made for the purpose of restoring a school building destroyed by fire or condemned by the state building inspector that is entitled to exemption from the limitations of the law, but only the levy provided for in section 7630-1 which is purely a sinking fund levy.

Accordingly I am of the opinion that neither of the levies described by you can be made outside of the limitations of the law, and that both must be made subject to all the limitations of the law unless the electors of the respective school districts approve bond issues for these purposes in which event the interest and sinking fund levies for the retirement of such bonds may be made outside of the limitations.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1191.

POWER OF THE BOARD OF ADMINISTRATION TO PAROLE A PRISONER WHO HAS BEEN PREVIOUSLY CONVICTED IN ANOTHER STATE, OR SENTENCED FOR AN OFFENSE WHICH IS A FELONY IN OHIO.

The Ohio board of administration is without power to parole a prisoner who has previously been convicted in another state or sentenced to an institution of another state for an offense which is a felony in Ohio.

COLUMBUS, OHIO, October 8, 1914.

HON. P. E. THOMAS, *Warden Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 21, 1914, as follows:

"Will you kindly interpret that portion of section 2169, General Code of Ohio, page 474, Ohio Laws, 103, reading as follows:

" 'And who had not previously been convicted of felony or served a term in a penal institution.'

"The question has been raised, that it applies only to convictions for felonies, and sentences served in penal institutions in the state of Ohio, and that one who has been convicted of a felony or served a term in a penal institution in another state is not ineligible to consideration for parole."

Section 2169, General Code, reads in part:

"Section 2169. The board of managers (now the Ohio board of administration) shall establish rules and regulations by which a prisoner * * * not previously convicted of a felony or not having served a term in a penal institution * * * may be allowed to go upon parole outside the buildings and enclosures of the penitentiary."

In the case of People vs. Caesar, 1 Parker's Criminal Report (N. Y.), 645, it was held that the statute declaring a second offense of petit larceny to be punishable in the state prison, is not applicable to a case in which the first conviction took place in another state. In that case the court said at page 647:

"The statute under which the prisoner was indicted is expressed in very general language, and is not, in terms, confined to a first conviction in this state. It provides that every person having been convicted of petit larceny, who shall be subsequently convicted of petit larceny, shall be sentenced to imprisonment in the state prison for a term not exceeding five years. Although this expression is broad enough to apply to cases where the first conviction took place in another state, yet I think no such meaning was intended by the legislature. Crimes are local. We have no cognizance of crimes committed in another state or country. Each state exercises exclusive jurisdiction over all cases of crime committed within its limits. In this respect the different states of the Union stand in the same relation to each other as foreign states (citing cases). And the better opinion, as drawn from these cases, seems to be that a conviction in one state of an infamous crime does not render the person convicted incompetent as a witness in another state, but only goes to his credibility.

"The penal statutes of each state, therefore, must be construed as being applicable only to offenses committed within its own borders, unless it appear affirmatively that the intention was otherwise."

In the case of People vs. Becker, 138 N. Y., Sup., 771, the statute provided that in certain cases an indeterminate sentence should be imposed on a person never before convicted of a crime punishable by imprisonment in a state prison, and the court held that where a defendant had been previously convicted in Ohio of two crimes, for which he would have been punishable by imprisonment in a state prison in New York, had they been committed there, he would not be entitled to an indeterminate sentence. The court said at page 772:

"The relator insists that the fair meaning of this provision of the law is that the former convictions must have been within the state of New York, else they could not have been punishable by imprisonment in a state prison, to wit, a state prison in the state of New York.

"I do not think this position is sound. The language 'convicted of a crime punishable by imprisonment in a state prison' seems to me to have

been adopted as a generic description of the crime and to have been used irrespective of the locality of the conviction or the place of punishment."

And again at page 773:

"What reason could the legislature assign for saying that a man convicted of an infamous crime in a sister state, the crime on the conviction of which in this state he would have been sentenced to imprisonment in a state prison in this state for a long period, and later convicted of a serious crime in this state, should receive punishment as though he never had been before convicted of a crime, and be a participant of all the consideration of a first offense."

And again at page 776:

"Is it probable that the legislature intended to permit a person who had been convicted of a felony in a sister state, to enjoy the privileges of this institution founded for the purpose of reforming its inmates and to deny such privileges to a person who had been convicted of a felony in the state of New York? It seems to me not?"

The view taken by the court in the case of People vs. Becker, just quoted is, I think, the correct one. The parole law was written upon the statute books for the purpose of assisting worthy prisoners to reform and the legislature, I am sure, in using the words "not previously convicted of felony or not having served a term in a penal institution," meant to withhold the privileges of this law from prisoners whose previous record would prove them to be unworthy of further assistance. It would be ridiculous to say that a prisoner previously convicted and imprisoned in another state, would be worthy of parole, while one previously convicted and imprisoned in this state could not be safely released.

Section 2192 of the General Code, relating to the duties of the clerk of the Ohio penitentiary, reads in part:

"Section 2192. * * * who shall keep a register in which shall be entered the name of each convict * * * and, if known, whether he has been previously confined in a penitentiary in this state or elsewhere and when and how he was discharged."

Provision has also been made for the establishment of a Bertillon department at the penitentiary.

These provisions have made it possible for the Ohio board of administration and the warden of the penitentiary, to gain a knowledge of the previous record of all the inmates of the penitentiary, and giving to section 2169, General Code, the natural and ordinary meaning of its language, it is my opinion that the board is without power to parole a prisoner who has previously been convicted in another state of, or sentenced to an institution of another state for, an offense which is a felony in Ohio.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

1192.

RIGHT TO SELL ARTICLES MANUFACTURED BY PRISONERS OF THE OHIO PENITENTIARY TO OTHER STATES, OR POLITICAL DIVISIONS THEREOF, OR PUBLIC INSTITUTIONS, OWNED BY SUCH STATES.

Articles manufactured by prisoners in the Ohio penitentiary may not be sold to other states, or political divisions thereof, or to public institutions owned, managed or controlled by such states, or such political divisions.

COLUMBUS, OHIO, October 8, 1914.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 17, 1914, as follows:

> "Will you kindly advise me if, under the law in this state, the products of the labor of prisoners in this institution, may be disposed of to states other than Ohio, or political divisions thereof, or to a public institution owned or managed and controlled by a state or a political division thereof, other than the state of Ohio.
>
> "We find a ready market for many of our prison made articles among the institutions of other states, and if permitted under the law to dispose of such articles to these institutions, it will naturally greatly increase our manufacture and sales department, and provide employment for a great many more of the inmates."

Section 2228 of the General Code reads in part:

> "Sec. 2228. * * * Convicts in such institution (Ohio penitentiary) may work for and the products of their labor may be disposed of, to the state or a political division thereof or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter."

Section 2230, General Code, reads:

> "Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile, and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

These sections authorize the employment of prison labor in the manufacture of such articles as are now being manufactured at the Ohio penitentiary. Nowhere in the statute is the board or warden given any authority to dispose of such products in the open market such as is given them with reference to the disposition of crushed stone in section 2235-1, which provides that such product may "be sold by the board of managers of the Ohio penitentiary (now the Ohio board of ad-

ministration) in the open market." Neither can it be argued that sections 2228 and 2230, General Code, authorize the sale of prison made articles to state institutions in other states, since the words "public institution owned, managed and controlled by the state or political divisions thereof," clearly indicates an intention that the sale shall be to institutions in the state of Ohio.

It is, therefore, my opinion that articles manufactured by prisoners in the Ohio penitentiary may not be sold to other states or political divisions thereof, or to public institutions owned, managed or controlled by such states or such political divisions.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1193.

TRANSFER OF TERRITORY FROM ONE RURAL OR VILLAGE SCHOOL DISTRICT TO ANOTHER— DISTRIBUTION OF FUNDS WHEN SUCH TRANSFER IS MADE—APPORTIONMENT OF INDEBTEDNESS WHEN SUCH TRANSFER IS MADE.

When territory is transferred from one rural or village school district to another, the equitable division of funds or indebtedness required by statute to be made shall be determined upon at the time of the transfer, by the county board of education, which, under section 4736, General Code, has exclusive power to make such transfer.

The indebtedness apportioned to the transferred district in accordance with the statute becomes a general indebtedness of the whole district, and does not attach only to the transferred territory.

COLUMBUS, OHIO, October 8, 1914.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of August 21st, previously acknowledged, you request my opinion upon the following questions:

> "(1) When territory is transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer.
>
> "Who has the authority to make this equitable division of funds or indebtedness?
>
> "(2) Section 4736 gives to county boards of education the authority to transfer territory from one village or rural district to another.
>
> "If the township has a bonded indebtedness and additional territory without indebtedness is attached to it for school purposes, shall the indebtedness be pro rated upon both the original township and the added territory?"

Prior to the series of amendments to the school laws made by the eightieth general assembly at its first extraordinary session in the year 1914, there were two methods of transferring territory from one school district to another, viz.: By the mutual consent of the boards of education having control of such districts (orig-

inal section 4692, General Code), and by proceedings in the probate court (original sections 4693-4695, inclusive, General Code).

Under the present laws there is only one way to transfer territory from what is properly known as one "school district" to another, viz.: by the action of the county board of education under section 4736, General Code, which provides as follows:

> "The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles."

Original sections 4692-4695, inclusive, of the General Code have all been repealed, the first of them by the act found in 104 Ohio Laws, at page 133, and the remaining three by the act found in 104 Ohio Laws, at page 225.

A new section 4692, General Code, was enacted, which differs from the original section so vitally as to make it rather a substitute therefor than an amendment thereof. It now provides as follows:

> "Part of any county school district may be transferred to an adjoining county school district or city or village school districts by the mutual consent of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such a resolution shall require a majority vote of the full membership of each board by yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board together with a copy of such map are filed with the auditors of the counties in which such transferred territory is situated."

So that at the present time section 4692, as amended, is not applicable to a transfer of territory between school districts, in the sense that the term is used in section 4736, and in the sense that the term was used in original sections 4692-4695, General Code; but only to what is called a transfer of territory from one county school district to another, or to (but not from) a city or village school district not a part of the county district. Inasmuch as the county school district is not a school district in every sense of the word but is, more properly speaking, a supervision district, and inasmuch as section 4696, directly involved in your inquiry, has not been materially changed in the process of amendment, and inasmuch, too, as it related, originally at least, only to a transfer of territory as between two school districts, in the exact sense, I mention section 4692 solely for the purpose of observing that nothing in this opinion is to be interpreted as applicable to the kind of transfer contemplated by that section. That is to say, my opinion will relate,

solely, to the application of section 4696, as amended, to a transfer of territory made by a county board of education, under section 4736.

Said section 4696, General Code, provides in full as follows:

> "When territory is transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer. When territory is transferred from one district to another by the annexation of territory to a city or village, the proper division of funds in the treasury, or in process of collection, of the board of education of the school district from which the territory is detached, shall, upon application to the probate court of the county in which such territory is situated by either board of education interested, be determined and ordered by such court. If such board of education is indebted, such indebtedness, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is transferred, annexed, or of the district created, shall be in like manner determined and ordered by the court."

It will be observed that the method of determining the equitable division of funds or indebtedness, in case of transfer, is expressly provided for in respect to such transfer of territory as takes place through the annexation of territory to a city or village, but that the agency which shall make the determination when the transfer is not so effected, is not specified. Obviously, that agency is not the probate court of the county, because that court is to act only "when territory is transferred * * * by the annexation of territory," etc.

It is clear to me that, in the absence of a requirement that the equitable division of funds and indebtedness shall be otherwise determined, the authority to make such determination resides where the authority to make the transfer is found.

It is, therefore, my opinion that in case of a transfer made by the county board of education, under section 4736, General Code, the equitable division shall be made at the time of the transfer by the county board of education.

If section, 4696, General Code, applies to the transfer spoken of in section 4692, a matter which as already stated is not passed upon in this opinion, it would follow, upon the principle above laid down, that the equitable division should be made by the mutual consent of the boards of education having control of the districts mentioned in section 4692, and would be an essential element in such transfer, without agreement upon which no such transfer could be made. But in this connection I must reiterate that this point is not herein decided.

In answering your second question I assume that when speaking of the bonded indebtedness of the "township" you mean that the rural school district, which was formerly a township school district, rests under a bonded indebtedness. Of course, if the indebtedness is that of the township, as such, it is not within the scope of section 4696 at all, as the words "funds or indebtedness," as therein used, refer to school funds and school indebtedness, only.

I shall also assume that in speaking of attaching territory to a township for school purposes you mean that the boundaries of what was formerly a township school district, are to be altered by the county board of education, under section 4736, General Code, necessitating a transfer of territory from one rural or village school district, to another. The situation presented, then, is that the rural district as orginally constituted, has no bonded indebtedness, whereas the district from which the territory is transferred is burdened with an indebtedness.

In such a situation the statute requires that a proportional part of the indebtedness of the old district, from which the territory was transferred, shall be as-

sumed by the new district. What proportion shall be thus assumed depends upon various factors. If, for example, a school house, on account of which a bonded indebtedness has been incurred, is located in the transferred territory, then the new district should assume the entire indebtedness, allowance being made for the exclusion from the territory transferred, of any territory formerly tributary to such school house. If, on the other hand, the indebtedness is not on account of any building which is located in the transferred territory, the assumption of indebtedness, if deemed equitable, should be made only on the basis of the fact that the new district will reap some benefit from the use of public buildings, i. e., that territory in the former township district and outside of the territory transferred will be served by the school house thus acquired. If no school building is acquired by transfer, then such portion of the bonded indebtedness of the old district should be assumed by the new district to which the transfer is made as will be equitable, having regard to the tax duplicate of the transferred territory, as compared with the tax duplicate of the original indebted district as it existed prior to the transfer, due allowance being made for whatever economy in the administration of the schools of the indebted district may be affected by detaching that territory from it and whatever additional burden the new district to which the transfer is made will assume by reason of the addition of such territory, in the administration of its schools.

In any event, if the school district which is indebted has accumulated money in a sinking fund for the retirement of the bonds, such portion of such sinking fund should be paid to the board of education of the new district to which the transfer of territory was made, as corresponds to the proportion of the indebtedness assumed.

The indebtedness so transferred becomes an indebtedness of the whole district thus formed, and is not to be met by levies upon the transferred territory, only.

In all such cases, there is no hard and fast rule to be applied. The statute requires an equitable division of property and indebtedness; and this requirement has the effect of reposing in the county board of education making the transfer, a sound discretion with respect to the determination which it is required to make, which will only be disturbed by the courts, in case of its abuse. The above discussion is intended merely to indicate some of the factors which should be taken into consideration by the county board of education in arriving at the determination.

I am of the opinion, therefore, in answer to your second question, that such portion of the indebtedness as is determined, should be apportioned to the former township district, under circumstances mentioned by you, becomes an indebtedness of such district as reformed and not merely an indebtedness of the territory transferred thereto.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1194.

POWER OF THE BOARD OF HEALTH UNDER BENSE ACT TO AUTHORIZE INSTALLATION SYSTEM OF SANITARY SEWERS AS A PERTINENT TO A SEWAGE DISPOSAL PLANT.

The board of health, under the Bense act, may authorize the installation of a system of sanitary sewers as appurtenant to a sewage disposal plant, and the funds necessary to pay for a village's portion of the cost of installing such sanitary sewers may be procured under the special limitations of the Bense act.

COLUMBUS, OHIO, October 8, 1914.

HON. C. B. NEWTON, *Village Solicitor, Kent, Ohio.*

DEAR SIR:—In your letter of July 21st you submit certain facts relative to the present outstanding bonded indebtedness of the village of Kent, and the tax duplicate, with the general statement that the village has been ordered to construct a sewer system and sewage disposal plant by the state board of health, with the approval of the governor and attorney general, and you desire an interpretation of the "Bense act," relative to the issuance of bonds.

I take it that you desire an opinion as to whether under the legislation above referred to a municipal corporation which has been ordered by the state board of health, with the approval of the governor and attorney general to install a sewer system and sewage disposal plant, may issue bonds up to 5% of the tax duplicate in addition to the total bonded indebtedness otherwise permitted by law, and without a vote of the electors. At any rate I shall limit my opinion to this question. In so doing I shall not consider the questions arising out of the tax limitations under the Smith law, so-called, or questions arising under art. XII, section 11; nor could I consider such questions, the facts necessary therefor, not being stated in your letter.

Section 1259, General Code, is that provision of the "Bense act," so called, which provides for the issuance of bonds, and is as follows:

> "Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. When so secured, or the bonds thereof have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for such purpose shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

I am of the opinion that this relates to the raising of revenues for any purpose with respect to which the state board of health, with the approval of the governor and attorney general, may make an order under the remaining provisions which originally constituted the "Bense act" (99 O. L., 74), viz., those provisions of the General Code now comprised in sections 1249 to 1261, inclusive.

In my opinion, therefore, it applies to the securing of funds for the installation of a means for disposing of sewage or other wastes within the meaning of section 1251, General Code, as well as to means of securing a water supply. That is to say, where the contamination of a source of water supply exists it may be cor-

rected in either or both of two ways, viz., the prevention of further contamination or choice of another supply. The evident intention and purpose of the "Bense act" is to authorize the correction of the evil by the state board of health with the approval of the governor and attorney general, by either means. To that end the following provisions of section 1250 and 1251, General Code, appear to be appropriate:

> "Sec. 1250. If the state board of health finds that the source of public water supply of a city, village or community is subject to contamination, or has been rendered impure from the discharge of sewage or other wastes, or in any other manner by a city, village, corporation or person, that such sewage or other wastes have so corrupted a stream, water course, lake or pond as to give rise to foul and noxious odors, or to conditions detrimental to the health or comfort of those residing in the vicinity thereof, it shall notify such city, village, corporation or person causing such contamination or pollution of its findings and give an opportunity to be heard.
>
> "Sec. 1251. After such hearing, if the state board of health determines that improvements or changes are necessary and should be made, it shall report its findings to the governor and attorney general, and, upon their approval, the board shall notify such city, village, corporation or person to install works or means, satisfactory to the board, for purifying or otherwise disposing of such sewage or other wastes, or to change or enlarge existing works in a manner satisfactory to the board. Such works or means must be completed and put into operation within the time fixed by the board, which time shall be subject to the approval of the governor and attorney general. But no city or village discharging sewage into a river which separates the state of Ohio from another state shall be required to install sewage purification works so long as the unpurified sewage of cities or villages of another state is discharged into such river above such city or village of this state."

It seems from your statement that the state board of health, the governor and attorney general have assumed that these provisions confer upon them the authority to order the installation of a system of sewerage and a means of sewage disposal. As already indicated, such an assumption is correct; and for reasons already stated the funds necessary on the part of the municipality itself to comply with the order may be secured, so far as any debt limitation is concerned, by acting under section 1259, General Code, supra.

It appears that $102,000 is less than 5% of $4,600,000. Therefore, as the limitation found in section 1259 clearly applies to the bonds issued on account of the particular improvement in question, no other bonds being counted in ascertaining the limitation therein referred to, I am of the opinion that in so far as section 1259 is concerned the village of Kent may lawfully issue bonds which it finds necessary to issue in order to install the improvements ordered by the state board of health.

As already indicated, however, this opinion is not to be taken as a positive holding that the village may issue bonds in the amount stated. Tax levies for the retirement of bonds must be made within all the limitations of the Smith 1% law, and under article XII, section 11 of the constitution provision must be made for such levies at the time the bonds are issued. As hereinbefore stated, however, there is no showing in your letter of facts on which any expression of view respecting the operation of these in direct limitations upon the borrowing power can be based.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1195.

POWER OF A MAYOR TO REMOVE MEMBERS OF COUNCIL OUTSIDE OF A PROVISION OF SECTION 4238, GENERAL CODE—REMOVAL FOR MISCONDUCT IN OFFICE.

Outside the provisions of section 4238, General Code, the mayor has no power to remove members of council. Members may be removed for misconduct in office, through the probate court, or through the common pleas court, upon filing of a petition by twenty per cent. of the electors.

COLUMBUS, OHIO, October 8, 1914.

HON. A. A. GEORGE, *Village Solicitor, Crooksville, Zanesville, Ohio.*

DEAR SIR:—Under date of September 8th, you request my opinion, as follows:

> "As solicitor for the village of Crooksville, Ohio, I desire to know if there is any provision by which the mayor can remove members of council for nonattendance aside from the provision of G. C., sec. 4238, which provides for removal after two months' nonattendance. Under such provision a councilman can miss six weeks, then attend one and miss six weeks more and still hold his place, and that is what they are doing in Crooksville and interfering with our municipal work to a great extent.
>
> "Only two members of council have been playing this sort of business but that takes away a two-thirds vote necessary in many cases. These two men were both adjudged by the state examiner to have drawn illegal fees for last term and they recently paid it back. Would that fact render them ineligible to hold their present positions?"

Section 4238, General Code, is as follows:

> "Council shall determine its own rules and keep a journal of its proceedings. It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two-thirds of all the members elected, and until the delinquent member has been notified of the charge or charges against him, and has had an opportunity to be heard."

It is clear that council's power to expel for absence, under this statute, is confined to a continued absence for two months. The situation presented by you, therefore, does not authorize council to proceed under this section.

Sections 4263, et seq., General Code, authorize the mayor to bring charges before the municipal council against officers guilty of misconduct in office. These statutes, however, do not apply to members of the council.

(Illuminating Co. vs. Hitchens, 30 N. P., n. s., 57.)

Under sections 4670, et seq., General Code, however, provision is made for complaint under oath against municipal officers, before the probate judge of the county and expressly against a member of council who has received compensation contrary to law, or who has been directly or indirectly interested in the profits of a contract, job, work or service, or is or who has been acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the

corporation, contrary to law; or who has been guilty of misfeasance or malfeasance in office. Under the proceedings contemplated by these statutes, where the facts justify, a councilman may be removed from office.

Also, on page 851 of 103, O. L., provision is made for the filing, with the common pleas court, of a complaint signed by 20% of the electors from the district wherein a councilman is elected, against a councilman charging him with neglect of official duty, gross immorality, drunkenness, misfeasance, malfeasance, etc. Further than these presented I am unable to point to any provisions of law which have application to the situation presented.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1196.

TRANSFER OF UNEXPENDED LIGHT FUND TO WATER FUND OF A VILLAGE—CIRCUMSTANCES UNDER WHICH SUCH TRANSFER MAY BE MADE—VILLAGE WATER WORKS.

An unexpended fund in the light fund of the village, for which there is no further use, cannot be transferred to the water fund of the village at all, if the said unexpended fund consists of the proceeds of a special tax levy or bond issue; otherwise, such transfer can be made, but only by proceedings in the common pleas court, under sections 2296, et seq., General Code.

The Longworth act is authority to issue bonds for the purpose of putting down new wells in connection with the village water works.

COLUMBUS, OHIO, October 8, 1914.

HON. F. B. MCCONNELL, *Legal Counsel, Osborn, Ohio.*

DEAR SIR:—You request my opinion upon the following questions:

> "Light and water plant conducted by village; light plant, excepting real estate recently sold to highest bidder. Water plant still operated by village through board of public affairs.
>
> "Can an unexpended fund, now in the light fund, for which there is no further use, be transferred to water fund by act of this board?
>
> "Assuming that sufficient funds cannot be raised by taxation to open new wells needed to maintain water plant and for fire protection by what method can such funds be secured?"

Answering your first question I beg to state that the board of trustees of public affairs have no authority whatever to transfer funds. Whatever authority there is in the premises is reposed in council. Council does not possess such authority with respect to the transfer you mention under section 3799, General Code, as amended 103 O. L., 522, providing for transfer by vote of three-fourths of the members of council, and the approval of the mayor, because their power to make such transfer is limited to transfers "among funds raised by taxation upon the real and personal property in the corporation."

I assume that neither the light fund nor the water fund are funds so raised.

Again, if the unexpended fund in the light fund represents the proceeds of a special bond issue, the section cited prohibits its transfer and section 5654, General

Code, as amended 103 O. L., 521, requires that the surplus be transferred to the sinking fund.

The only other provision for transferring funds is that of sections 2296, et seq., General Code, some of which are amended by the act already referred to. These sections contemplate a proceeding in the common pleas court for the purpose, and the right to transfer is not limited, as in the case of section 3799, to transfers among funds raised by taxation.

However, there is another limitation in these sections which may have application here, viz., that the transfer shall be among funds under the supervision of the council or "other board having the legislative power of a municipality."

Inasmuch as it cannot be successfully contended that the board of trustees of public affairs is a board having legislative power, it follows, I think, that the council is the only village "board" which has the right to proceed under section 2296; and the question then becomes one as to whether or not the light fund and the water fund are both funds under the supervision of the council.

The question here is to be answered, I think, by consideration of section 3960, General Code, which provides as follows:

> "Money collected for water works purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. *When appropriated by council,* it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

Of course, under section 4361, as amended, 103 O. L., 561, the board of trustees of public affairs is expressly given the powers of the director of public service existing under section 3960. In fact section 4361, as amended, seems to go further and to provide that the board of trustees of public affairs shall have and exercise, with respect to electric light, power and gas plants, and other similar public utilities, all the powers and duties of the director of public service relating to water works.

Giving to this language its full effect, it would seem that in villages the electric light fund should be treated as the water works fund is required to be treated by section 3960, General Code. However, for the purpose of the present question, these matters are of slight importance. While the water works fund and perhaps the electric light fund in a village is to be deposited and kept as a separate and distinct fund, subject to the direct order of the trustees of public affairs, without the intervention of a village clerk, yet it is not so subject to order without appropriation by council.

The proper reading of this section requires, I think, the holding that the council shall make a general appropriation rather than a detailed and specific appropriation. Be this as it may, however, it is certain that the power of council to appropriate the fund is sufficient to give it that degree of supervision over the fund which will entitle it to bring an action in the common pleas court for the purpose of transferring to such fund, from another fund under its supervision, or vice versa.

Accordingly, in answer to your first question, I am of the opinion that unless the unexpected balance in the light fund consists of the proceeds of a special tax or bond issue, the same can be transferred to the water works fund, not by action of the trustees of public affairs, and not by council itself, but by the common pleas court in a proceeding instituted by council under the section above cited.

Answering your second question, I beg to state that in my opinion wells needed in connection with the water works plant of a village may be obtained by the issuance of bonds under section 3939, General Code, and particularly the following two paragraphs thereof:

"2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it.

* * * * * * * * * * *

"11. For erecting or purchasing water works for supplying water to the corporation and the inhabitants thereof."

Such bonds must, of course, be issued under all the limitations of the related sections, but the form of your question does not require consideration of such limitations.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1197.

INTERPRETATION OF THE TERMS OF A WILL FOR THE PURPOSE OF DETERMINING INHERITANCE TAX.

The fact that a devise is founded upon a valuable consideration is immaterial as affecting the question of the exemption of the same from the inheritance tax.

Where a bequest to an individual is a charge upon an estate, other interests are to be appraised by deducting the first individual's legacy from the value of the estate devised to them.

Where separate exemptions exist, the interest of each individual is a separate inheritance for the purpose of the inheritance tax law.

The interest of the first individual, not being taxable, and being deducted from the interests of other individuals, neither of the latter is taxable, as both are reduced to $500.00.

COLUMBUS, OHIO, October 8, 1914.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—In your letter of September 23rd, previously acknowledged, you request my opinion upon the following question:

"T., a decedent testate in his will made the following devise: 'I give, devise and bequeath to F. and E. my home place, * * * consisting of two acres and all the buildings thereon, for the consideration of five hundred dollars to be paid by them to my niece M., as her share of my estate and for the further consideration that they shall furnish me with board, washing, nursing, care and attention during my natural life.'

"The devisees named in the foregoing item of T.'s will, did care for T., during the last years of his life. In like manner the legatee M., referred to therein, assisted in nursing and caring for decedent.

"The property devised is appraised at $1,500.00. The services rendered by F. and E., are asserted by them to be worth at least $750.00. Is the inheritance, to the extent of its value above $500.00 taxable, F. and E., not being related to T.?

No discrimination between devises and legacies founded upon a consideration, and those which are gratuitous appears in our inheritance tax law, at least by express provision.

Section 5331, General Code, as amended 103 O. L., 463, provides in part as follows:

> "All property within the jurisdiction of this state, and any interests therein * * * which pass by will or by the intestate laws of this state *or* by deed, grant, sale or *gift,* made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, etc., shall be liable to a tax. * * * All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes. * * *"

It will be observed that under the plain terms of this provision the passing of interests in property by will or by the intestate laws of this state to or for the use of persons other than those expressly excluded, is sufficient to make the estate taxable.

I find no language in the related sections in any way qualifying the general meaning of the sentence which I have quoted so far as the question submitted by you is concerned.

Section 5332, General Code, adds to the list of exemptions by excepting from the operation of the statute interests in property transmitted to certain public subdivisions or institutions.

Section 5334, General Code, contains specific provision for a case somewhat similar to that which you submit and yet easily distinguishable therefrom.

> "Sec. 5334. When a decedent appoints one or more executors or trustees, and instead of their lawful allowance makes a bequest or devise of property to them which would otherwise be liable to such tax, or appoints them his residuary legatees, and said bequests, devises, or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the probate court having jurisdiction of their accounts shall fix such compensation."

It was under this section that the case of In Re Hooper, 4 N. P., n. s., 186, was decided. No general principle is therefore deducible from that decision whatever its authority on other points.

Hagerty vs. State 55 O. S., 613, is an interpretation of the word "sale" as used in the section. The language of the syllabus on this point is:

> "2. The property 'which shall pass by sale' within the meaning of the act is such only as passes in transactions which are in fact gifts, though in form sales, and the act does not restrict the right to dispose of property by sale for a valuable consideration, which the parties in good faith, deem adequate."

It is obvious that this decision does not go to the extent of limiting the force and effect of the statute upon inheritances created by *will* to such as are in the nature of gifts as distinguished from those which rest upon a valuable consideration.

This being the state of the statute law, then, I am of the opinion that the principles laid down in the cases of In Re Gould 156 N. Y., 423; State Street Trust Co. vs. Stevens, 209 Mass., 373; In Re Kidd, 188 N. Y., 274; Ransome vs. U. S.,

Federal Case, 11574 and In Re Perry, Mass., Middlesex Co., Probate Court, July, 1911, apply. All these cases hold that in the absence of explicit statutory provisions to the contrary, an inheritance tax applies as well to a devise or bequest upon a valuable consideration as to one which is intended merely as a gratuity. Some of them even go so far as to hold that even where there has been a definite contract to make a will founded upon a valuable consideration, and the contract was executed on the part of the devisee or legatee, and the will made, the devisee or legatee is subject to the tax without reference to the contract. In such case the devisees or legatees may renounce their respective devises or bequests and elect to claim from the estate of the decedent as creditors thereof, but they may not, so these decisions hold, take under the will except upon the terms upon which all other persons, except those expressly exempt, take under the will, viz., subject to the tax.

In a word, a very clear distinction is made by the authorities between the taxability of property passing by will, founded upon a consideration, and property passing by deed, grant or sale intended to take effect after the death of the testator, and founded upon a consideration. For a deed intended to take effect at the death of the testator or other similar instrument is only *conventionally* an inheritance, and the convention which the statute constructs will be limited to the purpose of the statute, which is to guard against the evasion of the tax by the expedient of making sales, grants or deeds intended to take effect at the death of the testator; so that where the sale, grant or deed is in reality founded upon a valuable consideration it is not permitted to stand upon a different foundation from any other similar transaction merely because it happens to be so made as not to take effect until after the death of the testator, and is, therefore, not to be regarded as within the purview of the statute. But the real subject of the tax is the privilege of inheriting property. This is regarded as in a sense something other than a natural right, whereas the right to dispose of property by grant, sale or deed is a natural right inherent in the very idea of property itself. Therefore, no reason exists in the view of the authorities for making any such distinction as to taxation of inheritances created by will as is made with respect to conventional inheritance created by grant, sale or deed intended to take effect after the death of the testator.

These considerations are, under the Ohio law, emphasized as already hinted, by the fact that section 5334, General Code, expressly provides that the excess over the reasonable compensation of an executor to whom a bequest or devise is made shall be liable for the tax. In the absence of such provision the rule would clearly be, as already stated, that the whole devise or bequest made to such an executor or trustee would be so liable.

I am, therefore, of the opinion that the fact that the devises in the legacies were both made on a valuable consideration does not affect the question which you submit. But this conclusion does not answer your question. The $500.00 to be paid to M., regarded as a bequest, is not subject to the tax because legacies of $500.00 or less in amount are exempt therefrom. This department has held that the $500.00 exemption attached to each inheritance and not to the whole estate. And this conclusion, it is believed, necessarily follows from the language of section 5331, General Code, as well as upon the principles established by decisions in other states under similar laws.

In like manner, the respective interests of F. and E., though joint, are entitled to an exemption of $500.00.

Section 5331, General Code, provides that:

> "All property * * * and any interest therein * * * which passes * * * to *a person* * * * shall be liable to a tax of five per cent. of its value above the sum of $500.00."

F. and E., are separate persons within the purview of this language, and what passes to each of them is an *interest* in property; therefore, if their respective interests in the aggregate are to be valued for the purpose of the tax at but $1,000.00, no tax is payable on behalf of their respective estates. On the other hand, if for the purpose of the tax, the value of their estates in the aggregate is $1,500.00, then the tax should be assessed on the sum of $500.00 or $250.00 for each of them.

The ultimate question involved, then, is as to whether or not the $500.00 required to be paid by F. and E., to M., is to be deducted from the value of the estate devised to F. and E., jointly?

I think it is obvious that this question is to be solved by considering exactly what is the "interest" possessed by F. and E., jointly, in and to the estate devised to them. The rule seems to be that a gift by will to one, coupled with a direction that the devisee shall pay a specific legacy to another, constitutes the legacy a charge upon the land without express words to that effect. In Clyde vs. Simpson, 4 O. S., 445, and particularly in the opinion of Ranny J., will be found an exhaustive discussion of the law on this point. It would be impracticable to quote the whole opinion, which is interesting, but the following paragraph well shows the principle involved:

> " 'When Moore Simpson accepted the devise and took possession of the estate he became absolutely bound to pay these legacies as a part of its purchase price. The testator intended that he should have the property only upon paying so much of a consideration for it. If he had taken the title by deed, an undoubted equitable lien for these payments would have attached; and I am wholly unable to see how a doctrine resting upon the broad foundation of justice and conscience, and which will not permit one to keep the estate of another until full consideration is paid * * * can be made to depend upon the manner in which the title is derived. But whether the lien in this case, might rest upon this doctrine or not, it derives a strong support from the analogy; and I think it very clear, that the actual knowledge and contemplation of such a lien by the testator, are no more important to its existence, than in the case of a vendor of real property."

Now if the lien is one that is created by the will itself, as appears in this case, then I think it logically follows that the interest of the devisees in the estate, passing by will, is something less than the whole estate.

A distinction may be observed between a devise of land encumbered by mortgage, and a devise of land thus encumbered by charging a specific legacy upon it. There may be some doubt as to whether in the former case the interest passing should be regarded as the whole estate or only the testator's equity therein, although there is authority to the effect that the equity only is to be appraised and taxed.

In Re Sutton, 149 N. Y., 618.

But in the case submitted, the thing which cuts down the quantity of the interest devised is the will itself by the operation which it has in making the legacy a charge on the real estate. In other words, one inheritance is a charge upon another inheritance. The closest analogy is perhaps afforded by the right of dower under the intestacy law. Here the value of the estate passing to the heirs is cut down by the interest of the widow or widower in the real property. One inheritance by being a charge upon the other affects the value of the latter.

While I have not encountered any authorities directly in point, I am of the opinion that upon principle the interest of F. and E., in the estate, subject to ap-

praisement and taxation, is limited in value, on the facts submitted to $1,000.00; F. and E., then being entitled to a separate exemption of $500.00 each, the whole estate is exhausted by the exemptions and there is nothing to tax.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1198.

DUTY OF COUNTY AUDITOR WITH REFERENCE TO THE DISTRIBUTION OF SCHOOL FUNDS FOR THE USE OF THE COUNTY BOARD OF EDUCATION—COUNTY AUDITOR MUST MAKE SETTLEMENT ON THE BASIS OF CERTIFICATE REQUIRED TO BE MADE BY THE COUNTY BOARD OF EDUCATION UNDER SECTION 4744-2, GENERAL CODE.

It is the duty of county auditors to obtain from the distribution of school funds the amounts set apart under section 4744-3, *General Code, for the use of the county board of education fund, regardless of the fact that such retention was not taken into account by the rural boards of education in making their* 1913 *tax levies. Such retention is to be made out of all the moneys to be distributed to the several districts including the proceeds of local levies, as well as the amount to be apportioned to the district as its portion of the state common school fund, and is not to be charged against any one particular fund or levy.*

The county auditor cannot make any valid settlement, except on the basis of the certificate required to be made by the county board of education by section 4744-2, *General Code, respecting the number of teachers employed by the various school districts under its jurisdiction, etc. If the county board fails to make proper certificate until after the usual period of settlement and the settlement is made, the error should be corrected under section* 2597, *General Code, in the next succeeding semi-annual settlement, and in the meantime the county board of education fund must get along without the moneys belonging to it, and the county and district superintendents must serve on one-half pay until the next settlement time, when the arrearages in their respective salaries will be made up.*

COLUMBUS, OHIO, October 8, 1914.

HON. BENJAMIN OLDS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—In your letter of September 17th, previously acknowledged, you request my opinion upon certain questions arising under the new school laws. Your questions are as follows:

> "Under section 4744-3, General Code of Ohio, would the county auditor be authorized to retain the amounts necessary to pay the portion of the salaries of the county and district superintendents of the respective village and rural school districts, from the 1914 semi-annual August apportionment, the county board of education having complied with the requirements of section 4744-2 of the General Code; the said apportionment having been raised by a levy of taxes under a budget which did not include said salaries, and said levy having been made before sections 4744-2 and 4744-3 of the General Code were enacted.
>
> "If the county board of education has not complied with the require-

ments of section 4744-2, G. C., but on the 11th day of September, 1914, said board did make the certificate required by said section, the county auditor having at that time completed his August settlements with the various school boards, would it be legal for the various school boards to return to the county treasurer their respective apportionments for the purpose of creating the 'county board of education fund,' and if so could they be compelled to do so should they refuse?"

The first question involves consideration of section 4744-3, General Code, as enacted in 104 O. L., 133-143.

"Sec. 4744-3. The county auditor when making his semi-annual apportionment of the *school funds* to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amounts shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipts by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

A preliminary question arises as to the meaning of the italicized words in the above section, viz., "school funds." Do these words mean and refer to the taxes locally levied or do they mean and refer to the state common school fund, or both?

In my opinion the meaning of the phrase is indicated by the provisions of section 7600, General Code, as amended at the same session of the General Assembly (104 O. L., 159) by an act passed one day later than the act enacting the above quoted section. Said section 7600, so amended, provides as follows:

"After each annual settlement with the county treasurer, each county auditor shall immediately apportion school funds for his county. The state common school funds shall be apportioned as follows:

"Each school district within the county shall receive thirty dollars for each teacher employed in such district, and the balance of such funds shall be apportioned among the various school districts according to the average daily attendance of pupils in the schools of such district. If an enumeration of the youth of any district has not been taken and returned for any year and the average daily attendance of such district has not been certified to the county auditor such district shall not be entitled to receive any portion of that fund. The local school tax collected from the several districts shall be paid to the districts from which it was collected. Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the territory designated by the auditor of state as entitled thereto on the basis of thirty dollars for each teacher employed and the balance according to the average daily attendance. All other money in the county treasury for the support of common schools and not otherwise appropriated by law, shall be apportioned annually in the same manner as the state common school fund."

It will thus be seen that the function of apportioning school funds includes distribution of the local school tax and the state common school fund as well.

It appears, therefore, that the fund from which the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board is to be retained by the county auditor, is the undivided fund, so to speak, consisting in part of the proceeds of local levies and in part of the distribution of the state common school fund.

The only difficulty encountered in reaching this conclusion lies in the fact that section 7600 requires an annual apportionment, while section 4744-3 refers to a semi-annual apportionment. This difficulty, however, is more apparent than real. While section 7600 provides only for an annual apportionment, yet in so far as it covers the actual distribution of taxes, and at least in so far as it applies to the payment to the several districts of local school taxes levied by them, it covers the discharge of a function which must be exercised semi-annually. Formerly I have held in an opinion to the bureau of inspection and supervision of public offices that while the apportionment of school funds, meaning thereby the distribution of the state common school fund among the districts is to be fixed annually, the actual distribution is to take place semi-annually.

Consideration of section 7744-3, General Code, shows that it fits into the scheme of things thus defined, and further justifies my previous interpretation of section 7600.

The fact that no specific levy of taxes was included in the 1913 budget of any school district on account of supervision is, in my opinion, immaterial. There is, of course, a general principle that the proceeds of a tax levy constitute a trust fund which cannot be diverted to any extraneous purpose. This principle is inherent in article XII, section 5 of the constitution, which provides that every law imposing a tax shall specify the object to which only it shall be applied. But this principle cannot be applied too strictly. Otherwise no new function could ever be imposed upon public officers or subdivisions as such, in such a way as to involve the expenditure of money, without providing a specific tax for the discharge of that function.

Now, the local school levies are divided into those for tuition, those for contingent purposes, those for building purposes and those for interest and sinking fund purposes. All of these are, generally speaking, school purposes. So is supervision, and for the legislature to require moneys already raised for these general purposes to be applied in part to supervision would, in my judgment, not be violative of any constitutional limitation. Indeed, there are many other instances of legislation of the same character. Thus fees of the county treasurer and county auditor are payable out of the undivided taxes and are to be retained by these officers from that source; while sections prescribing the payment of such fees were in force when the 1913 levy was made, so that it might be said to have been made in contemplation of the excision from their proceeds of the fees of these officers, yet so far as the strict language of the constitution is concerned the same violence would be done thereto by these statutes as by the one under consideration here.

A case closer in point is the compulsory workmen's compensation act, 103 O. L., 77. Section 19 thereof provides for the retention by the county auditor out of the undivided taxes ultimately payable to the various taxing district of an amount sufficient to pay into the state insurance fund the amount levied by law upon the various subdivisions for the support of that fund. This act went into force on January 1, 1914, and did not become effective as a law under the referendum provisions of the constitution until about June 15, 1914; both dates therefore being after the time for levying taxes in the year 1914. Nevertheless, in January, 1914, under the terms of this act, it was the duty of the county auditor to withhold from the distribution to be made to the various taxing districts an amount to pay state insurance premiums which had not been contemplated, in the legal sense, at the time of the levy.

Unless these statutes are unconstitutional—and I do not believe for reasons al-

ready stated that they are—they clearly evince a policy to the effect that the time of taking effect of a statute requiring retention of moneys from the undivided taxes is not, in the practical sense, postponed until after the taxing authorities have had an opportunity to levy specifically for such purposes or at least to take such retention into account in fixing the amounts which they will levy for other purposes. But for reasons already stated it is not entirely clear that the real burden of the exaction under section 4744-3 will fall wholly upon the proceeds of the local levies. In all probability (though your question does not require me so to decide) all the funds when apportioned to the local district must share in the excision made under section 4744-3. That is to say, the amount of which the section speaks is to be retained from the total amount due to the district and the state common school fund distribution, the tuition fund, the building fund, the contingent fund and the sinking fund must suffer on that account *pro rata*. In short, it is not in the first instance taken from the funds as such at all, but from the undivided moneys in the hands of the county treasurer. It is not taken out of the treasury of the school district, for it never reaches that treasury.

For these reasons it is clear that no appropriation under section 5649-3d, General Code, need be made by the local school boards on this behalf; and further that the prohibition in the same section against making an appropriation "for any purpose not set forth in the annual budget" is not inconsistent with the operation of section 4744-3.

For all the foregoing reasons, then, I am of the opinion, notwithstanding the fact that the budgets of the various village and rural school districts constituting the levies producing the moneys settled for in August, 1914, do not contemplate the payment by the district, in the sense resulting from the operation of section 4744-3, of any portion of the salaries of county and district superintendents, the county auditor is authorized to retain from that settlement the amounts referred to in section 4744-3 of the General Code.

Your second question requires consideration of section 4744-2, 104 O. L., 142, which is as follows:

> "On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

Is the provision for time, as found in this section, directory or mandatory? In my opinion it is directory merely. There is a well settled principle that unless a contrary intention is clearly manifested, provisions respecting the time within which an official act is to be performed are to be regarded as merely directory. Particularly is this true where the intention of the whole law is that the thing commanded to be done shall at all events be done rather than that it shall not be done at all unless done prior to a given date.

Without quoting extensively from the related sections of the amended school laws, I may say that upon a consideration of these laws as a whole, or as a system, I am satisfied that the legislature intended that there should at all events be a county board of education in each county and a county superintendent of schools in each county, as well as district superintendents therein. Compulsory supervision is the keynote in this respect of all these measures.

Inasmuch as compulsory supervision is required it follows, I think, that the legislature must have intended that adequate provision for the salaries of county and district superintendents should be made at all events. Therefore, I am of the opinion that the intention of the legislature, as clearly manifested, is that the certificate required by section 4744-2, General Code, must in all events be made.

I am further of the opinion that the county auditor should not make his settlement with the school districts until the certificate provided for in section 4744-2 is forthcoming from the board of education. In fact without this certificate he would have no proper basis upon which to make a settlement, not only on account of the provisions of section 4744-3, but also on account of the influence of the facts stated in the certificate required by section 4744-2 upon the ratio of distribution of the state common school fund among the various districts under section 7600, General Code, supra.

It appears, therefore, from your statement, that the county auditor has made an unauthorized and premature settlement. Nevertheless, it is a settlement, and I am seriously in doubt as to whether or not the local districts could be compelled to return to the county treasury their respective apportionments for the purpose of creating a county board of education fund or otherwise to return the money which they have received for the purpose of a proper division of the state common school fund. If there is a liability in the premises it would seem to be that of the county auditor, who by his act or neglect, has failed to provide the county board of education fund with a portion of its revenue.

I suggest, however, as the best way out of the difficulty, that the matter be adjusted under section 2587, G. C., at the next semi-annual settlement in March, and that pending such adjustment, the county and district superintendents be induced to serve without receiving their full compensation, and yet without prejudice to their right to receive the same when the county board of education fund shall have been properly reimbursed at the March settlement.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

1199.

ASSESSMENT OF CANAL LANDS—ASSESSMENT OF ELECTRIC RAILWAY WHOSE LINES PARALLEL IMPROVEMENTS MADE UNDER SECTION 7407, GENERAL CODE—FARMERS' LAND MAY NOT BE ASSESSED FOR SUCH IMPROVEMENT—COLLECTION OF COSTS FROM ABUTTING OWNERS.

The state of Ohio, as the owner of canal lands abutting on a road improvement made under favor of sections 7407 and 7463, General Code, inclusive, may not be assessed for any part of the cost of such improvement.

An electric railway whose lines parallel such improvement and abut thereon may be assessed for such improvement, but not in excess of the benefits derived therefrom.

Farmers whose lands lie across either the canal or railroad cannot be assessed for such improvements, where such railroad or canal deprives such land owner of full, free and lawful access to the improvement. (31 O. S., 514; 43 O. S., 190.)

The amount of cost of an improvement, under the above mentioned sections, which, but for the rules laid down in this opinion, might be collected from the state of Ohio, or from farmers across the railroad or canal or from the railroad on account of benefits not equaling the same, cannot be charged against or collected from the abutting owners on the residue of said improvement.

COLUMBUS, OHIO, October 8, 1914.

HON. J. HOWARD JONES, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your letter of August 21, 1914, enclosing a letter to you from your county commissioners in which it is stated that they are making a road improvement under sections 7407 to 7463, General Code, and inquire:

> "1. Whether the state may be assessed because of the fact that the canal abuts on the road being improved?
>
> "2nd. Whether the Ohio Electric railway which also abuts on the side opposite the canal may be assessed for such improvement one-half, if the state may be assessed, otherwise for the full cost assessable?
>
> "3rd. Whether the farmers across either the canal or railroad may be assessed?
>
> "4th. Whether, if the state or electric railway may not be assessed, the full amount of ten per cent. of the improvement may be charged against the remaining frontage?"

Section 7413, General Code, reads:

> "The county commissioners shall assess not more than twenty-five nor less than fifteen per cent. of the cost and expense of such improvement on said abutting land. Not to exceed ten per cent. of said levy may be used for making sidewalks or bicycle paths."

This makes no specific direction as to the manner of assessment, or other direction, than it shall be assessed "on said abutting land." The question of the power to assess property belonging to the state will be first considered.

Dillon on Municipal Corporations, volume 4, section 1446, lays down the rule:

"The principle which makes property of the state or of any of its political or municipal subdivisions nontaxable under general statutory provisions and in the absence of a positive direction therefor, according to the great weight of authority, also precludes the imposition of a special assessment for a street or other local improvement upon such property unless there is positive legislative authority therefor. But property of a municipal corporation is not excepted by implication from the operation of laws authorizing the imposition of special assessments when it is not held for public use. In some states the implied exception is not recognized, and a statute authorizing the imposition of special assessments upon property abutting on an improvement or benefited thereby is held to authorize the imposition of special assessments upon the property of municipalities and other civil divisions of the state."

This, as I take it, answers your first question in the negative and the canal property may not be assessed.

The question whether the electric railway may be assessed, rests upon an entirely different basis. Section 3812 of the General Code, reads:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of a municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place, by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, water courses, water mains, or laying of water pipe, and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon by one of the following methods:

"1. By a percentage of the tax value of the property assessed;

"2. In proportion to the benefits which may result from the improvement;

"3. By the foot frontage of the property bounding and abutting upon the improvement.

"Council, having been conducted upon a rule which excluded the consideration of the question of benefits, and placed the burden upon the land on a theory inconsistent with such consideration, the assessment is, therefore, an illegal one. This conclusion is further shown by the language of the majority opinion delivered by Mr. Justice Harlan. At page 278 these words: 'But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?' " (61 O. S., 8, Shroder vs. Overman, Clerk.)

Norwood vs. Baker was also cited and quoted in Walsh vs. Barron, Treas., 61 O. S., 24. On page 26 of this opinion will be found:

"It must, therefore, be held that all assessments under this law must be limited to all benefits conferred, or, it must follow that the legislature designed a palpable invasion of the rights of private property, which is not admissible. In other words, in authorizing an assessment to pay for im-

provements under the law, the legislature had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received."

These authorities limit the power of assessment in all instances to benefits conferred and their application to the question of assessment against the electric railway property raises the question of fact not here presented, as to the character of title held by the railway company; that is, whether in fee or as a mere easement. If held in fee, it is land and abuts on the improvement but it cannot be assessed in any amount in excess of the benefits conferred by the improvement, which must be based upon benefits to this land other and different from such as are conferred upon the general public.

To conclude, therefore, upon this question, I am of opinion that the right of way of the Ohio Electric railway may be assessed for this improvement to the extent but not beyond the benefits conferred by the improvement upon such lands of this company as it owns in fee and is so specially benefited by the improvement.

Your third question must be answered in the negative upon the ground that they are not abutters upon the improvement. It seems clear to me that these farmers are cut off from the improvement by the canal on one side and the electric railroad on the other, as to deprive them of full, free and lawful access to the improvement. See Richards vs. Cincinnati, 31 O. S., 514 and 43 O. S. 190.

Your fourth question is whether, if the state, canal and farmers across both may not be assessed, whether the total cost of the improvement may be charged against the land owners abutting on the balance of the improvement? To do this would, at first glance, appear to be manifestly unjust, and in the absence of express authority to do so, I would not feel authorized in coming to such conclusion.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1200.

TRANSCRIPT OF PROCEEDINGS OF THE COUNCIL OF THE VILLAGE OF GRANDVIEW HEIGHTS IN THE MATTER OF BONDS ISSUED FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, October 8, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have examined at your request the transcript of the proceedings of the council of the village of Grandview Heights in the matter of the issuance of bonds in the sum of $38,000 in anticipation of the collection of special assessments for the improvement of several streets in said village; also an issue of bonds in the amount of $3,000 in anticipation of the collection of special assessments for the improvement of Lincoln Road in said village; also the issue of a bond in the sum of $150 to pay the village's portion of the cost and expense of certain street improvements therein.

In the course of my examination I came to the conclusion that the ordinances authorizing the issue of these bonds should be amended so as to comply with article XII, section 11 of the constitution. I am this day in receipt of a supplemental transcript of proceedings showing the amendment of such ordinances by an ordinance passed October 7, 1914. Technically this ordinance does not go into effect until completion of the period prescribed by law, viz., ten days (section 4227,

General Code). I am clearly of the opinion that the bonds having been corrected on their face so as to refer to the amendatory ordinance, they would, if purchased not earlier than October 18, 1914, be in all respects valid.

Subject to the foregoing qualifications, I am of the opinion, and hereby certify, that said bonds have been issued in accordance with the provisions of law, and that the same constitute a good and valid obligation against the village of Grandview Heights, to be paid in accordance with the terms specified therein.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1201.

TRANSCRIPT OF PROCEEDINGS INCLUDING ORDINANCE AND RESOLUTIONS ADOPTED BY VILLAGE COUNCIL OF MASON, OHIO, IN REFERENCE TO BOND ISSUE IN THE CONSTRUCTION OF AN ELECTRIC LIGHT PLANT.

COLUMBUS, OHIO, October 9, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I return herewith transcript of proceedings, including ordinances and resolutions adopted by the village council of Mason, Ohio, relative to the issuance of bonds of the village in the amount of $14,000 for the purpose of constructing an electric light plant.

Upon the examination of such transcript I am of the opinion, and hereby certify, that said bonds have been issued in accordance with the provisions of law, and that the same constitute a good and valid legal obligation against the village of Mason, to be paid in accordance with the terms specified therein.

In this connection, however, I observe one question; the ordinance issuing the bonds was published in but one newspaper, the clerk certifying that there is but one newspaper published in the village.

The Court of Appeals of Muskingum county, held, in the case of Vermillion vs. Village of New Concord, that such publication was insufficient. This holding of the court of appeals was contrary to the practice and to the general impression throughout the state. Subsequently to this decision, September 2, 1914, I was called upon by the bureau of inspection and supervision of public offices to express my opinion in the premises. I investigated the decision in question and found that the court of appeals in deciding the case cited had overlooked certain provisions of law having obvious bearing upon the questions involved. I ascertained further, by conversation with counsel who were engaged in the case, that these statutes had not been called to the attention of the court, and that the village of New Concord had acquiesced in the decision, and reformed its proceedings instead of seeking to secure a review of the decision of the court of appeals by appropriate action in the supreme court of the state.

It is only under exceptional circumstances that I do not follow the decisions of courts of appeals but in this instance I felt so sure that the court had reached an erroneous conclusion, and furthermore that it would have come to the opposite conclusion had its attention been called to all the statutes bearing upon the subject, that in my opinion to the bureau of inspection and supervision of public offices I expressed the view that notwithstanding the decision, ordinances and resolutions should be published in one newspaper, published and of general circulation in a

municipality, if there were but one such newspaper published therein, and that such publication would be sufficient.

I have carefully weighed the propriety of certifying to you my opinion as to the legality of these bonds in view of the circumstances above outlined, and have come to the conclusion that the bonds are valid and should be purchased by the industrial commission, feeling that the question made by the erroneous decision of the court of appeals is not serious enough to warrant contrary advice.

I feel, however, that I should qualify my certificate by a full statement of the facts so that if the industrial commission deems it wise to refuse the bonds on account of the existence of a question of this sort the commission may be governed accordingly.

The bonds, however, should be corrected on their face, so as to refer to the ordinance of August 18, 1914, as well as to the other ordinances mentioned therein, before being delivered to the commission and accepted by it.

Yours very truly,
CHARLES FOLLETT,
First Assistant Attorney General.

1202.

ABSTRACT OF TITLE FOR OHIO UNIVERSITY, ATHENS, OHIO.

COLUMBUS, OHIO, October 13, 1914.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title to the following described real estate:

> "Fifty-five (55) feet off of the north side of in-lot 556, in the city of Athens, Ohio, subject to a right-of-way 6 feet wide off the east end thereof for street purposes."

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby, except that there does not appear to be a governor's deed therefor. There are no liens or incumbrances against said real estate, except the taxes for the year 1914, the amount of which is as yet undetermined.

Subject only to the foregoing exceptions, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in William Hoover to the real estate in question.

The abstract is returned to you under separate cover.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1203.

ABSTRACT OF TITLE, OHIO UNIVERSITY, ATHENS, OHIO.

COLUMBUS, OHIO, October 13, 1914.

DR. AUSTIN ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of abstract of title and deed from Levi A. Sprague and wife, to the president and trustees of the Ohio university for the following described real estate, situate in the city of Athens, Athens county, Ohio, to wit:

> *"First Tract.* All that part of in-lot No. sixty-four (64) as lies west of a line north and south one hundred and twelve (112) feet west of the east line of said lot.
>
> *"Second Tract.* In-lot No. one hundred and forty-two (142).
>
> *"Third Tract.* Beginning at the northwest corner of in-lot No. one hundred and forty-two (142) in said city; and thence running south 28 deg. east, 2.23 1/3 chains; thence east 25 links; thence north 33½° west; 2.33½ chains to the place of beginning and containing 24/1000 of an acre, and being an addition to said in-lot No. 142.
>
> *"Fourth Tract.* In-lot No. two hundred and one (201) lying west of and adjoining said in-lot Number 142."

I have carefully examined said abstract and find no defects in the title to the said real estate as disclosed thereby, except that no governor's deed for the third tract above described is abstracted. There are no liens or incumbrances against said real estate except the taxes for the year 1914, the amount of which is as yet undetermined.

Subject only to the foregoing exceptions, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in Levi A. Sprague, to said premises. The deed is in proper form, is duly signed, acknowledged and witnessed, and conveys to the state of Ohio a title in fee simple to the above described real estate.

The abstract and deed are sent to you under separate cover.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1204.

ABSTRACT OF TITLE, OHIO UNIVERSITY, ATHENS, OHIO.

COLUMBUS, OHIO, October 13, 1914.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title and deed from Charles A. Cornwell and wife, to the president and trustees of Ohio university, for the following described real estate:

Situated in the city of Athens, Athens county, Ohio, to wit:

> "*First Tract.* Fifty-two (52) feet off of the south side of in-lot numbered sixty-nine (69) in said city, subject, however, to the right-of-way six (6) feet wide for street purposes over and across the east end thereof as conveyed to Margaret A. Martin and others by the said Charles A. Cornwell and wife by their deed dated June 25, 1909, and recorded in Deed Book 110, at page 76.
>
> "*Second Tract.* A permanent right of way for the purpose of a private alley, as an appurtenance to the foregoing first tract, over and along a strip of land thirteen (13) feet in width along the north side of said first tract and extending eastward from University Terrace the whole length of said in-lot No. sixty-nine (69)."

I have carefully examined said abstract and find no defects in the title of said real estate as disclosed thereby, except that there does not appear to be a governor's deed therefor. There are no liens or incumbrances against said real estate except the taxes for the year 1914, the amount of which is as yet undetermined, and an uncancelled mortgage from Charles A. Cornwell and wife to Kate Hoskinson for $2,000 dated January 23, 1914, and abstracted at page 41.

Subject only to the foregoing exceptions, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in Charles A. Cornwell to said premises. The deed is in good form, is duly signed, acknowledged and witnessed, and conveys to the state of Ohio a title in fee simple to the real estate above described.

The abstract and deed are sent to you under separate cover.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1205.

TRANSCRIPT OF PROCEEDINGS AND COPY OF RESOLUTION IN FORM OF BOND FOR BOND ISSUE FOR RURAL SCHOOL DISTRICT, SPRINGFIELD TOWNSHIP, ROSS COUNTY, OHIO.

COLUMBUS, OHIO, October 14, 1914.

The Industrial Commission of Ohio, Majestic Bldg., Columbus, Ohio.

GENTLEMEN:—I am herewith returning to you transcript of proceedings, copy of resolution and form of bond, also certain additions to the transcript which this department requires.

On the transcript as it now appears, I am of the opinion that the bond issue is legal as a valid and binding obligation of the rural school district of Springfield township, Ross county, Ohio, and hereby approve the same, provided, however, that the bonds should contain on their face section 5a of the resolution, which does not appear on the form submitted, for the reason that it was an amendment to the original. I am making this suggestion to the prosecuting attorney.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1206.

VANDALIA RAILROAD COMPANY NOT LIABLE FOR THE PAYMENT OF EXCISE OR FRANCHISE TAX—ROLLING STOCK USED BY THIS RAILROAD COMPANY IN OHIO ON THE TRACKS OF ANOTHER RAILROAD TAXABLE AS PROPERTY—SUCH RAILROAD COMPANY TO REPORT AS A RAILROAD COMPANY AND A PUBLIC UTILITY TO THE TAX COMMISSION OF OHIO.

The Vandalia Railroad Company is not liable for the payment of any excise or franchise tax, but its rolling stock so used in Ohio is taxable as property, and for that purpose it should make a report as a railroad company and a public utility to the tax commission of Ohio, which should ascertain the total value of all the rolling stock of the Vandalia Railroad Company, and give to Ohio such a proportion thereof as is represented by the number of miles of main track over which the Vandalia runs cars in Ohio, as compared with its total mileage within and outside of Ohio, including said Ohio mileage; and the value so apportioned to Ohio shall be further apportioned among the taxing districts in Ohio through which the tracks used by it run in proportion to the mileage located in each.

COLUMBUS, OHIO, October 17, 1914.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of August 21st, submitting for my opinion thereon the following question:

> "The Vandalia Railroad Company has a contract with the Wabash which gives them simply the right to run their trains over the tracks of that company between Butler, Indiana, and Toledo. Ohio, which prohibits them from doing any business between those points or between those points

and intermediate Wabash stations. Under an agreement with the Lake Shore they use that company's station in Toledo for their passenger trains. Under another arrangement with the Toledo Terminal Railroad Company they use the tracks of that company between Gould, O., and the tracks of the Pennsylvania Company and the freight facilities in Toledo of the last-named company. They claim to have no property located in the state and have earned no income from business handled exclusively in Ohio. All their earnings are derived from interstate traffic alone.

"QUERY: Is the Vandalia Railroad Company liable for a tax of any kind? If so, what? If not, are the companies over whose tracks the cars are operated liable for a tax upon said cars?"

These facts and the question which you submit thereon require consideration of the following sections of the General Code:

"Section 5415. The term 'public utility' as used in this act means and embraces each corporation * * * herein referred to as * * * railroad company * * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.

"Section 5416. Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated. * * *

"When engaged in the business of operating a railroad, either wholly or partially within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company.

"Section 5420. Each public utility, * * * shall annually, * * * make and deliver to the tax commission * * * a statement, with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state.

"Section 5422. Such statement shall contain: * * *

"(13) In the case of * * * railroad companies, such statements shall also give:

"(a) The whole length of their lines and the length of so much of their lines as is without and is within this state, * * * which shall contain lines and branches such companies *control and use* under lease or otherwise. * * *

"(c) Such statement as to character, classes, number, amounts, values, locations, ownership or control and use of rolling stock, as the commission may require.

"Section 5423. * * * The commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act * * *

"Section 5424. In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility.

"Section 5429. The commission shall ascertain all of the personal property * * * and real estate necessary to the daily running operations of the road, moneys and credits of each railroad company * * * *having*

any line, or road, or part thereof in this state * * * and also locomotives, motors and cars not belonging to the company, * * * but hired for its use or run under its control on its road by a sleeping car company or other company. * * *

"Section 5430. The value of such property * * * of each of such * * * railroad companies * * * shall be apportioned by the commission among the several counties through which the road * * * runs, so that to each county and to each taxing district shall be apportioned such part thereof * * * that the rolling stock, main track, * * * supplies, moneys and credits of the company shall be apportioned in like proportion that the length of the road in such county, bears to the entire length thereof in all the counties, and to each city, village and district or part thereof therein.

"Section 5445. When a * * * railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits * * * so found and determined, * * * and divide it in the proportion the length of the road in this state bears to the whole length * * * thereof." * * *

The quotation of the excise tax statutes is unnecessary, as you say that the company concerning which you inquire does no intrastate business whatever but is exclusively engaged in transporting interstate commerce. That being the case, the principles outlined in the opinion to the commission in the matter of the Connecting Gas Company apply, and the corporation is not liable for the payment of any excise or franchise tax, whatever.

I shall first discuss, then, the question arising under the statutes as I have quoted them, viz., as to whether or not the Vandalia Railroad Company constitutes a railroad company and a "public utility" within the meaning thereof. If the answer to this question is to be given in the affirmative, then that company would be required to be assessed on the value of so much of its property as is localized in Ohio by the operation of those statutes.

The first subordinate question which arises is as to whether or not the operation which you describe satisfies the definition of a "railroad company;" for it is apparent, I think, that if it does, then the operation of trains in the state would constitute "property * * * operated," within the meaning of the definition of the term "public utility," embodied in section 5415, General Code. Now the business of operating a railroad is not defined at all. The situation is presented of a definitive section using terms which, themselves require definition. The exact language is "when engaged in the business of operating a railroad * * * on rights-of-way acquired and held exclusively by such company, or otherwise." The inference is that the mere fact that a railroad may be operated upon rights-of-way not acquired and held exclusively by the company does not deprive the operation of the character which the statute contemplates. It is well known, of course, that many railroads in this state are operated over rights-of-way which are not owned by the operating companies, but are merely leased by them. It is also true that in many instances railroads in this state operate trains over rights-of-way which they do not even lease, under contracts similar to that described by you, but so far as I am informed, the instance which you mention is the only one in which such an operation is the only kind of operation which the company carries on in the state.

I think we may, therefore, eliminate the question as to exclusive ownership or use of the right-of-way as reflecting on the application of the statutory definition. In other words, it is not essential in determining whether or not a given company

satisfies the definition of a "railroad company," in section 5416, General Code, that the company have exclusive control of any right-of-way, either as owner or lessee. The statute, itself, precludes any such consideration by the use of the language "own rights-of-way acquired and held exclusively by such company, or otherwise." Therefore, the mere fact that the Vandalia Railroad Company has not the exclusive use of any right-of-way in Ohio, does not deprive it of the character of a railroad company.

As already stated, once the conclusion is reached under section 5416, that a given operation constitutes a company a railroad company, the property operated by such company becomes a "public utility" within the meaning of the second definition of section 5416, General Code. In the case submitted, the property operated would, as you suggest, be the locomotives and cars and only such property.

But it must be admitted that all the related statutes must be read together, and that if any inconsistencies appear in other sections of the General Code, which I have quoted, they may be properly used to modify what would otherwise be the primary meaning of the definition found in section 5416.

Section 5422, General Code, in prescribing the substance of the property statement to be made to the tax commission by railroads, assumes, at least, the control and use under lease or otherwise, of lines and branches within this state. Just what is meant by the term "control and use under lease or otherwise" is perhaps a difficult question. Evidently something less than ownership is here contemplated, so that the length of lines so required to be reported is not the length of those lines which the company owns only. So much is obvious. If then something less than ownership is all that is required, the question arises as to whether or not exclusive control and use under lease is contemplated. This can certainly not be the case because of the failure of the statute to use the word "exclusively," and because of its use of the phrase "and otherwise." On the whole, I think that the particular phraseology now under consideration, standing by itself, is at least, very susceptible to a meaning which would include lines which a railroad might control and use under contract for the purpose of the regular operation of certain trains over the same.

I have reached this conclusion not alone on the language under review, itself, but also in view of the purpose for which the report of the length of track is required. Anticipating a little, the trackage is reported that the commission may make a certain apportionment of the entire value of the railroad after deducting therefrom the value of certain localized property such as terminals, station houses, real estate not used in operation, etc., as between Ohio and the rest of the world, and as among the various taxing districts in Ohio, respectively. That is to say, assuming that a railroad may have property which Ohio has power to tax and that property is not definitely localized in any one place in Ohio, the intention of the statute is that its value shall be shared in, so to speak, by the duplicates of the various taxing districts in Ohio, for the extension of taxes thereon, according to a fixed formula which, in turn, is based upon track mileage. It would, accordingly, be immaterial for the purpose of making such an apportionment, whether the track itself were owned by the railroad company or not, provided its rolling stock were operated over that track; for the value of the rolling stock, assuming the statute to apply to such a case, would then be distributed among the various taxing districts in which it might move, proportionately to the number of miles of track over which the same was operated, located in the various taxing districts of the state, regardless of the ownership of that track.

So I have reached the conclusion that paragraph "a" of subsection 13 of section 5422, General Code, above quoted, is at least susceptible to the meaning that a railroad company shall report the number of miles of track in Ohio which the

company controls and uses regularly under lease or otherwise, for the operation of trains whether such control is exclusive or not.

Of course it is obvious that paragraph "c" of the same section might have application to the facts as stated by you. That is to say, the Vandalia Railroad Company is controlling and using rolling stock in the state of Ohio, and if it is required to make any report at all, is in position to make the report required by this provision.

Coming now to sections 5423 and 5424, I note that the subject of the tax commission's determination, under these sections, is the value of the property of the public utility "in this state." If the Vandalia Railroad Company has any property at all, in this state, such property consists solely of rolling stock which is operated across a part of this state in the transportation of interstate commerce, and which presumptively is not localized definitely at any one point in this state, but is kept, at all times, occupied in moving such commerce.

Anticipating again, I may say, on this point, that the mere fact that this kind of property constitutes the only property which the Vandalia Railroad Company could be said to have in this state, cannot be regarded as of importance if it appears that as to railroads actually having fixed property within this state, such as road bed, and right-of-way, wires, poles and rails, the rolling stock thereof, whether moving in interstate commerce or not, is to be regarded as property in this state, for the purpose of the related sections. That is to say, taking as an example the case of the Louisville & Nashville Railroad Company, which owns a very short line of railroad in this state over which it moves no trains save those engaged in carrying on interstate commerce, if it appears that the law now under consideration applied to the Louisville & Nashville Railroad Company, would so result as to assign to Ohio a proportionate part of the value of its rolling stock, then, so far as the question of rolling stock being regarded as "property in this state" is concerned, that of the Vandalia Railroad Company must be likewise considered; for though the two cases differ with respect to the location of fixed property in this state, they are alike in their essential particulars. They are alike with respect to the situs, or rather the lack thereof, of their respective rolling stocks.

The answer to the question just suggested is, in my opinion, found in sections 5429, 5430 and 5445, above quoted. Without analyzing these sections in detail, it is sufficient to state, I think, that they contemplate that so much of the value of the entire property of a railroad company, subject to assessment in Ohio, as is attributable to rolling stock, main track, supplies, moneys and credits, etc., and in short to all other property not definitely localized, such as real estate, structures and stationary personal property, is to be divided between Ohio and the rest of the world, and, in Ohio among the various taxing districts through which the road runs, in proportion to the track mileage. That being the case, it is clear at a glance that rolling stock is regarded as property taxable in Ohio weather it is used in interstate commerce or not; and accordingly rolling stock is "property in this state, within the meaning of sections 5423 and 5424.

In connection with section 5429, General Code, I observe the use of the phrase "having any line or road or part thereof in this state." Standing by itself, this phrase would have a natural meaning which would, at least, exclude lines, roads or parts thereof not exclusively controlled and used by a railroad company, so that upon such a strict interpretation of the phrase, the Vandalia Railroad Company, which does not have the exclusive use of any line or road in this state, would not be within the purview of the statute. But I do not think that the phrase can be so interpreted. This section must be taken in connection with all the related sections of the same act, and it being apparent upon the consideration of sections 5416 and 5422, that the act is intended to apply to railroads controlling and using lines in this state, whether such control and use is exclusive or not, the phrase

"line or road or part thereof," as used in section 5429, must be regarded as descriptive of such control and use of a line of railroad in this state, as is contemplated by such other sections.

In addition to the foregoing consideration, I think it is obvious that the public utility assessment statutes, and especially those relating to railroads, require such an application as will reach to the full extent of the state's taxing power respecting property. Without singling out any particular phrase or clause, it may be said of these statutes, generally, I think, that they are very comprehensive, and that they evince clearly a legislative intention to reach every subject of taxation within the taxing power of the state.

Now it has been held in such leading cases as Pullman's Palace Car Co. vs. Pa. 141 U. S., 18, and P. C. C. & St. L. Ry. Company vs. Backus, 154 U. S., 421, that rolling stock used in a state by a railroad company, whether engaged wholly or partly in the transportation of interstate commerce is a proper subject of taxation as property by such state, provided the power to tax the same is not so exerted as to reach the whole value of the rolling stock so taxed, but equitably assigns to the taxing state a fair proportion thereof. As said by Mr. Justice Gray in the opinion of the first of these cases, at pages 25 and 26:

> *"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state;* and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. * * * The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state, but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property. * * *
>
> "The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run."

Citing several decisions Mr. Justice Gray points out that the right of a state so to appropriate a part of an entire value and make it subject to its taxing power as property, is sustained by authority.

It appears, therefore, that upon the highest authority, rolling stock moving in interstate commerce within the confines of the state is "property in the state" so far as the state's power to tax it is concerned; and that that power may be exercised by taking the value of all of the property of this kind operated by a given company, and assigning to the taxing state such proportion thereof as is represented by relative mileage of routes of travel. Now it is clear that the Ohio statute at least is susceptible to the interpretation that routes of travel are to constitute the basis of its apportionment. It is also clear that the state intends that its property taxation laws shall apply to all property in the state, by which, I think,

is meant all property which the state has the power to tax as property in the state. That being the case, I am of the opinion that the rolling stock of the Vandalia Railroad Company, under the circumstances mentioned by you, or rather so much thereof as may be appropriately assigned to Ohio, constitutes property in this state, within the meaning of the related statutes.

But I am led to this conclusion by other fundamental considerations as well as those which have been mentioned. The state, as has been seen, has the power to tax this rolling stock. If such rolling stock is not reached by the statutes now under consideration, then some other statute must be looked to as exerting the state's power. There is no other statute which would be regarded as applicable here, unless it be sections 5404 and 5405 of the General Code, applicable to corporations, generally. These statutes need not be quoted. It is sufficient to say of them that they require the property of a company located in a county to be reported to the county auditor, valued by him and apportioned among the various taxing districts of the county in proportion to the value of the real estate and fixed property therein. While it might be true, in the academic sense, that rolling stock could be reached under this statute, the practical difficulties in the way of determining what amount of rolling stock happened to be located, on the day of the assessment, in a given county in the state, when all the rolling stock was undoubtedly on that day in continuous motion through several counties in the state, are insurmountable in the way of any actual application thereof. Furthermore, sections 5404, et seq., must fail of application because the apportionment of the property in a county among the taxing districts therein must be based upon the value of the real estate and fixed property situated in each; whereas, upon the facts stated by you, the Vandalia Railroad Company has no real estate or fixed property anywhere in Ohio.

Therefore, if the Vandalia Railroad Company's rolling stock is not taxable, under the public utilities sections of the taxation act, it is not taxable at all, despite the fact that the state has the power to tax it, and despite the fact, also, that the state taxes the rolling stock of other railroad companies.

In passing I may refer to the sections for the taxation of sleeping cars, freight lines and equipment companies, as evincing in the state's policy, to the effect that railroad rolling stock shall contribute to its revenue.

There is such a thing, of course, as accidental exemption from taxation, but I am not aware of any principle of construction which would favor such accidental exemption while strictly construing express exemptions. True, taxation statutes are said to be subject to a strict interpretation, but this principle, I take it, does not go to the extent of producing an entire exemption from taxation, especially in the face of the constitutional requirement that laws shall be passed taxing, by uniform rule, all real and personal property.

I think it is fair, therefore, to interpret the related sections of the statutes in the light of these principles, and to hold that where the statutes can be made applicable to a given class of property, and where the consequence of failing so to apply them would be to exempt such property from taxation entirely, that interpretation of such statutory provisions will be adopted which will subject the property in question to the same burdens that are imposed by the laws of the state on other similar property.

I am, therefore, of the opinion that the property of the Vandalia Railroad Company, consisting of rolling stock which can be, under the statute, assigned to Ohio, is taxable here, and is to be assessed for taxation by the tax commission of Ohio, under the public utilities provisions of the statutes.

The manner in which this assessment should be made is not difficult to determine. That is, the statutes are easily applied to the situation. The first thing that must be done is for the commission to ascertain from the report made by the company, the whole value of the Vandalia Railroad wherever located. From

that value must be taken, as factors not entering into the Ohio assessment, the whole value of all real estate, fixed property, the right-of-way, etc. In short, practically everything except the rolling stock itself. Such rolling stock, when the value thereof is thus ascertained by elimination (or in my judgment, it would be perfectly proper to ascertain the whole value of all the rolling stock by direct assessment without going through such a complicated process), must be apportioned between Ohio and the rest of the world, on the basis of the relative mileage of track used by the Vandalia Company in Ohio as compared with all the main track used by it, wherever situated. The result will be the value in Ohio, which in turn, is to be apportioned among the various counties through which the lines used in Ohio by the Vandalia Railroad Company are located, in proportion to the respective miles of mail track located in each. In short, for the purpose of apportionment, the tracks used by the Vandalia Company in Ohio are to be regarded as the "length of the road," for the purposes of sections 5430 and 5431, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1207.

SUPPLEMENT TO OPINION NO. 1205.

COLUMBUS, OHIO, October 21, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I return to you herewith a letter addressed to the industrial commission by Hon. Walter Boulger, prosecuting attorney of Ross county, in the matter of the bond issue for Springfield township rural school district.

Enclosed in Mr. Boulger's letter is an amended form of bond which I have examined, and I hereby certify that the same is satisfactory to me and desire to supplement my former opinion to this extent.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1208.

TRANSCRIPT OF THE PROCEEDINGS OF THE COMMISSIONERS OF COLUMBIANA COUNTY IN THE MATTER OF A BOND ISSUE.

COLUMBUS, OHIO, October 21, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the request of the commission I have examined transcript of the proceedings of the commissioners of Columbiana county in the matter of the issuance of bonds in the amount of $51,000, in anticipation of the collection in Unity township of said county of taxes and assessments for the payment of fifty per cent. of the total cost and expense of the improvement of a certain section of the main market road, number 14, situated in said township, under the state highway law.

I have also examined a form of bond which has been sent to me by Hon. Lewis P. Metzger, attorney-at-law, Salem, Ohio, and which I have caused to be attached to the transcript and enclosed herewith.

In my opinion, the proceedings for the issuance of the bonds in question are,

in all respects, regular. Objection might be taken to the language of one of the preliminary resolutions of the trustees of Unity township shown at pages 11 and 12 of the transcript from which the inference arises that the intention of the trustees is that the assessment against abutting property shall be to reimburse the township, and that taxes shall be, in the first instance, levied on all the taxable property of the township to pay the township and property owners' portion together.

This defect, if it be such, is however, in my opinion, remedied by the later resolution of the trustees shown at pages 12 and 13 of the transcript, which is in strict conformity to law, and by the amended resolution of the county commissioners shown in the appendix to the transcript also enclosed herewith, being a resolution of the commissioners passed October 5, 1914, wherein provision is made for the collection of taxes and assessments, in a manner which conforms to the law. Therefore, I regard the language of the first resolution above referred to as not constituting a defect in the procedings, and as in no way bearing upon the validity of the bonds.

With respect to the form of bond I beg to advise that the form should be amended so as to refer to the amendatory resolution passed October 5, 1914, and heretofore referred to in this letter. By comparing the printed bonds with the form enclosed herewith, the industrial commission will be in a position to determine whether or not this change has been made. Otherwise the form of the bond is, in all respects, proper.

Subject to the foregoing qualifications then, and repeating the admonition that the form of the bond should be examined to see that the same refers to the amendatory resolution of October 5, 1914, as well as to the original commissioners' resolution of July 27, 1914, I hereby certify that, in my opinion, the above mentioned bonds of Columbiana county in the amount of $51,000 have been issued in accordance with the provisions of the law, and that the same constitute a good and valid legal obligation against the county of Columbiana, to be paid in accordance with the terms specified therein, from the proceeds of the taxes and assessments therein referred to.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1209.

TRANSCRIPT OF THE PROCEEDINGS FOR THE ISSUANCE OF BONDS OF SANDUSKY COUNTY, OHIO, AND A FORM OF BOND ISSUE IN PURSUANCE THEREOF.

COLUMBUS, OHIO, October 22, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I herewith certify that I have examined the transcript of the proceedings for the issuance of bonds of Sandusky county, Ohio, in the sum of $25,000.00, and a form of bond issued in pursuance thereof, all of which are enclosed herewith; and that I find that said bonds have been issued in accordance with the provisions of law, and that the same constitute a good and valid legal obligation against Sandusky county, Ohio, to be paid in accordance with the terms specified therein.

I must make one qualification with respect to the form of bond. There should be inserted therein, after the date of the resolution referred to in the second paragraph thereof; the date of the amendatory resolution shown at page one of the

supplement to the transcript, to wit, October 14, 1914, so that the bonds will appear on their face to have been issued in accordance with the amended resolution. I am advised that the bonds have been returned by the treasurer of state to the county commissioners for this purpose. The face of the bonds should be examined by the commission to see that this amendment is made, and the commission should be officially advised that the same has been done upon the order of the county commissioners before the bonds are accepted for investment.

Yours very truly,
CHARLES FOLLETT,
First Assistant Attorney General.

1210.

TRANSCRIPT OF THE PROCEEDINGS FOR THE ISSUANCE BY COUNCIL OF CITY OF NILES, OHIO, OF BONDS IN ANTICIPATION OF THE COLLECTION OF SPECIAL ASSESSMENTS FOR THE IMPROVEMENT OF STREETS IN SAID CITY.

COLUMBUS, OHIO, October 24, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the request of the commission I have examined the transcript of the proceedings for the issuance by the council of the city of Niles of bonds in the amount of $3,216.50 in anticipation of the collection of special assessments for the improvement of West Church street in said city.

I have also examined the bonds themselves which are on deposit in the office of the treasurer of state.

The transcript which I have examined is enclosed herewith but no form of bond is attached thereto.

I hereby certify that in my opinion the said bonds have been issued in accordance with the provisions of law and that the same constitute a good and valid legal obligation against the city of Niles, to be paid in accordance with the terms specified therein.

Yours very truly,

CHARLES FOLLETT,
First Assistant Attorney General.

1211.

UNDER THE PROVISION OF SECTION 12556, GENERAL CODE, IT IS NOT NECESSARY THAT THE TWENTY-FIVE MILES THAT AN ENGINE MAY RUN WITHOUT CARS AND WITHOUT TRAIN CREW BE IN ONE DIRECTION; IT MAY BE CALCULATED AS GOING TO AND RETURNING FROM A GIVEN POINT.

It is a violation of section 12556, *General Code, to send an engine, without cars, and without the train crew prescribed in said section, to run under one order and as one trip a distance of more than twenty-five miles from the starting point, and it is not necessary that the twenty-five miles be in one direction; it may be calculated as going to and returning from a given point to which the engine is sent, with directions to return as part of the same order.*

COLUMBUS, OHIO, October 26, 1914.

The Public Utilities Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 14, 1914, in which you inquire:

> "The public utilities commission of Ohio has requested that you give them an official opinion construing that part of section 12556, General Code, which makes it an offense to run a light engine on a railroad without cars a distance of more than twenty-five miles from the starting point, with less than a full crew in charge."

Section 12556 reads:

> "Whoever, being a superintendent or other employe of a railroad company, sends or causes to be sent outside of yard limits, on a road over which are run more than four freight trains in every twenty-four hours, a through freight train with less than one engineer, one fireman, one conductor and two brakemen, or a light engine without cars, to run a distance of more than twenty-five miles from starting point, with less than one engineer, one fireman and one conductor or flagman, shall be fined not less than twenty-five dollars for each offense."

This section is of comparatively recent origin, having been first passed May 2, 1902 (95 O. L., 337), which act was repealed May 10, 1902 (95 O. L., 532). The repeal and re-enactment in so short a time is attributable to the fact that as originally passed, section 2 was so worded in the original act as to probably fail to prescribe any penalty for disobedience.

The amended section 2 prescribed a penalty for sending outside of the yards a through freight train, omitting a penalty as to sending a light engine without cars to run a distance of more than twenty-five miles from the starting point.

The codification is found in section 12556, above copied, and a penalty is affixed for a violation of either of the requirements of the section.

Under the rule laid down in State vs. Toney, 81 O. S., 130, the change brought into the law by the codifiers is valid and a general discussion of the effect of a codification is unnecessary, and it therefore follows that a determination of the meaning of section 12556 is all that is now needed.

This determination is left to a choice between holding that the language "to run a distance of more than twenty-five miles from starting point" applies to a going distance only and should be construed as though it read to run to a place

more than twenty-five miles from the starting point and without considering the matter of "running distance" or "distance traveled" as a controlling factor in construing this section. Taking the section as an entirety, and we have "Whoever * * * sends or causes to be sent * * * a light engine without cars, to run a distance of more than twenty-five miles from starting point * * * shall be fined, etc."

When we consider this entire section as applicable to a light engine without cars, we see the offense is the "sending" or "causing to be sent" to run a distance of more than twenty-five miles from starting point." Dropping the last three words and there is nothing to construe; it is the *distance to be run or traveled* under the *"sending"* that controls, and no one would think of limiting the distance run to the going, and leave out of sight the distance traveled in returning. Does the addition of the words "from starting point" modify "limit" or even change the meaning in any regard? Running a distance does not necessarily mean a going in one direction only, but may easily be held to mean both going and returning. I regard "sending," "running" and "distance" to be the controlling elements in construing this section, and cannot understand that when an engine is sent out to a point more than twelve and one-half miles from starting point to there perform some work and then return light, it is not sent out to *run a distance* of more than twenty-five miles from the starting point.

Another consideration presents itself: the prohibition as to a through freight train is as to sending it outside of yard limits. Yard limits may in some instances, include a distance of five miles or even more, and these words as we find them at the close of that part of the sentence under consideration, doubtless were inserted to avoid the construction of this part of the section as applying to twenty-five miles outside of yard limits and not from the point of starting within the yards.

Consequently, I am of the opinion that to properly construe this section, we must consider the "sending" or "causing to be sent" as the primary element in construing the sections, and when considering this language, we are confronted with the question, how is such an engine sent. The answer is plain—by an order from the superintendent or some other employe. Such being the case, we cannot lose sight of the fact that an order is necessary, nor that such order may be a direction to run to a certain point, perform certain services and await further orders, or to return on fulfillment of the mission as directed. Therefore, it is plain that if such engine is sent to perform a duty at a point more than twelve and one-half miles from the starting point, and return light, it is sent out to run a distance of more than twenty-five miles from the starting point, while if ordered to go to a point say twenty-four miles from the starting point and there perform certain duties and await further orders, it was not sent out to run more than twenty-five miles, as the movements of the engine while complying with the order should not be calculated.

To conclude, therefore, I am of the opinion that where a light engine without cars, is sent out under one order and on one trip to run more than twenty-five miles, including both going and returning, it must carry the prescribed crew, and the distance traveled is not confined to the distance reached when farthest away from the starting point, but includes actual distance traveled under the order or in fulfilling its mission.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1212.

TRANSCRIPT OF PROCEEDINGS FOR THE ISSUANCE OF BONDS OF COLUMBIANA COUNTY, ISSUED IN ANTICIPATION OF THE COLLECTION OF TAXES AND ASSESSMENTS LEVIED IN FAIRFIELD TOWNSHIP ON ACCOUNT OF IMPROVEMENT OF INTERCOUNTY HIGHWAY.

COLUMBUS, OHIO, October 30, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I hereby certify that I have examined, in accordance with your request, the transcript of the proceedings for the issuance of bonds of Columbiana county in the sum of $43,100.00, issued in anticipation of the collection of taxes and assessments levied in Fairfield township, said county, on account of the improvement of section 2 of intercounty highway No. 86, situated in said township and county; and also that I examined the bonds themselves which are on deposit in the office of the treasurer of state; and that in my opinion said bonds have been issued in accordance with the provisions of the law and that the same constitute a good and valid legal obligation against the board of county commissioners of said county, to be paid in accordance with the terms specified therein.

In this connecton I observe a discrepancy, already referred to in a letter written to you recently, between your resolution of September 26, 1914, and the facts disclosed by the transcript. Your resolution accepts, subject to my opinion, bonds of the general description above set forth in the sum of $40,000, falling due in certain series on the first of August annually between the years 1915 and 1922, inclusive. The transcript shows the entire issue to have been in the sum of $43,100. Bonds numbered 1 to 85, inclusive, to be of the denomination of $500 and bond number 86 to be of the denomination of $600. Said bonds are to fall due in series but not exactly corresponding to those described in your resolution. Thus, the first series which falls due August 1, 1915, as described in your resolution consists of bonds numbers 1 to 11, inclusive, whereas, as issued said series consist of bonds numbered 1 to 9 both inclusive. Bond No. 80 of the series described in your resolution is the last one of the series falling due August 1, 1922; whereas, bond No. 80 in the resolution of the commissioners belongs in the series consisting of bonds numbered 73 to 81 both inclusive, and falls due on September 1, 1923.

I am verbally informed by a representative of the commissioners of Columbiana county that the commission has agreed to take $40,000 of these bonds. This could be done by accepting bonds numbered 1 to 80, inclusive, and these are the bonds which have been delivered to the treasurer of state.

As above stated I am clearly of the opinion that the proceedings are in all respects regular and that the bonds are in all respects valid, but I call your attention to this possible immaterial variation between your resolution and the issue as made in the interest of accuracy, and with a view to permitting the commission to correct its own records or to review the entire matter as may be desired.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1213.

TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE FOR THE VILLAGE OF HUDSON, OHIO, FOR PAVING OF STREETS IN SAID VILLAGE.

COLUMBUS, OHIO, November 2, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In accordance with your request, I have examined the proceedings for the issuance of bonds of the village of Hudson, Ohio, in the sum of $3,150.00 (thirty one hundred and fifty and 00/100 dollars), in anticipation of the collection of special assessments for the improvement, by paving, of Church street in said village.

It affirmatively appears by supplement to the transcript attached thereto that the proceeding for the improvement was initiated by filing with the council a petition therefor, signed by the owners of the majority of the foot frontage abutting upon the improvement. This being the case, the fact that fewer than thirty days elapsed between the date of the passage of the resolution of necessity, or that of the passage of the ordinance determining to proceed, is rendered immaterial.

Section 4227-3, General Code, or part of the proceedings for the municipal initiative and referendum stipulates that:

> "Ordinances or other measures providing * * * for street improvements petitioned for by the owners of the majority of the feet front of the property benefited and to be specially and especially assessed for the cost thereof, as provided by statute * * * shall go into immediate effect."

The original transcript furnished me did not make this fact clear and accordingly gave rise to a question which is rendered somewhat doubtful in view of the decision of the common pleas court of Cuyahoga county in the case of Drum vs. Cleveland, 13 n. p. n. s., 281, and that of the court of appeals of the same county in the same case, in an opinion which has not been reported.

The form of the bond is attached to the transcript.

No other question appearing upon the face of the transcript, I hereby certify that in my opinion said bonds have been issued in accordance with the provisions of the law and that the same constitute a good and valid legal obligation against the village of Hudson, Ohio, to be paid in accordance with the terms specified therein.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1214.

MANNER IN WHICH THE DIRECTOR OF PUBLIC SERVICE MAY MAKE CONTRACTS INVOLVING MORE THAN FIVE HUNDRED DOLLARS IN THE PURCHASE DEPARTMENT OF A CITY.

The director of public service of a city must make contracts involving more than five hundred dollars in the department of purchase, the same as other contracts are made by said director.

Sections 4278, 4334, 4402 *and* 4403 *are to be read and construed together with sections* 3626 *and* 3627, *General Code.*

COLUMBUS, OHIO, November 5, 1914.

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

GENTLEMEN:—I am in receipt of your letter of May 16, 1914, requesting my opinion upon the following questions:

> *"First.* If the council of a city, under the powers granted to municipalities to be exercised through council has created and established a department of purchase, construction and repair (sections 3626 and 3627), must contracts for gravel for street repairs, involving an expenditure of more than five hundred dollars be made by the purchasing agent in charge of said department of purchase, etc., or must said contracts be made by the director of service having charge of the repair of streets upon bids advertised and submitted to said director of service, as provided by sections 4328 and 4334, the same to be opened in the presence of the city auditor, or his deputy, as provided by section 4278, and award thereof approved by the board of control, as provided by section 4403?
>
> *"Second.* In view of the fact that section 4278, 4334, 4402 and 4403, specifically enumerating the duties of the city auditor and board of control, were enactments subsequent to sections 3626 and 3627, creating the department of purchase, etc., will the provisions thereof prevail over the previous legislation on said subject, as found in section 3626 and section 3627, and thus relieve such purchasing agent of such duties.
>
> *"Third.* If the ordinance creating said department of purchase, construction and repair be specific in its terms defining the scope, powers and duties of such department, must such contracts in such service department be awarded to the purchasing agent, if said ordinance so provides?
>
> *"Fourth.* What, if any, are the duties of the city auditor, director of service and board of control in regard to the making of such contracts, if vested in the purchasing department?"

The sections creating the office of director of public service and the department of purchase, construction and repair in municipalities and defining their respective duties, although they seem at first glance to be somewhat in conflict, will, if read and construed together, harmonize so as to define clearly the duties of said department.

Section 4323 creates the department and director of public service, and reads in part as follows:

> "In each city there shall be a department of public service which shall be administered by a director of public service. * * * He shall make rules and regulations for the administration of the affairs under his supervision."

Section 4328 and section 4334 define the duties of the director of public service with reference to the letting of public contracts, and are as follows:

"Sec. 4328. The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.

"Sec. 4334. All contracts made by the director of public service shall be executed by him in the name of the city, and a duplicate copy shall be filed in his office and a copy with the auditor of the city. No liability shall be created against the city as to any matters under the supervision of such director except by his express authority. * * *"

Sections 3626 and 3627, General Code, give to council of municipalities the right to establish the department of purchase, construction and repair, and also limit and define the extent of its powers. These sections are as follows:

"Sec. 3626. To establish and furnish the necessary equipment for a municipal department to be known as the department of purchase, construction and repair. Such department shall be under the management and control of the director of public service, who shall purchase all material, supplies, tools, machinery and equipment, together with all construction, alterations and repairs of every kind and thing in each of the departments of the municipality, whether established by law or ordinance.

"Sec. 3627. No purchase, construction, alteration or repair shall be made except, either upon requisition by the director or officer at the head of the department for which it is to be made or done, or upon the order of council, nor shall any purchase, construction, alteration or repair for any of such departments be made or done except on authority of council and under the laws as to competitive bidding if the cost thereof exceed five hundred dollars."

You will observe from the reading of those sections that the creation of the department of purchase, construction and repair does not take the letting of public contracts within such municipality from the jurisdiction of the director of public service. On the other hand section 3626 specifically states that such department shall be under the management and control of the director of public service.

It is evident that the legislature did not intend to take from the director of public service the power of making such contracts as referred to in your letter, but that it gave to council the right to create the department of purchase, construction and repair as a subordinate department of the department of public service and thus facilitate its work.

Section 4328 also provides that when an expenditure of more than five hundred dollars is made, other than the compensation of persons employed therein, such expenditure shall first be authorized and directed by ordinance of council and when so authorized and directed the director of public service shall make a written contract with the lowest and best bidder, after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.

Section 4334 provides that all contracts thus made by the director of public service shall be executed by him in the name of the city, and a duplicate of it shall be filed in his office and a copy with the auditor of the city.

Section 4278 provides that all bids required to be filed for the letting of contracts by the director of public service or public safety shall be opened in the presence of the city auditor, or his chief deputy.

Sections 4402 and 4403 create the board of control of municipalities and define their powers and duties, and are as follows:

> "Sec. 4402. The mayor, director of public service and director of public safety shall constitute the board of control. The mayor shall be ex-officio president. All votes shall be yeas and nays and entered on the record, and the vote of a majority of all the members of the board shall be necessary to adopt any question, motion or order.
>
> "Sec. 4403. No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract. The members of the board shall prepare estimates of the revenue and expenditures of their respective departments to be submitted to the council by the mayor, as provided by law."

Section 4403 provides that no contract in the department of public service or public safety shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract.

Construing together all the sections above referred to, I will say that the contracts for gravel for street repairs by a municipality in which council have established a department of purchase, construction and repair, must be let by the director of public service through the said department of purchase, construction and repair, and if said contract involves the expenditure of more than five hundred dollars, the same must first be authorized by an ordinance of council, approved by the board of control and then let to the lowest bidder, as provided in section 4328. Said contract shall also be executed by the director of public service as provided in section 4334.

In answer to the second question, it is my opinion that although sections 4278, 4402 and 4403 were enacted subsequent to sections 3626 and 3627, they are not entitled to prevail over the previous legislation, but should be read and construed together with the same so as to bring them into harmony rather than to conflict.

As your third question has been answered with the first, I will pass on to the fourth question and say that the duties of the city auditor, with reference to the contracts for gravel referred to, would be to attend and assist at the opening of the bids after such contracts have been advertised as provided in section 4278; the duty of the director of public service is to make such contracts, through his subordinate department of purchase, construction and repair, and the duty of the board of control is to approve the making of such contracts and to direct the said department to enter into them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1215.

OHIO BOARD OF CENSORS IS NOT REQUIRED TO FURNISH LEADERS OR STAMPS OF APPROVAL BEFORE MOTION PICTURE FILMS ARE PUBLICLY EXHIBITED.

The Ohio board of censors is not required to furnish leaders or stamps of approval to be projected upon screens before motion picture films are publicly exhibited. If, however, such stamp or leader has been attached to the film, it becomes a part thereof and its ownership passes to him who owns the film.

If said board of censors furnishes a leader as its stamp, such leader becomes the property of the person for whose film it is used as a stamp, and the leader may be projected upon the screen, if he desires to do so.

COLUMBUS, OHIO, November 5, 1914.

MR. H. E. VESTAL, *Chairman, Board of Moving Picture Censors, 175 East Rich St., Columbus, Ohio.*

DEAR SIR:—Under date of October 15, 1914, you submit the following:

> "The following is a copy of a resolution adopted by the board:
>
> " '*Whereas,* The Ohio board of censors has found that its leaders, designations or stamps of approval, bearing the words "Approved by the Ohio Board of Censors" have been misused, mutilated, destroyed and misappropriated, thereby causing serious complications; therefore, be it
>
> " '*Resolved,* That the board ask the attorney general's department for a formal opinion as to the legal ownership of said leaders, designations or stamps of approval and as to the board's jurisdiction over same.'
>
> "We shall appreciate it if you will render us a decision on the above point at your earliest convenience."

Section 4 of an act providing for a board to censor motion picture films and prescribing its powers and duties, 103 O. L., 399, reads thus:

> "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, there shall be projected upon the screen the words, 'Approved by the Ohio Board of Censors' and the number of the film."

Section 6 of said act provides that:

> "Ninety days after this act shall take effect no films may be publicly shown or exhibited within the state of Ohio unless they have been passed and approved by the board or the censor congress and stamped and numbered by such board, or congress, as provided for herein."

Section 7 prescribes the penal sanction for the act in the following language:

> "Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed, approved and stamped by the Ohio board of censors or the congress of cen-

sors shall upon conviction thereof, be fined not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00) or imprisoned not less than thirty days nor more than one year, or both, for each offense."

I can find nothing in these sections, or in any other provision of the law, which requires the board of censors to provide a "leader" for projection upon the screen on which moving pictures are exhibited. The duty of stamping the films does not seem to require that such stamp shall be exhibited. There is nothing in the law to show that it must be of such character or style as would require its exhibition. The object to be attained is that the film may be designated as having been approved, but this does not carry with it the implication that such designation should be shown upon the screen. It is true that the statute says that before the picture film shall be publicly exhibited there shall be projected on the screen the words "Approved by the Ohio Board of Censors," but there is nothing whatever to lead one to the belief that this does not mean that the exhibitor of the film may, in any form he sees fit, cause this approval to be shown at the time the picture is exhibited. The language of section 6 prohibits the showing of films unless they have been passed, approved, stamped and numbered by the board, but the mere numbering and stamping of the film does not require that such stamp and number appear on the film itself, or on any leader stamped by the board of censors. This matter, in so far as the statute goes, seems to be left to the exhibitor of the pictures, the requirement being that he shall show upon the screen that the film which he is exhibiting has been approved by the board of censors, the number being given.

The penal section adds force to this in that it penalizes the exhibition of a motion picture which has not been "passed, approved and stamped." Nothing is said about failure to show the stamp upon the screen.

Such being the situation it seems to me that the exhibitor cannot be compelled to use a leader prepared by the board of censors. If, however, the only stamp of approval that is used by the board is one that is attached to the film, then it would appear that such stamp would become part of the film, and its legal ownership would vest in him who owned the film. The object to be attained by the statute is that no film be shown which has not been approved, and in order to accomplish this result the statute requires the exhibitor to project upon the screen the words "Approved by the Ohio Board of Censors" and the number of the film. When this has been done the statute has been complied with in the respects which you discuss in your resolution. Whether your board and the industrial commission would have the right to prescribe rules covering the situation is not before me at this time, and consequently I do not pass upon this question.

Of course, if your board adopts a "leader" *as its stamp,* then such "leader" would pass to him to whom the film belongs and if he desires to project it upon the screen he may do so.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1216.

THE SECRETARY OF STATE HAS NO RIGHT TO REMIT THE ONE HUNDRED DOLLARS PENALTY EXACTED FROM A CORPORATION WHOSE ARTICLES OF INCORPORATION OR CERTIFICATE OF AUTHORITY TO DO BUSINESS HAS BEEN CANCELLED.

The penalty of one hundred dollars exacted of a corporation, the articles of incorporation or certificate of authority to do business of which has been cancelled, may not be remitted or waived by the secretary of state.

COLUMBUS, OHIO, November 5, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of October 14th, in which you submit for my opinion the following question:

> "May the secretary of state remit the penalty of $100 provided for in section 5511, General Code, as a condition precedent to the reinstatement of a corporation, the articles of incorporation or certificate of authority to do business of which has been cancelled for failure to make reports or pay fees or taxes as required by law?"

Said section 5511, General Code, provides as follows:

> "Any corporation whose articles of incorporation or certificate of authority to do business in this state, has been cancelled by the secretary of state, as provided in section one hundred and twenty (G. C., sec. 5509) of this act, upon the filing, within two years after such cancellation, with the secretary of state, of a certificate from the commission that it has complied with all the requirements of this act and paid all taxes, fees or penalties due from it, and upon the payment to the secretary of state of an additional penalty of one hundred dollars, shall be entitled again to exercise its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry made by him under the provisions of section one hundred and twenty (G. C., sec. 5509) of this act, and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises."

The section itself does not authorize the secretary of state to remit the penalty. Authority of this kind cannot be implied but must appear in express statutory language. In fact I am not aware of any language in the section, or the related statutes, upon which any contention with respect to the existence of implied power might be based.

Section 5524, General Code, which is a part of the same act in which section 5511, General Code, originally appeared, provides as follows:

> "With the advice and consent of the commission, the attorney general may, before or after any action for the recovery of fees, taxes or penalties certified to him, as delinquent, under the provisions of this act, compromise or settle any claim for delinquent taxes, fees or penalties so certified.

"And all claims compromised or settled as herein provided shall be set forth in the annual report of the tax commission to the general assembly and governor, giving in detail the terms and conditions of such compromise or settlement."

This section pertains by its own terms only to the compromise or settlement of penalties certified to the attorney general for collection. Inasmuch as the penalty of $100.00 provided for by section 5511 is not certified to the attorney general, but is payable to the secretary of state, it is obvious that said section 5524 does not authorize the remission of the penalty in question.

Section 191, General Code, authorizes the secretary of state to remit certain penalties, but this authority does not extend to the penalty described by section 5511, General Code. Indeed, strictly speaking, the payment of $100.00 exacted from a corporation, the articles of incorporation or certificate of authority to do business of which has been cancelled, is not a penalty, but rather a condition precedent to the revivor of the articles or certificate. This consideration merely strengthens the view that in the absence of explicit authority no state official is empowered to waive it.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1217.

OFFICES INCOMPATIBLE—CHIEF OF POLICE AND CHIEF OF FIRE DEPARTMENT.

The same person cannot serve as chief of police and chief of the fire department, although serving as chief of the fire department without salary, for the reason that the two offices are incompatible.

COLUMBUS, OHIO, November 5, 1914.

THE HON. EDWARD A. BINYON, *City Solicitor, East Cleveland, Ohio.*

DEAR SIR:—Under date of September 22, 1914, you inquire as follows:

"The law of this state provides by separate sections that there shall be a chief of police and there shall be a chief of fire department. For a long time previous to February, 1912, when the village of East Cleveland became a city, James H. Stamberger had been doing the duties of marshal, chief of the fire department, building inspector, etc. After the village became a city, the council passed an ordinance establishing a police department, and also an ordinance establishing a fire department. In the police ordinance, it made provision to the effect that nothing in that ordinance should preclude the chief of police from serving as chief of the fire department without salary. So that since that time, said Stamberger has been occupying these two offices and drawing a salary of $1,800.00 per year as chief of the police department and receiving no salary as chief of the fire department. It is my opinion that the duties of the two offices conflict. When the chief of the fire department is engaged in directing the department in suppressing fires, he is unable to perform his duties as chief of

the police department, and when he is performing his duties as chief of the police department he is not in a position to perform properly his duties as chief of the fire department. Under the law I take it that both of these officers are of necessity on duty at all times.

"Will you kindly, at your earliest convenience, have your department furnish me with an opinion as to whether or not it is lawful for one individual to hold the office of chief of police and the office of chief of the fire department at the same time."

Under the law, offices are considered incompatible when one acts as a check over the other, or when the incumbent of one is required to supervise or inspect the duties of the other, or when the holding of both offices at the same time would act in contravention of public policy, or when the duties of the office are so conflicting as regards time for performance, that it would be impossible for one man to perform both at the same time.

In the present case I agree with your statement that it is a practical impossibility for a man to attend to the duties of the office of chief of police while he is engaged in performing the duties incumbent upon him as chief of the fire department, and vice versa.

Indeed to the above grounds of incompatibility, I think another might be added, to wit: offices wherein the incumbent is expected to give his entire time to the performance of the duties, and this ground, I think, clearly applies to the case at hand.

I am, therefore, of the opinion that the rules of law do not endorse the holding of both of these positions at the same time by a single individual.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1218.

PERSONS IN THE DEPARTMENT OF AUDITOR OF STATE IN THE UNCLASSIFIED CIVIL SERVICE.

The deputy auditor of state and the three deputy inspectors and supervisors of public offices are deputies within the meaning of subdivision 8 (a) of section 8 of the civil service act, and are in the unclassified service.

In addition to the above deputies, the auditor of state is entitled to have two clerks, or two assistants, or one clerk and one assistant, to be designated by him, in the unclassified service, under subdivision 7 (a) of section 8 of the civil service act.

COLUMBUS, OHIO, November 5, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of October 20, 1914, Hon. A. V. Donahey, state auditor, submits the following inquiry:

"Kindly give me your written opinion as to whether or not the following are under civil service:

"Deputy auditor;

"Chief clerk to state auditor;

"Heads of the departments in the bureau of inspection and supervision of public offices;

"Chief clerk in the bureau of inspection and supervision of public offices."

As this concerns the civil service law the opinion is addressed to the state civil service commission.

Subdivisions 7 (a) and 8 (a) of section 8 of the civil service act, section 486-8, General Code, places the following positions in the unclassified service:

> "7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.
>
> "8. The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

Section 237, General Code, authorizes the appointment of a deputy auditor:

> "The auditor of state shall appoint a deputy auditor of state whose appointment shall be in writing under the official seal of the auditor and recorded in the office of the secretary of state."

Section 238, General Code, provides:

> "Before entering upon the discharge of the duties of his office, the deputy auditor of state shall give a bond to the auditor of state in the sum of ten thousand dollars, with two or more sureties approved by the auditor, conditioned for the faithful discharge of the duties of his office."

Section 239, General Code, reads:

> "The deputy auditor of state shall have the power conferred by law upon a deputy and perform the duties assigned him by the auditor of state. Such deputy shall not serve upon any board or commission of which the auditor of state is made a member by law."

These sections make the deputy auditor of state a deputy within the meaning of subdivision 8 (a), supra.

Section 274, General Code, as amended in 103 Ohio Laws, 246, provides:

> "There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred and seventy-five to two hundred and eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expense of such examination shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding three deputy inspectors and supervisors, and a clerk. No more than two deputy inspectors and supervisors shall belong to the same political party."

The deputy inspectors act generally for and in place of the chief inspector and supervisor of public offices. In order to be a deputy it is not necessary that the deputy may act for the state auditor in all things. In the present case the deputy inspectors act for and in place of their principal as to the duties of the bureau of inspection and supervision of public offices. This makes them deputies within the meaning of the civil service act.

Section 2249, General Code, provides in part:

> "The annual salaries of the appointees herein enumerated of elective state officers shall be as follows:
> "Deputy auditor of state, three thousand dollars; chief clerk to auditor of state, two thousand four hundred dollars. * * *"

This section would authorize the auditor of state to appoint a chief clerk.

By section 274, General Code, supra, the auditor of state is authorized to appoint a clerk in the bureau of inspection and supervision of public offices.

Section 276, General Code, provides in part:

> "The chief inspector and supervisor shall appoint such assistants as he deems necessary, who shall be known as state examiners, and such other assistants as he deems necessary, who shall be known as assistant state examiners. * * *"

The state examiners are assistants within the meaning of the civil service act.

In addition to the deputies, the state auditor may have two clerks, or two assistants, or one assistant and one clerk in the unclassified service under subdivision 7 (a) of section 8 of the civil service act. The auditor of state may determine which two of his clerks or assistants shall be placed in the unclassified service.

The deputy auditor of state and three deputy inspectors and supervisors of public offices are in the unclassified service. Two clerks, or two assistants, or one clerk and one assistant, to be selected by the auditor of state, are also in the unclassified service.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

1219.

DISPOSITION OF THE SURPLUS IN A ROAD IMPROVEMENT FUND CREATED BY A BOND ISSUE—COUNTY COMMISSIONERS HAVE NO RIGHT TO TRANSFER A SURPLUS IN A SPECIAL OR ESTABLISHED FUND IN A COUNTY TO A FUND FOR THE BUILDING OF A NEW ROAD.

A surplus in a road improvement fund, created by bond issue, must go to the sinking fund for the retirement of such bonds or any other bonds of the county. Such surplus cannot be transferred to a fund created for the building of other roads.

The county commissioners may not transfer a surplus in any special or established fund of the county to a fund for the building of a new road and then levy taxes for the total cost of the improvement, in this way borrowing money from the surplus funds instead of issuing bonds.

COLUMBUS, OHIO, November 5, 1914.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I have heretofore acknowledged receipt of two letters from you under date of September 9th, requesting my opinion upon the following questions:

> "(1) A new road is built and bonds issued by the county for its payment and when such road is paid for in toto there is an excess in that fund from such bond issue. Can the commissioners use this money for building new roads in the county thereby saving a new bond issue for such new roads?
>
> "(2) May commissioners transfer money from any fund having a surplus to a fund for building new roads for the purpose of saving a bond issue, and then levy the tax to pay for the roads the same as if a bonds issue had been made?"

The answer to your first question is found in the provisions of section 5654, General Code, as amended 103 Ohio Laws, page 521, which is as follows:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

From this section it is apparent at a glance that if there is a surplus in a special road improvement fund, the same must be applied to the retirement of the bonds of the county. In the case you submit it appears very likely that there are outstanding bonds of the county, and indeed that the surplus of which you speak is the remainder of the proceeds of the sale of such bonds.

The answer to your second question is not fully dependent upon the provisions already considered. If the funds from which it is desired to make the transfer constitute proceeds of special levies, loans or bond issues, then of course on that account alone the authority to make the transfer must be denied.

But if the fund from which it is desired to make the transfer is a regular fund of the county, such as the pike repair fund or the bridge fund, the question requires further examination. I may say, generally, that it would depend in a given case upon two facts, viz.: (1) the authority to transfer from the first fund and (2) the authority to use the transferred money in the second fund, and then to levy taxes as if a bond issue had been made.

The only authority of the county commissioners to transfer money by their own action is that found in section 5654, General Code, above quoted. This section in its original form, together with section 5655, General Code, contained the only authority of county commissioners to make such transfer. By amending section 5654 and repealing section 5655, the general assembly in the act above cited, has destroyed the general power of the county commissioners to transfer from what was formerly designated by section 5655 as an "established fund or division of the funds." The only authority now to be found for the transfer, by the commissioners, of money from one regular or established fund to another, is that of section 2296, et seq., General Code, as amended by the act already cited. These sections contemplate a special proceeding in the common pleas court, so that the commissioners cannot take the action contemplated on their own initiative except by applying as petitioners to that court.

I do not believe, however, that the general or established funds of the county can be transferred by court proceedings with a view, so to speak, of making a temporary loan to some other special road improvement fund. You do not advise me as to what road improvement statute or statutes the commissioners desire to avail themselves of, but I am aware of none which authorize the use of surplus county funds in this way, although some of them, I believe, do authorize the use of any unexpended balances in a county road fund, in defraying a part of the total cost of the improvement; but in that event, the subsequent levying of tax on account of the improvement and the use of the proceeds *pro tanto* to reimburse the fund is not contemplated nor permitted. If the proceedings which you have in mind is under some such statute, the commissioners might, by the use of the procedure above referred to, transfer money to the general county road fund and then use it as a part of that fund in defraying a part of the cost of the improvement; but the tax on account of the road would be reduced proportionately. In short, there is no authority of law, of which I am aware, for the borrowing of money from a standing county fund for the use of a road improvement fund and the reimbursement of the former fund from the proceeds of the special road tax.

Of course, there could not conceivably be any authority to use the proceeds of special assessments or taxes in a road district smaller than the county to reimburse a county fund, for this would constitute the diversion of a trust fund and the use of special taxes levied in one district for a purpose not pertaining to that district, in violation of settled constitutional principles.

I would prefer not to be positive nor specific, in answer to your second question without being advised as to what road improvement law the commissioners are proceeding under; so that if a more definite answer is wanted, I should have to request that this information be furnished. I have no hesitancy in saying, however, upon general principles, that the exact thing which you describe in your second question cannot lawfully be done.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1220.

NECESSITY OF ORDINANCE FOR CONSTRUCTION OF SIDEWALKS IN CITIES AND VILLAGES—SUCH ORDINANCE NEED NOT BE PUBLISHED—NOTICE TO ABUTTING PROPERTY OWNERS.

Ordinances providing for the assessment of the cost of construction of sidewalks are not required in villages, but are necessary in cities under section 3857, General Code.

Such ordinances not being of a general nature, nor providing for improvements, need not be published.

Notice of the proceedings requiring the construction of pavements must be given abutting owners under sections 3854, 3855, 3856 and 3857, General Code, in order to authorize the assessment of the cost of construction of sidewalks against abutting owners.

COLUMBUS, OHIO, November 5, 1914.

HON. WALTER M. SCHOENLE, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of September 1, 1914, as follows:

"There has been referred to this office for an opinion the question as to whether it is necessary to publish by advertisement in a newspaper an ordinance assessing the cost of construction of sidewalks where the owners are nonresidents and have failed to maintain a walk in front of their respective premises and the city has let the work to a contractor for completion. It has been suggested that your office has rendered an opinion upon this subject, but I have been unable to locate same and would be pleased to have you advise me with reference to the matter."

The sections for consideration, in answer to your question, are:

"When the council of a municipal corporation declares by resolution that certain specified sidewalks, curbing or gutters shall be constructed or repaired, the clerk of council shall cause a written notice of the passage of such resolution to be served upon the owner or agent of the owner of each parcel of land abutting on such sidewalk, who may be a resident of of the corporation, in the manner provided by law for the service of summons in a civil action, and shall return a copy of the notice with the time and manner of service indorsed thereon, signed by the officer serving it, to the director of public service in cities, and to council in villages which shall file and preserve it.

"Section 3854. When the council of a municipal corporation declares by resolution that certain specified sidewalks, curbing or gutters shall be constructed or repaired, the clerk of council shall cause a written notice of the passage of such resolution to be served upon the owner or agent of the owner of each parcel of land abutting on such sidewalk, who may be a resident of the corporation in the manner provided by law for the service of summons in a civil action, and shall return a copy of the notice with the time and manner of service indorsed thereon, signed by the officer serving it, to the director of public service in cities, and to council in villages which shall file and preserve it.

"Section 3855. For the purpose of such service, if the owner is not a resident of the corporation, any person charged with the collection of

rents or the payment of taxes on such property or having general control thereof in any way, shall be regarded as the agent of the owner, and the return shall have the like force and effect as the sheriff's return on summons in a civil action.

"Section 3856. If it appears in any such return, that the owner is a nonresident of the county, or that neither such owner, agent, or his place of residence could be found, publication of a copy of the resolution in a newspaper of general circulation in the corporation, in the manner provided for service by publication of resolutions for street improvements, shall be deemed sufficient notice to such owner, but no publication of the resolution shall be necessary in the case of construction or repair of sidewalks, curbing and gutters where the notice is served upon the owner or agent as provided in the preceding two sections.

"Section 3857. If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of notice, or completion of the publication, the director of public service in cities may do or have it done at the expense of the owner, and all such expenses shall be assessed on all the property abounding or abutting thereon. Such assessments shall be collected in the same manner with a penalty of five per cent. and interest for failure to pay at the time fixed by the assessing ordinance, as in cases of improvement.

"Section 3858. No other or further proceedings for the construction or repair of sidewalks, curbing or gutters and levying assessments therefor, shall be necessary by the director of public service, than the proceedings required under this and the preceding four sections. In any case in which special assessments have been made on the property for all the cost of the construction or repair of sidewalks, curbing or gutters under such sections, such assessments, within the limitation of benefits and the limits of thirty-three per cent. of the taxed value of the property shall be valid assessments upon such property.

"Section 3859. If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of the notice, or completion of the publication, the council in villages may have it done at the expense of the owner and report the cost thereof to such owner. Such cost shall constitute a lien on the property abutting on such sidewalks from the date it is so reported to the owner, and shall be paid by him to the treasurer of the municipality. If it is not paid within ten days from the time it was reported to such owner, the clerk in villages shall certify it, with a penalty of five per cent. thereon to the county auditor, who shall place it on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected."

These sections, as I understand them, do not call for an assessing ordinance in the ordinary sense of that term. Section 3854 very clearly implies that a resolution declaring the necessity or determination to construct certain sidewalks, shall be passed; that the clerk shall give notice thereof in the manner provided by law for the service of summons, which can only be complied with by serving a copy of the notice of the passage of the resolution on the lot owner or leaving a copy thereof at his usual place of residence.

Section 3855 authorizes such service on an agent as defined in such section. If the owner is a nonresident and no agent upon whom service may be made can be found, then publication of notice of the passage of such resolution may be made as provided in section 3856.

From a consideration of these sections, I think it clear that no assessing ordinance in the ordinary sense of that term is required, and the only requirement as to publication is found in section 3856. This conclusion, to my mind, is made clear by section 3858, where it provides that "no other or further proceeding * * * shall be necessary under this and the four preceding sections.

While this probably raises the question whether proper notice of the preliminary proceedings has been given in your case rather than giving a categorical answer to the question propounded, yet I feel reasonably certain that it will meet all your wishes.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1221.

RIGHT OF TOWNSHIP TRUSTEES TO BORROW MONEY TO REPLENISH THE TOWNSHIP POOR FUND.

The township trustees may not borrow money to replenish the township poor fund. Expenditures for the temporary relief of the poor are of such a character as to constitute an exception to section 5660, *General Code, commonly known as the Burns law, so that when an obligation is thus created, a valid debt is incurred for the payment of which money may be borrowed under section* 5656, *General Code, by the trustees.*

COLUMBUS, OHIO, November 5, 1914.

HON. GEORGE D. KLIEN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Under date of September 10th you requested my opinion as to whether or not township trustees may borrow money to replenish the poor fund.

Replying thereto I beg to state that I know of no authority in the township trustees to borrow money for this purpose. The county commissioners have such authority with respect to the county poor fund under section 2434, General Code, but like authority does not seem to have been given to the township trustees who may only borrow money and create funds for specific improvements. However, the township is liable for the temporary support or "out-door relief" of all persons having a legal settlement in the township, and otherwise qualified to receive such relief. This is made plain by sections 3476, 3478 and 3480, General Code, which provide as follows:

> "Sec. 3476. Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it.
>
> "Sec. 3478. In an action to compel the support or relief of a pauper, or in an action based upon the refusal of such officers to afford support or relief to any person, it shall be a sufficient defense for the township trustees, or proper municipal officers to show that such person, during the period necessary to obtain a legal settlement therein has been supported in whole or in part by others with the intention to thereby make such person a charge upon such township or municipal corporation. The fact that

such person, during the period necessary to obtain a legal settlement therein, has been supported in whole or in part by others shall be prima facie evidence of such intention.

"Section 3480. When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees or officers in writing that he is attending such person and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begun, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered."

So that it appears that the relief or support of the poor which falls properly to the lot of the township, as distinguished from the county, is an obligation fastened by law upon the township and not merely a matter within the discretion of the township trustees. In other words, it is a duty and not a power.

Under these circumstances I am of the opinion that it is competent for the township trustees, when the township has been made liable for medical and other relief given to persons in straightened circumstances, qualified to receive poor relief but not proper inmates of the infirmary, to borrow money under the provisions of section 5656, General Code, which provides as follows:

"The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

In other words the relief and support of the poor constitute activities for which township trustees may lawfully make expenditures of such public moneys without being subject to the provisions of section 5660, General Code. That is to say, it would not be a defense against an action to compel the support of a pauper that there is no money in the treasury of the township available for that purpose for section 3478 specifies what shall be a sufficient defense, and section 3480 specifies the circumstances under which liability arises; so that any expenditures contracted for by the township trustees after the township has been made liable by proper proceedings under section 3480, General Code, cannot be avoided because of failure of the clerk to certify that the necessary money was in the treasury as required by section 5660 for contracts generally.

One distinction must be carefully observed in borrowing money under section 5656. The trustees may not create a fund and then disburse it as occasion requires; they must become indebted to particular individuals on account of specific

transactions; then to pay these debts the trustees may borrow money under the section cited.

While, therefore, I can find no authority in the township to borrow money to replenish the poor fund as such, I am of the opinion that any liabilities which the township has incurred by proceedings under the poor law, may be discharged by borrowing money under section 5656, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1222.

THE STATUTES AUTHORIZING TOWNSHIP TRUSTEES, UNDER CERTAIN CIRCUMSTANCES, TO LEVY CERTAIN TAXES FOR ROAD PURPOSES REMAIN IN FORCE GENERALLY.

The statutes authorizing the township trustees, under certain circumstances, to levy certain taxes for road improvement purposes, remain in force generally, notwithstanding the enactment of the Smith law, although the special limitation upon the tax authorized by the original statute has been supplanted by the Smith law limitations; and in particular that this tax must be levied subject to the ten-mill limitation law.

COLUMBUS, OHIO, November 5, 1914.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—In your letter of October 3rd, previously acknowledged, you request my opinion upon the following question:

> "Under favor of section 7019 of the General Code, is the six-mill levy therein referred to still in force in view of the Smith tax law? If it is in force, may the levy be within the ten mills or over the ten mills provided by that act?"

Said section 7019, General Code, provides as follows:

> "The board of trustees of a township may levy and assess upon the taxable property of such township, a tax not exceeding six mills in any one year upon the dollar valuation of the taxable property therein, in addition to other taxes authorized by law, for the purpose of improving by macadamizing and graveling the public highways in the township, as it deems expedient or necessary."

The Smith one per cent. law, consisting of sections 5649-1 and 5649-5b, inclusive, was enacted after section 7019 and its companion sections, the one group of sections being last amended in 1904 and the other being enacted in 1911 and last amended in 1913.

Under section 5649-3a of the General Code, a part of the Smith law, the limitation upon the rate of taxation for township purposes is two mills; under other sections of the same law the aggregate limitation for all purposes in any taxing district is ten mills, exclusive of interest and sinking fund levies of a certain

kind, and fifteen mills for all purposes excepting certain state levies and certain emergency levies.

I think it is clear that there is an irreconcilable inconsistency between the Smith law and section 7019, General Code, which can only be resolved by regarding the latter as impliedly amended. I do not think that the Smith law had the effect of repealing section 7019, General Code. To say that the Smith law, by implication, repealed all sections authorizing the levying of taxes which were partially inconsistent with it, would be to hold that it destroyed every vestige of levying power committed to local agencies by statutes previously enacted. Such was obviously not the legislative intention which is evinced particularly by section 5649-3 of the Smith law since repealed. Said section provided in effect that the maximum limitations existing under previously enacted statutes should be reduced or changed so that the limitation under the Smith law should be the amount that would have been produced by a levy on the 1910 duplicate at the rate formerly in force.

In other words, the purpose of the Smith law was not to destroy the levying power but to impose new limitations. Therefore, the former statutes are not to be regarded as repealed but merely as amended so as to strike out the former limitations and to substitute those imposed by the Smith law.

I am of the opinion that section 7019, General Code, is still in force in so far as it authorizes township trustees to levy a tax for the purpose therein stipulated, and under the circumstances referred to in the related sections; but I am further of the opinion that the levy thus made must be brought within the ten mill limitation of the Smith law which in present section 5649-2 (103 O. L., 552) is provided for as follows:

> "Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

I think there is no question that this language is comprehensive, and that it is intended to, and does, embrace levies for purposes, such as those referred to in section 7019, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1223.

NOTES MAY NOT BE ISSUED BY A VILLAGE IN ANTICIPATION OF THE COLLECTION OF THE SPECIAL TAX AUTHORIZED BY SECTION 4362, GENERAL CODE, TO DEFRAY PARTIALLY THE EXPENSES OF OPERATING A MUNICIPAL WATERWORKS PLANT.

Notes may not be issued by a village in anticipation of the collection of the special tax authorized by section 4362, General Code, to defray partially the expense of operating a municipal waterworks plant. No authority whatever exists to borrow money for the purpose of paying the running expenses of a waterworks plant, or supplying a deficiency in the waterworks fund, otherwise than through the issuance of deficiency bonds upon a vote of the electors, which is not considered in the opinion.

COLUMBUS, OHIO, November 5, 1914.

HON. T. B. WILLIAMS, *Village Solicitor, New Lexington, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of October 12th, requesting my opinion upon the following questions:

"1. May a levy made by a village council for the running expenses of a municipal waterworks system, which is not self-sustaining, be made the basis of the issuance of notes in anticipation of the collection of taxes under section 3913, General Code?

"2. In case money can be borrowed in this way on behalf of the corporation, should the notes be issued by the council or by the board of trustees of public affairs; or is the board of trustees of public affairs authorized to borrow money for the purpose of supplying deficiencies in the waterworks fund independently of the authority found in section 3913, General Code?

"3. In case council has authority to borrow money in the manner referred to, may the money so borrowed be placed in the waterworks fund to be disbursed by the trustees of public affairs?"

Authority to make the levy in question is found in section 4362, General Code, which provides as follows:

"When waterworks and electric light plants or either of them are owned and operated by a village which receives its street lighting and fire protection therefrom and the proceeds from the operation of such plant or plants is insufficient to pay the expenses of operating such plants or either of them, the council may levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village, real and personal, to pay the running expenses and extensions made thereto after applying the proceeds therefrom, which tax shall be in addition to all other taxes authorized by law."

Section 3913, General Code, about which you inquire, provides as follows:

"In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loan shall be made to exceed the amount estimated to be recived from taxes and revenues at the

next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest."

The first question encountered is as to whether or not the special tax provided for in section 4362 constitutes a part of the "general revenue fund" within the purview of section 3913. This question has not been, so far as I am able to ascertain, determined by judicial interpretation. In the absence of such interpretation I think section 3913 should be given a rather strict and literal construction.

It will be observed that the section, by clear implication, recognizes the existence of tax collections other than for the general revenue fund, for it speaks of the "tax collections for such fund," referring to the general revenue fund which has been previously mentioned in that section. Therefore, it cannot be said that any and all taxes which might be levied on the general duplicate of a municipality would constitute sources of the "general revenue fund" referred to in the section.

Surely, then, if there are taxes other than taxes for the general revenue fund, the tax authorized by section 4362, General Code, is such a tax. This is a special tax in every sense of the word. It is limited by a special rate limitation and its application is specifically provided for. Therefore, I am of the opinion that the proceeds of the tax authorized by section 4362, General Code, do not constitute a part of the general revenue fund of a municipality; in consequence of which holding it follows that the special tax authorized by section 4362, General Code, cannot be anticipated by the issuance of certificates of indebtedness under authority of section 3913, General Code.

This conclusion disposes of all the questions which you ask except the one with respect to the power of the board of trustees of public affairs to borrow money for the current expenses of the waterworks, which, as you state it, does not involve an interpretation of section 2913, General Code. This question for the present purpose may be extended so as to embrace the question as to whether or not there is any authority in any municipal tribunal to borrow money to meet deficiencies in the waterworks fund.

From a consideration of this question section 3931, General Code, may be eliminated for your purposes. It provides for the issuance of deficiency bonds, but such bonds can only be issued upon the approval of the electors at a regular or special election. The manner in which you have asked your question indicates that you wish to be advised as to the existence of authority to issue bonds or notes otherwise than upon the approval of the electors. Section 3974, General Code, which I need not quote, refers to borrowing money to defray the expenses of the management of a waterworks, but does not itself confer authority to borrow such money.

In short, I am unable to find any authority whatever to borrow money on behalf of the village for the purpose about which you inquire.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1224.

RIGHT OF THE DIRECTOR OF PUBLIC SERVICE, OR A COUNCIL OF THE MUNICIPALITY, TO CONTRACT WITH A PROPERTY OWNER FOR THE CONSTRUCTION OF A SANITARY SEWER FROM HIS PROPERTY.

A contract may not be made by the director of public service, or the council of the municipality, with a property owner for the construction of a sanitary sewer from his property, and for its benefit, the same to be paid out of the general fund of the municipality, or a bond issue thereof, unless it be out of a bond issue for the share of the municipality or in anticipation of the collection of assessments, made as provided by law.

COLUMBUS, OHIO, November 5, 1914.

HON. FRANK J. DOORLEY, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—In your letter of October 6, 1914, you inquire:

> "Would it be proper for the director of public service to contract with a property owner so that the property owner is to install a sewer in the street so as to benefit his property. The property owner agrees to pay for the cost of putting in the sewer but to hold said cost as a charge against the city, the city to pay it from either a proposed bond issue or from the general fund of next year?"

You state in your letter of October 14, 1914, that the cost will be under $500.00.

There are two insurmountable difficulties in the way of doing this in the manner suggested. The first is, there being no money in the treasury to meet the obligation of the proposed contract, it will not be possible to make and file the certificate required by section 3806, G. C. The second is that under your statement "to contract with a property owner so that the property owner is to install a sewer in the street so as to benefit his property." This would be nothing more or less than the construction of a private sewer at public expense, for which there is neither precedent nor authority.

It has been suggested that the city is acting under section 3647, G. C., and not under section 3871, and that the action of the city is justified by the case of R. R. Co. vs. City, 40 O. S., 155.

Section 3647 is a general grant of power without any direction or provision as to how it may be carried out. Section 3871 designates the manner in which this may be done.

The case presented in 40 O. S., 155, was very different from that now for consideration; in that case a sewer was constructed as, or as part, of a street improvement prior to the adoption by the council of Hartwell of a sewer system, and the court held that it might be done; that is, that the adoption of a sewer system was not a condition precedent to the construction of a sewer as part of a street improvement, and assessing the cost of the same against abutting owners.

An examination of this case will develop that it holds that the council of Hartwell, to use the language of Nash, J., "proceeded to exercise the power conferred by paragraph 21, section 199, and in substantial compliance with the provisions of chapter 49, Municipal Code." 40 O. S., 156.

Being of the opinion that the sewer as you describe it is not a public but a private matter, I am of opinion that the cost thereof may not be paid out of the general revenue fund of the city nor out of a bond issue, except it be a bond issue to pay the city's share of, or issued in anticipation of assessments, as provided by our Municipal Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1225.

A MUNICIPALITY MAY NOT ADVERTISE FOR BIDS ON A PROPOSED IMPROVEMENT, AFTER HAVING OFFERED BONDS FOR SALE, AND RECEIVING NO BIDS THEREFOR, AND WHERE THE CONTRACTOR WOULD AGREE TO TAKE THE BONDS AS A PART OF HIS CONTRACT.

A municipality having offered bonds for sale and received no bids therefor, may not advertise for bids on the proposed improvement and enter into an agreement with the lowest bidder to take such bonds or procure a purchaser for the same, as a condition or part of his contract.

COLUMBUS, OHIO, November 5, 1914.

HON. WM. J. MEYER, *City Solicitor, New Boston, Ohio, Portsmouth, Ohio.*

DEAR SIR:—I have your letter of October 8, 1914, in which you state and inquire:

> "Several months ago, at an election on the question of issuing $42,000.00 bonds for the purpose of installing a water supply system, there was a majority of votes cast in favor of the proposition to issue bonds. Thereupon, council advertised the bonds for sale, and the advertisement called for bids about the first of August, at which time, as matters turned out, the bond market became unsettled, with the result that no bids were received by the village. Attempts to dispose of the bonds at private sale have proved fruitless so far.
>
> "The plan which council is now considering is that of going ahead, advertising for bids for the work, and then when the time comes, state to the contractor who puts in the lowest bid that the work can be awarded to him only on condition that he arrange for the sale of the bonds either to himself or to some other person. The plan outlined was suggested to the council by a local contractor, who says that he is willing to put in a bid on the work with the understanding that if he is the low bidder he will arrange for the sale of the bonds through some of the banks here."

In my opinion, to advertise for bids on a contract for construction of the contemplated waterworks in the usual and formal manner, and after receipt of the bids to attach a condition that the contractor should either take the bonds himself or arrange for their sale to a third person, would be beyond the power of the village council and result either in taking advantage of the contractor if he was ignorant of what was coming, or if he knew of it, giving him the opportunity to formulate his bid for the work so as to compensate him for trouble in taking and handling, or selling the bonds.

Looking at the matter in the first light and it falls little, if any short of deceiving bidders and from the second point of view, it works out a sale of bonds in a manner unauthorized by law, and permits a sale for a sum less than par and accrued interest, which is the minimum fixed in the statutes.

From any point of view suggesting itself to my mind, I cannot indorse the course suggested and feel well satisfied that great trouble might be encountered in any attempt to sell the bonds other than by advertising in the usual way, to the industrial commission.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1226.

RIGHT OF THE BOARD OF EDUCATION TO BORROW MONEY UNDER SECTION 5656, GENERAL CODE, TO PAY OBLIGATIONS INCURRED FOR FURNISHING THE TRANSPORTATION OF PUPILS, WHICH THE LAW REQUIRES TO BE FURNISHED.

A board of education may borrow money under section 5656, General Code, to pay obligations incurred in furnishing the transportation to pupils which the law requires to be furnished, such expense being a charge against the district, regardless of the existence of sufficient funds in the district treasury, and the contract for transportation being at least the nature of an employment contract.

It is not a condition precedent to the exercise of power under said section that previously incurred floating or funded indebtedness has been created under the same section, that is, it is not necessary that the one debt shall be extinguished before the time of payment of the other is extended.

COLUMBUS, OHIO, November 5, 1914.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I have acknowledged receipt of your letter of September 24, describing the situation in certain school districts in your county and requesting my opinion upon two specific questions of law as follows:

> "1. May a board of education borrow money under section 5656, General Code, to pay for the transportation of pupils?
>
> "2. May a board of education, which has in the past been obliged by its limits of taxation to borrow money to pay the salaries of teachers, continue to borrow money for this purpose without paying the loan already made?"

You refer in your letter to my opinion to the effect that under section 5656, General Code, money may be borrowed by the board of education to pay its teachers. This opinion is founded upon the fact that a board of education may enter into a valid contract for the employment of a teacher without the presence of the money in the treasury as required for other contracts by section 5660, General Code. In other words, under the provisions of section 5661, General Code, contracts authorized to be made by boards of education "for the employment of teachers, officers and other school employes," are exempt from the prohibition against entering into any contracts involving the expenditure of money unless the clerk first certifies that the amount required for the payment thereof is in the treasury, etc., which prohibition is made in section 5660, General Code.

Having the power, then, to make a valid contract regardless of the presence of the necessary funds in the treasury, it follows that when services are rendered under such a contract a valid indebtedness against the school district arises. The power to borrow money under section 5656, General Code, is broad enough to provide for any case in which an indebtedness, which from its limits of taxation, the school district is unable to pay at maturity, exists.

Whether or not the money may be borrowed to pay for the transportation of pupils depends, therefore, upon the further question as to whether a contract for such transportation is a contract for the employment of a "school employe" within the meaning of section 5661, General Code, as well as upon any other fact that might make such transportation a legal obligation of the district, notwithstanding the limitations of section 5660, General Code.

The sections requiring transportation are sections 7730 and 7731, General Code, as amended 104 O. L., 139. They provide as follows:

> "7730. The board of education of any rural school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide and in such rural school district shall provide for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. * * *
>
> "Sec. 7731. In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

I would be of the opinion that if transportation were provided for by the hiring of a team and driver, the contract would be only for the employment of a school employe within the meaning of section 5661, General Code. It is at least clear that if the local board of education neglects or refuses to provide transportation and the same is provided by the county board of education and the cost thereof is charged against the local school district, the charge against the district will constitute a legal indebtedness of the district within the meaning of section 5656, General Code.

It being at least clear, then, that the board of education may borrow money to pay a charge against the district on account of transportation when the same is made by the county board of education, and it being reasonably clear at least that a contract for furnishing transportation would be a contract of employment, I am of the opinion that a local board of education has power under section 5656, General Code, to borrow money for this purpose to the extent that transportation may be *required by law.* However, as pointed out in my opinion respecting the exercise of the borrowing power for the purpose of paying teachers, it is not competent under this section to borrow money and thus to create a fund in advance. The contract must be made with the person who is to provide the transportation and a liquidated liability, under the contract, must be incurred before section 5656 becomes available. This distinction should be carefully observed.

In answer to your second question I may say that the authority of a board of education to borrow money or issue bonds for the purpose of funding a floating debt is not expressly, at least, made to depend upon any condition other than that such a debt exists. It is not required of the board of education that it first pay one debt before it extends the time of payment of another. Nor could such a requirement be effective in the nature of things so long as boards of education are required to conduct schools according to a certain standard, and are permitted in so conducting them to incur obligations without regard to their financial ability to pay them. There would seem to be no public policy which would require an arbitrarily forced interpretation of the statutes authorizing the refunding of the indebtedness so as to make power to refund one indebtedness contingent upon the payment of an earlier indebtedness which had been previously refunded or funded. If it were the policy of our statutes to avoid cumulative extension and refunding

of indebtedness, that policy would be expressed in a statute denying the authority to create an original indebtedness until a previously existing funded indebtedness had been provided for, or in a statute elevating tax limitations so as to permit the payment of such a previously funded indebtedness. We do not have any such statutes, however, but on the contrary the statutes requiring a certain standard of efficiency in the conduct of public schools tend, under the tax limitation statutes, to a precisely opposite result.

I know of no constitutional provision or implied limitation that would either make the joint effect of the statutes commented upon unconstitutional or compel such a forced construction of them as to deny the power to refund a valid debt simply because a debt of a similar nature previously incurred and then funded or refunded, had not been paid. If there should come a time when a school district should find itself in an impossible situation, financially speaking, the legislature would doubtless afford appropriate relief and at the present time all that can be said is that it is presumed that such relief will be forthcoming at the proper time. In the meantime other remedies are available for the alleviation of the situation. The aid which the state affords a weak school district, the new school supervision laws enabling county boards of education to adjust boundaries of rural and village school districts, and the new tax assessment laws providing means of bringing local tax duplicates up to the standard contemplated by the constitution, would seem to point a way to a solution of such problems without recourse to the extreme remedies hereinbefore mentioned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1227.

WHEN LANDS WERE SOLD AT JUDICIAL SALE IN THE MONTH OF MARCH, 1914, THE TAXES FOR 1914 ARE NOT PAYABLE FROM THE PROCEEDS OF THE SALE.

When lands were sold at judicial sale in the month of March, 1914, *the taxes for the year* 1914 *are not payable from the proceeds of the sale, but must be paid by the purchaser.*

COLUMBUS, OHIO, November 5, 1914.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—In your letter of October 12th, previously acknowledged, you request my opinion upon the following question:

> "A parcel of real estate was sold on the 25th day of March, 1914, by an administrator, under proceedings to sell real estate to pay the debts of the decedent. Should the taxes for the year 1914, which under the statute are a lien against the real estate as of the first Monday of February, 1914, be paid by the administrator or by the purchaser at the judicial sale?"

The lands being sold by the administrator in the proceeding above described, the statute which governs the distribution of the proceeds of the sale is section 5692, General Code, which provides as follows:

> "When lands so held by tenants in common are sold upon proceedings in partition, or taken by the election of any of the parties to such proceedings, or real estate is sold at judicial sale, or by administrators, executors,

guardians, or trustees, the court shall order the taxes and penalties, and the interest thereon against such lands, to be discharged out of the proceeds of such sale or election."

In Hoglen vs. Cohen, 30 O. S., 436, this statute was interpreted, and it was held that the annual taxes levied upon real estate, payable out of the proceeds of judicial sale thereof, are those taxes which stand charged upon the duplicate of the county; and that as to taxes, the lien of which has attached prior to the date of sale, but as to which no charge has been made on the duplicate, a judicial sale has not the effect of discharging the lien and the purchaser must take the land subject to the lien for taxes. This decision was followed in Makley vs. Whitmore, 61 O. S., 587, and must be accepted as the present law of the state, the phraseology of the statutes involved not having been altered in the mean time.

Therefore, upon the question submitted by you, I am of the opinion that the administrator should not pay the taxes on the real estate in question and that the same constitute a charge against the land itself which the purchaser at the judicial sale must discharge in order to protect his property.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1228.

POWER OF MUNICIPAL BOARD OF HEALTH TO REGULATE THE KEEPING OF POULTRY.

1. *A municipal board of health has power to regulate and control coops and houses for keeping and sheltering domestic fowls and preventing them from becoming nuisances.*

2. *Whether it has power to prevent domestic fowls from running at large in the streets, lanes and public places of the municipality, but it has not power to prohibit domestic fowls from running at large on the owner's premises, or on another's premises with his consent.*

3. *Where the legislature affixes a penalty for a violation of an order or regulation of the board of health, such board has no power to prescribe a different penalty, and if it attempts to do so, its effort is void.*

COLUMBUS, OHIO, November 5, 1914.

HON. R. D. WICKHAM, *City Solicitor, Norwalk, Ohio.*

DEAR SIR:—I have your letter of August 24, 1914, enclosing a copy of a resolution of your board of health, together with an inquiry as to the power of such board to pass and enforce the same.

The resolution is as follows:

"A RESOLUTION

"Regulating the keeping of fowl or fowls.

"Be it Resolved by the Board of Health of the City of Norwalk, Ohio, as follows, to wit:

"Section 1. That the board of health regulations of the city of Norwalk, O., heretofore adopted by the council of general ordinances of said

city, passed and approved March 21, 1911, be supplemented by the sections following and designated sections 553a, 553b, 553c.

"Sec. 553a. No person shall, without obtaining a permit from the board of health, allow any domestic fowl or fowls to occupy any building, enclosure or place as a coop, or roosting place within fifty feet from any well, residence, church or school building, or any building which is used or occupied as a workshop, office or factory, or within twenty-five feet of any public street, avenue or any public grounds of the city, or within ten feet of any barn or stable occupied by any other person than the owner of said fowl or fowls except as herein is further provided.

"That when in the judgment of the board of health of said city, the public health will not become jeopardized, a permit may be granted by the proper committee to keep poultry as aforesaid and hereinafter provided, within less distance than fifty feet; but every permit so granted under this standing order, shall expire on the 31st day of December next after date of issue, unless sooner revoked by said board of health for cause which was not apparent at the time of issuing said permit, and all permits issued under this standing order must be placed in a frame and tacked in a conspicuous place in which said fowls are kept.

"Moreover, without reference to distance limitation, no person shall allow any domestic fowl or fowls to occupy any building, enclosure or place as a coop or roosting place until the location of such coop or roosting place has been approved by the board of health; provided that the restrictions of this standing order shall not be held to apply to a temporary coop, occupied by a single brood of very young poultry while under the care of a brooding fowl, or to the parent fowl while rearing her young; but every temporary coop shall, during occupancy, be either removed to a new location or thoroughly cleaned once each week, and as much oftener in any case as the board of health may require, and no person shall permit any such fowl or fowls to run at large either on his or her premises or on the premises of any other person, or on the streets, avenues or other public grounds of the city between the dates of April 1st and November 1st.

"Sec. 553b. Whoever violates the provisions of the next preceding three sections shall be fined in a sum not exceeding ten dollars nor less than one dollar for each offense.

"Section 2. That this resolution shall be in force upon its passage and publication.

"Passed July 28, 1913.

"EDGAR G. MARTIN,
"President of Board of Health.

"Attest: GEO. H. MARTIN, *Clerk.*"

It will be observed that this resolution is to supplement former action of the board "by the sections following and designated as sections 553a, 553b, 553c," and that no such section as 553c is found in the resolution.

The code sections necessary to consider are sections 4413, 4414 and 4421, which read as follows:

"Section 4413. The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipali-

ties, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances.

"Section 4414. Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or abstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense.

"Section 4421. The board of health may also regulate the location, construction and repair of yards, pens and stables, and the use, emptying and cleaning thereof, and of water closets, privies, cess pools, sinks, plumbing, drains or other places where offensive or dangerous substances or liquids are or may accumulate. * * *"

These sections very clearly authorize the board of health to pass regulations of the character of the one in question, because it will be conceded that while all chicken coops and houses are not nuisances, they may readily become so by lack of care and attention. Generally speaking, therefore, the resolution is authorized. However, this resolution does not end with provisions as to location and cleanliness of houses in which fowls are kept or roosted, but goes further to the extent of prohibiting "such fowl or fowls from running at large either on his or her premises, or on the premises of any other person, or on the streets, avenues or other public grounds of the city, between the dates of April 1st and November 1st."

That there is power to prohibit fowls from running *at large,* although doubted, may be conceded, this resolution does not stop with a prohibition of running at large, i. e., off the owner premises, but also prohibits them from running at large on the premises of the owner or on that of any other person. So long as each individual has a right to so use his own property as he desires, and such use does not interfere with the rights of others, the latter inhibition is doubtful, to say the least.

I am of the opinion that so long as the rights of the public and adjacent proprietors are not interfered with, that it is not within municipal power to prohibit an owner of property from permitting his fowl to run at large on his own premises.

The policy of this state in regard to animals running at large, is found in sections 5806 to 5823, G. C., inclusive. From them may be ascertained the character of animals prohibited from running at large and the places where they may not be permitted and the history of these sections develop the fact that with the exception of geese, domestic fowls are not to be found in the prescribed list, and no effort has ever been made by the legislature to prohibit an owner from allowing his animals to roam at large on his own premises, or upon the premises of another, with such others consent.

I do not feel like sending this opinion out without calling attention to the fact that the word "inclosed" as used in section 5809, is an apparent typographical error; in the revised statutes and in all enactments prior to the General Code, the word used was "uninclosed," "off the owner's premises" or other words of similar import.

Section 553b provides a penalty for violation of the preceding regulations. Section 4414, supra, does the same. The legislature having acted on the subject, is it within the power of the board of health to affix a penalty also? It will be observed that section 4414 presents a penalty of a fine not to exceed $100.00, or not to exceed 90 days' imprisonment, or both. This regulation prescribes a fine of not more than $10.00, nor less than $1.00, for each offense, thereby eliminating the im-

prisonment found in the statute and fixing a minimum of $1.00 fine where the statute provides no minimum. This resolution in prescribing a minimum, not to be found in the statutes, and in eliminating imprisonment, fails to conform to the statutes, and I am of the opinion, therefore, that section 553b is invalid and cannot be enforced.

This, it must be observed, does not let offenders against the regulation go free, but leaves their prosecution to the board, and punishment as prescribed by the legislature.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1229.

A COUNTY AUDITOR IS NOT ESTOPPED FROM RECOVERING MONEY PAID OUT BY HIM ACCORDING TO THE RULE OF THE BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES WHEN A DIFFERENT RULE IS SUBSEQUENTLY DECIDED BY THE SUPREME COURT.

If a county auditor, in making settlement when the salary law was enacted, does so in accordance with the ruling of the bureau of inspection and supervision of public offices, and the supreme court subsequently decides that a different rule should be adopted which would have entitled auditor to retain for himself a greater amount of money than he did, he is not estopped from recovering the difference.

COLUMBUS, OHIO, November 6, 1914.

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

GENTLEMEN:—Under date of July 24, 1914, you wrote as follows:

"Under date of January 4, 1913, we called your attention to the case of Will R. Lewis vs. State, ex rel., Stilwell (No. 12881 in the Supreme Court) in which it was held that county auditors in office February, 1907, were entitled to three-fourths of the fees accruing on the February, 1907, settlement, and that one-fourth of such fees should be paid into their respective fee funds. We inquired whether, applying the principle laid down in this case, a county auditor whose term expired the third Monday of October, 1904, was entitled to a pro rata share of the fees accruing on the February, 1905, settlement, based as the time from August 15th to the third Monday of October, 1904, is to the time from the third Monday of October, 1904, to February 15th, 1905. In answer to this question, you replied in an opinion to this department, dated May 19, 1913, that such claims are barred by the statute of limitations.

"We now desire your opinion as to whether or not a county auditor in office in February, 1907, is entitled to receive any payments due him, in accordance with the decision in the above case, over and above what he actually received, settlement having been made by dividing the February, 1907, settlement fees pro rata as the time from the third Monday of October to January 1, 1907, is to the time from January 1, 1907, to February 15, 1907 (that being the ruling of the fee commission which considered the February, 1907, settlement fees to be compensation for the one-half of the

official year beginning the third Monday of October), provided he commenced suit against the county for the recovery of such payments within six years after February 15, 1907."

The right of the county auditor in question to three-fourths of the fees accruing on the February settlement, such amount being the portion which the period from August 15th to January 1st, bears to the period from August 15th to February 15th, is settled by the decision, above referred to, of Lewis vs. State, ex rel.

According to your statement of facts the auditor received a less amount by reason of the fact that he was paid, in accordance with the custom then in vogue, such portion of the fees of the February, 1907, settlement, as the period from the third Monday of October to the first day of January, bore to the period from the said third Monday of October, 1906, to the third Monday of April, 1907.

In my opinion of May 19th, I held that claims of this nature are subject to the bar of the statute of limitations. In the case in question, however, the auditor brought suit within the six-year limitation, and the question of bar by the statute of limitations, is, therefore, avoided by him. It has been suggested to me, however, that a question arises by reason of the auditor's acquiescence with respect to the custom then in vogue, and that, by voluntarily paying the balance, which, in accordance with the supreme court's decision, was due to him, into the fee fund, he thereby estopped himself from claiming such balance and is now precluded, by reason of his voluntary payment, from recovering this balance.

I am unable to find any authority whatever which is precisely in point upon the situation presented. The following cases, however, may be presented as having some bearing:

"Inspectors of customs are appointed by the secretary of the treasury, at a designated compensation of less than $3.00 per day. When paid they are compelled to receipt in full therefor.

"I. When a statute (Rev. Stat., Sec. 2733) creates an office, prescribes its duties and fixes its compensation, the appointing power has no control over compensation, either to increase or diminish it.

"II. The Revised Statutes (Sec. 2733) fixed the pay of inspectors of customs, and of 'others performing the duties of inspectors of customs' (Sec. 2738) at $3.00 'for every day he shall actually be employed;' and an inspector, or person acting as such, may recover this, though by the terms of his appointment he was to receive less.

"III. A public officer may recover the lawful compensation of his office, notwithstanding that he accepted a less amount and receipted in full therefor."

(Adams vs. U. S., 20 Ct. Claims, 115.)

"The decedent while an employe of the United States coast and geodetic survey at a salary of $2,400 a year is appointed a member of the Mississippi river commission at the same salary. Later his salary is reduced by the secretary of the treasury to $1,600 a year.

"I. Where a statute creates an office and fixes its compensation the appointing power cannot diminish or increase it.

"II. A public officer may recover the lawful compensation of his office though he accepted a less amount and receipted therefor in full.

"III. Where a statute provides that government officers shall discharge duties additional to those of their regular office and that they 'shall receive no other pay or compensation than is now allowed them by law,'

the pay at the time of the appointment fixes the amount to be paid in the new position."

(Whiting, Administratrix, vs. The United States, 35 Ct. Claims, 291.)

In People, ex rel., Miller vs. The Board of Auditors, 41 Mich, page 4, the per curiam of the court is as follows:

"Per Curiam. The board of auditors cannot change action that they have once taken in fixing a salary except by further action spread upon their records. They cannot change it by parol. *The fact that relator received less than he was entitled to does not amount to a waiver of his rights.* Other legal questions in the case need not be passed on. Mandamus granted.

"Where the compensation of an employe of the state is fixed by statute, it cannot be reduced by the state officer under whom he is employed.

"The fact that the employe takes, for a time, the reduced compensation, does not estop him from claiming the residue.

"The provision of the appropriation act of 1875 (chap. 634, Laws of 1875), fixing 'the compensation of the men employed as firemen in the capitol' had reference to the old capitol; it was not confined to firemen in service in 1875, but was prospective in its character and was in force in 1881.

"Accordingly held, that plaintiff, who was employed as fireman in May, 1880, by the superintendent of the old capitol, and who continued to serve in that capacity until about December, 1881, but who had been paid during the summer months but one-half the daily allowance fixed by said act, was entitled to the balance; and that a decision of the board of audit rejecting his claim therefor was error."

These authorities are all harmonious in so far as they hold that when a compensation is fixed by statute, the officer or employe is entitled to the amount fixed, notwithstanding he has accepted a less amount from the paying authority and notwithstanding, furthermore, that he gives a receipt in full for the amount. They differ from the case in question in that the officer himself, in these cases, did not have the payment of his own compensation under his control. I am of the opinion, however, that the situation presents no material distinction and offers no grave reason under the circumstances why recovery should be disallowed in this case. The payment was made in accordance with a universal custom and was furthermore taken, not solely in the specific instance of computation, upon the authority and conclusion of the auditor alone, but in conjunction with the authority and conclusions of the treasurer.

It is true the auditor pays the money into the fee fund, but in effect this, in reality, is a mere transfer of the funds from the county general fund to the fee fund, and show, virtually, not so much a voluntary payment to the county as a failure to draw out funds of the county.

I cannot bring myself to believe that the auditor's action in the case in question was of any more effect than was the acceptance of lesser sums and the giving of a receipt in full by the individuals in the cases above presented. I am, therefore, of the opinion, that the auditor's action, in view of the authorities above quoted, may not be regarded as a waiver to recover the balance legitimately due to him, and that he is not estopped from recovery.

I do not enter into the question of the mistake of law in this connection, for the reason that I find the authorities do not give consideration to this phase, in cases of like nature. In the above authorities such factor was entirely ignored,

and, indeed, a review of the authorities, under this head, seems to disclose that the consideration of that question is confined to dealings of a contractual nature and to the construction of instruments of writing.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1230.

RIGHT OF A JUSTICE OF THE PEACE TO RECEIVE ONE DOLLAR FOR SITTING IN A TRIAL IN A CRIMINAL PROCEEDING WHERE NO DEFENSE IS INTERPOSED—WHERE A JUDICIAL EXAMINATION IS HELD.

Under section 1746, *General Code, which provides that a justice of the peace may receive one dollar for sitting in a trial in a criminal proceeding where a defense is interposed, the justice of the peace is not entitled to that fee in any case where a plea of guilty is made, for the reason that in such case it may not be said that a defense is interposed.*

Under section 3346, *General Code, however, providing the fee of one dollar for a constable for attendance at criminal trials, it is held that where defendant pleads guilty, and the justice enters into a judicial examination for the purpose of determining the amount of fine as based upon the gravity of the offense, the constable may receive his one dollar for attendance upon such hearing. Trial is defined by statute as a judicial examination of the issues, and it is held in the opinion that the question of the amount of fines and gravity of offense is a material issue in a criminal proceeding.*

COLUMBUS, OHIO, November 6, 1914.

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

GENTLEMEN:—Under date of August 1st you request my opinion as follows:

"By request of Mr. M. J. Penty, justice of the peace, Cleveland, we submit the following questions:

"*First.* In a criminal action wherein the justice has final jurisdiction and a plea of guilty is entered, is the justice entitled to the fee of one dollar for sitting at the trial?

"*Second.* In a similar action is the constable entitled to the fee of one dollar for attendance at trial?

"We might add that your department answered both of these questions in the negative in an opinion rendered to this department under date of July 28, 1913.

"Mr. Penty accompanies his questions with reference to the case of Palmer vs. State, 42 O. S., 596, and the United States court in the case of United States vs. Winslow Curtis, 4 Mason's Reports, page 232. He also refers to an opinion of the attorney general under date of November 27, 1911, as bearing on the question as to what constitutes a trial."

Section 1746 of the General Code provides in part:

"* * * Justices of the peace, for the services named, when rendered, may receive the following fees * * * sitting in the trial of a cause, civil or criminal, where a defense is interposed, whether tried to the justice or to a jury, one dollar."

Section 3347 of the General Code, provides in part as to fees of constables:

"For services rendered * * * constables shall be entitled to receive the following fees * * * for each day's attendance before a justice of the peace on criminal trial one dollar."

In both of the former opinions referred to by you, the case of Palmer vs. State, 42 O. S., 596, was cited as defining a trial to be a judicial examination of the issues, whether of law or facts, in an action or proceeding.

The case of Railway Co. vs. Thurston, 44 O. S., 525, may be cited to the same effect. These cases adopt the definition found in the statutes of the same language, to wit: Section 11376 of the General Code. To receive the fees prescribed, therefore, a justice of the peace must be sitting in a proceeding having for its object a judicial examination of the issues, whether of law or of facts, wherein some defense is interposed, and a constable must be attending at such proceeding having a like object, but without the necessity of a defense being interposed.

In the former opinions referred to in your request attention was not paid to the phase of the matter which I understand is entertained by the party desiring a solution of the questions presented. In the particular view entertained reference is had especially to occasions wherein it is necessary, after plea of guilty is entered, for the justice to consider matters pertaining to gravity of the offense. In brief, where a defendant pleads guilty to an offense punishable by a fine, the question of the proper amount of a variable fine which may be assessed, becomes a very material issue, and it is essential to have facts introduced in evidence which may tend to mitigate or aggravate the nature of the case. The question at hand, therefore, is whether or not such an examination of facts by a magistrate amounts to a judicial examination of an issue in a proceeding.

In the case of Railway vs. Thurston, above quoted, the court has regard to the sections of the Code immediately following section 11376 for the purpose of defining the meaning of the word "issue" in this statute. These statutes are as follows:

"Sec. 11377. Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds: (1) Of law; (2) of fact.

"Sec. 11378. An issue of fact arises:

"1. Upon a material allegation in the petition denied by the answer.

"2. Upon a set-off, counterclaim, or new matter, presented in the answer and denied by the reply.

"3. Upon material new matter in the reply, which is to be considered as controverted by the adverse party, without further pleading.

"Sec. 11379. Issues of law must be tried by the court, unless referred as hereinafter provided. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as herinafter provided.

"Sec. 11380. All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred."

These statutes have primary reference, it is clear, to civil proceedings, and seem to imply that all issues must be clearly set forth and controverted in the pleadings filed. In the case at hand, however, the proceeding is criminal and the same exactness cannot be accorded an application of the statutes to the situation. The plea of not guilty, or of guilty, in a criminal proceeding takes the place of pleadings in a civil proceeding, and all issue of the trial are raised by the trial of such a case.

It is true the primary issue is of presence or absence of guilt, but the question of gravity and the problem of mitigation or aggravation will surely be viewed as an issue, even though it must be considered more or less of a secondary nature. In this connection section 13696 of the General Code is of interest. This statute is as follows:

> "When a person is convicted of an offense punishable, either in whole or in part, by a fine, the court, by motion, may hear testimony in mitigation of the sentence. The court shall hear such testimony at the term at which the motion is made, or may continue the case to the next term on like terms as the case might have been continued before verdict or confession. The prosecuting attorney shall attend such proceedings on behalf of the state, and offer testimony necessary to give the court a true understanding of such case."

Here by express authorization of statute the court is authorized to make a judicial examination and to hear testimony for the purposes in mind. I am of the opinion that such an examination partakes just as much of the nature of a trial as is the main trial for the purpose of determining the question of presence or absence of guilt. In brief, the determination of the amount of the fine is quite as important as far as issues are concerned as is the question of whether or not any fine at all should justly be assessed.

Having this view, therefore, of the issues in a trial, the distinction between the provision for payment of one dollar to the justice for sitting in a trial where *a defense is interposed,* and the provision for $1.00 for the constable for each attendance before a justice on trial, is of interest. In brief the former provides for payment only where a defense is interposed, and the latter makes no mention whatever of the interposition of a defense. When a defendant pleads guilty it is clear that there is no defense interposed, and yet if the justice is required to examine into the material fact of gravity of the offense, there takes place what is clearly to be classed as a trial, in accordance with the reasoning of the above. Some importance must be attached to the difference in the statutory provisions above referred to, and the legislature clearly must be presumed to have had a definite intent in requiring a defense to be interposed as a condition precedent to the justice receiving his fee, while omitting such condition precedent in the case of a constable's fee. The only sensible import which can be given to the provision relating to the justices' fee is that no fee is to be paid where a plea of guilty is entered, since in that case no defense is interposed.

In answer to your questions, therefore, I am of the opinion that the use of the words "where a defense is interposed" precludes the justice from receiving his fee in very case where a plea of guilty is entered, notwithstanding the necessity of making an examination for the purpose of determining the gravity of the offense. In the case of a constable, however, no such condition is imposed, and since the justice when investigating for the purpose of determining gravity and hearing both sides, is engaged in the trial of material issues, he is conducting a trial within the meaning of the statute, and the constable should be entitled in such case, under section 3347 of the General Code, to $1.00 for attendance.

In coming to this conclusion it will be understood that the holding in no wise changes the conclusion of the former opinion of this department rendered under date of July 28, 1913, which opinion has reference solely to a plea of guilty when no examination is made for the purpose of determining degree of guilt.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1231.

A VILLAGE MAYOR IS REQUIRED TO ENFORCE AN ORDINANCE PASSED BY COUNCIL OF A VILLAGE TO PROHIBIT THE RUNNING OF DOGS AT LARGE, WITHOUT PERMITS, SECURED BY THE OWNERS OF THE DOGS, FROM THE MAYOR.

Where council of a village enacts an ordinance to prohibit the running of dogs at large without a permit secured from the mayor, and the village marshal is required to enforce such ordinance by catching dogs without a permit, keep them for forty-eight hours and then kill them if the owner does not call for them, such, marshal is entitled to the extra compensation thereafter fixed by council for the performance of such additional duties.

COLUMBUS, OHIO, November 6, 1914.

HON. C. B. MCCLINTOCK, *Solicitor of Village of Brewster, Canton, Ohio.*

DEAR SIR:—Your favor of August 21, 1914, is received in which you set forth the following:

"The village of Brewster passed an ordinance in November, 1913, fixing the salary of all of the officials for the ensuing two years and said ordinance also fixed the duties of each official.

"A short time ago, and since the passage of that ordinance, another ordinance was passed relative to the running of dogs at large in this village. Amongst other things this ordinance provided that all dogs should be tagged and each person desiring to keep a dog should first secure a permit from the mayor of said village. The ordinance further provided that any dogs found running at large violating this provision and certain others named therein, should be taken up by the village marshal and kept for a period of forty-eight hours and if the owner did not call for the dog at such time said marshal was authorized to kill him. The ordinance further provided that any dogs that were taken up by the marshal in violation of said ordinance before the owner could secure the same he was to pay a certain sum of money.

"By the terms of this ordinance the duties of the marshal of the village would be very much increased. The council thereafter passed a resolution fixing a sum of money to be paid to the marshal for each dog caught by him and for each dog fed by him and killed by him. These sums of money would be in addition to his regular salary and in addition to his duties prescribed by the ordinance passed when his salary was fixed.

"I desire your opinion as to the right of the marshal to receive this additional compensation."

Section 3633, General Code, grants power to municipal corporations,

"_____; to regulate or prohibit the running at large of dogs, and provide against injury and annoyance therefrom, and to authorize the disposition of them when running at large contrary to the provisions of any ordinance."

Section 4219, General Code, provides:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor.

The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

By virtue of this section the compensation of an officer or employe when fixed cannot "be increased or diminished during the term" for which he may have been elected or appointed.

Sections 4384, et seq., General Code, fix the term and prescribe the duties of a village marshal.

Section 4384, General Code, reads:

"The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

The marshal is elected for a definite term.

Section 4385, General Code, provides:

"The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance."

Section 4386, General Code, provides:

"He shall suppress all riots, disturbances and breaches of the peace and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial, and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states."

Section 4387, General Code, provides:

"In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

In the performance of the duties prescribed in these sections the marshal deals with persons and not with animals.

Section 5809, General Code, provides:

> "A person or corporation being the owner or having the charge of horses, mules, cattle, sheep, goats, swine, dogs or geese, shall not permit them to run at large in the public road, highway, street, lane or alley, or upon inclosed land or cause such animal to be herded, kept or detained for the purpose of grazing on premises other than those owned or occupied by the owner or keeper thereof, except as provided in section fifty-eight hundred and eleven."

Section 5910, General Code, provides:

> "Whoever violates the provisions of the next preceding section shall forfeit and pay for each violation not less than one dollar nor more than five dollars. Continued violation, after notice of prosecution, shall be an additional offense for each day of such continuance."

The offense in violation of these sections is committed by the owner and the penalty is against the owner.

In section 4216, General Code, it is provided, among other things:

> "* * * From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council."

It would have been within the power of council to create a position of "dog catcher" to enforce the provisions of the ordinance and to have fixed his compensation. The council in the present case has seen fit to pass an ordinance for the taking up of stray dogs and has placed this duty upon the village marshal.

Is the marshal entitled to extra compensation for these additional duties, as fixed by council?

At section 525 of McQuillin on Municipal Corporations, it is said:

> "Where an officer performs duties imposed by law he is entitled to the compensation therefor fixed by law and no other. He is not entitled to extra compensation for services performed in the line of his official duty. The fact that the salary or compensation may be recognized as inadequate remuneration for the services exacted and actually performed does not change the rule. And the principle is the same although his duties are greatly increased."

Also at section 526:

> "Extra pay may be allowed in some cases for the performance of additional services, but, of course, this must depend on the law and the nature of the duties of the office. While as mentioned, a public officer may not receive extra pay for services rendered by him for which compensation by way of salary is allowed by law, sometimes he may recover pay for other services which he may render outside of and in addition to his ordinary official duties which could as well be performed by other persons as by the officer."

In the present case the village marshal is required to catch and keep the stray dogs; to feed them and if not called for by the owner, he is required to kill them.

These duties in my opinion are in addition to the duties prescribed for a village marshal and the council may therefore grant to the marshal additional compensation for performing such additional duties.

This would not be increasing his compensation as village marshal but would be giving him a compensation for his services required in enforcing the ordinance prohibiting the running of dogs at large. Council might have created a new position the encumbent of which would be required to enforce this ordinance.

It is my conclusion that the marshal is entitled to the additional compensation.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1232.

RIGHT OF THE TAX COMMISSION TO REQUIRE FOREIGN CORPORATIONS TO REPORT TO THE COMMISSION A LIST OF THEIR OHIO STOCKHOLDERS, AS A PART OF THEIR ANNUAL REPORT.

The tax commission may require foreign corporations to report to the commission a list of their Ohio stockholders, as a part of their annual reports to the commission, under the law.

COLUMBUS, OHIO, November 6, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 6th, enclosing a copy of a blank form prescribed by the tax commission for the report of a foreign corporation under the franchise tax sections of the laws which the commission is required to administer, and directing my attention to the requirement on the third page thereof in the following language:

> "Attached herewith is a true and correct list of the stockholders in this company residing in Ohio, showing the name, address and number of shares held by each."

You mention in your letter several particular cases, which I will not discuss in this letter, as my opinion is requested upon a single proposition, viz.:

> "May the commission require foreign corporations, filing annual reports with it, to furnish lists of stockholders resident in Ohio?"

My attention is called to section 12924-1, General Code, which provides as follows:

> "Whoever, being an officer, agent or employe of any public utility, company, firm, person, co-partnership, corporation or association, *subject to the provisions of any law which the tax commission of Ohio is required to administer, shall fail or refuse to fill out and return any blanks, as required by such law*, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or wilfully give a false answer to any such

question where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or refuse to exhibit to such commission or any commissioner or any person duly authorized, any book, paper, account, record or memorandum of such public utility, which is in his possession or under his control, shall be fined not more than one thousand dollars for each offense."

Analyzing this section, the following facts are to me clearly apparent:

1. A violation of this penal statute can be committed only by a corporation, person, etc., subject to the provisions of a law which the tax commission is required to administer.

2. The blanks in which the question, refusal to answer which is penalized, are found, must be blanks required by law to be filled out and returned; and the law requiring the filling out and returning of such blanks must be a law which the tax commission of Ohio is required to administer.

3. The same principle applies to failure or refusal to answer questions propounded in such blank. That is to say, in order for an offense to be committed under this head it is necessary that a law which the commission is required to administer shall require blanks to be filled out and returned. It is not sufficient that some law which the commission is not required to administer shall require the filling out and returning of blanks.

I mention this fact because your letter refers to the Warnes law, so-called, 103 O. L. 786. In a way this law is one which the tax commission of Ohio was required to administer because section 1 thereof provides that the tax commission shall "direct and supervise the assessment of all real and personal property in the state;" and certain other statutes impose specific duties upon and vest specific powers in the tax commission with respect to the assessment or taxation of real and personal property generally in the state, but this law, i. e., the Warnes law, does not require foreign corporations or any other corporations to fill out and return any blanks to the tax commission of Ohio.

Therefore, I am of the opinion that the Warnes law may be eliminated from consideration in answering your question, and as a consequence of such elimination it follows, of course, that authority to require answer to a question of the kind concerning which you inquire must exist, if at all, by virtue of the provisions of law relating to foreign corporations as such, or at least by virtue of the provisions of what is known as the Hollinger law, which is part of the same legislative act.

The provisions of this law particularly applicable to foreign corporations are as follows:

"Sec. 5499. Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe.

"Sec. 5500. Such report shall be signed and sworn to before an officer, authorized to administer oaths, by the president, vice-president, secretary, superintendent or managing agent in this state, and forwarded to the commission.

"Sec. 5501. Such report shall contain:

"1. The name of the corporation and under the laws of what state or country organized.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock, and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

"7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state.

"8. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state.

"9. The value of the property owned and used by the company in this state, where situated, and the value of the property owned and used outside of this state, and where situated.

"10. The change or changes, if any, in the above particulars, made since the last annual report."

Standing by themselves these sections do not authorize the commission to require information of the kind specified in your inquiry. But these sections must be read in connection with sections 1465-18 and 1465-19, General Code, which are a part of the same legislative act in which the former sections are found.

"Sec. 1465-18. Each company, firm, corporation, person, association, co-partnership or public utility, shall furnish the commission in the form of returns prescribed by it all information required by law and all other facts and information, *in addition to the facts and information in this act specifically required to be given, which the commission may require to enable it to carry into effect the provisions of the laws which the commission is required to administer, and shall make specific answers to all questions submitted by the commission.*

"Sec. 1465-19. Any such company, firm, corporation, person, association, co-partnership or public utility, receiving from the commission any blanks with directions to fill them, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure."

It will thus be seen that the Hollinger act directly authorizes the commission, in the blanks to be prepared by it for the reports of foreign corporations, to incorporate questions relative to facts and information other than such facts and information as the law itself requires to be furnished in such report, provided such additional facts and information relate to laws which the commission is required to administer.

I think then that for the purpose of section 12024-1 information of a proper character, requested by the commission in addition to that which the law itself requires the commission to request in the blanks prepared by it, constitutes the subject matter of a question propounded in a blank required by the Hollinger law. That is to say, an answer to a proper question of this sort would be an answer to a question required by the Hollinger law, which in turn is the law which requires the report to be made out and returned by foreign corporations.

But this conclusion does not decide your question. It still remains to be determined whether or not information respecting the stockholders of a foreign cor-

poration, resident in Ohio, is information enabling the tax commission "to carry into effect the provisions of * * * laws which the commission is required to administer" within the meaning of section 1465-18.

While I have stated that the Warnes law must be eliminated from consideration as the law requiring the report, for the purpose of giving to section 12924-1 its proper interpretation, I do find it necessary to consider the Warnes law in answering the question which is now raised. It is at least clear that the administration of the Hollinger law, relative to the taxation of domestic and foreign corporations, public utilities and banks does not involve the use of information of the character inquired about by you; but as already stated, the Warnes law is a law which, in a sense at least, the tax commission is required to administer. True it was passed after the Hollinger law was passed, but the principle is well established that a statute which applies to a genus is not limited to the species constituting that genus at the time such law is passed, but has equal application to other species brought within that genus subsequently to the passage of the original law by the enactment of other laws or otherwise. Therefore, the mere fact that the Warnes law was passed after section 1465-18 was enacted is not sufficient, in my judgment, to deprive the former of the character of a law which the commission is required to administer if it partakes otherwise of that character.

Turning now to the Warnes law, I observe in section 1 thereof, not only the language already quoted, but also the following:

> "Such district assessor shall, under the direction and supervision of the tax commission, be the assessors of real and personal property for taxation, within and for their respective districts, * * *".

I find in section 4 thereof the following:

> "The district assessor shall, annually, under the direction and supervision of the tax commission, list and value for taxation all real and personal property subject to taxation in the county constituting his assessment district * * *".

Section 49 of the Warnes law (103 O. L. 798) provides as follows:

> "The tax commission of Ohio, district assessors and district boards of complaints shall notify the prosecuting attorney of the proper county of any wilful violations of the laws relating to the assessment of real and personal property for taxation, by persons, firms, partnerships, associations or corporations, for which a penalty, either civil or criminal, may be provided by law, and shall sign and verify affidavits or petitions with respect thereto when prepared by the prosecuting attorney."

The implication of this section is that the tax commission in some manner or another may acquire knowledge of the violation of the tax assessment laws by private individuals.

Section 42 of the Warnes law gives to the local taxing officers authority to examine public records, presumably with a view to ascertaining facts bearing upon the listing of property for taxation. This section also provides that the *tax commission of Ohio shall have the same power,* and at the end of the section is found the following proviso:

> "Nothing in this act shall be construed or held to authorize the tax commission, or any of its agents or employes, to examine the accounts or records

of any banking or financial institution which is subject to the official inspection under the laws of the state of Ohio or of the United States, nor to demand or receive any list of depositors, stock depositors, members or others who transact business in or with such institutions."

The proviso last above quoted indicates clearly to my mind that the general assembly at least supposed that without this language in the statute the tax commission would be authorized to exercise inquisitorial powers in respect to bank deposits. But as will more fully appear I do not think that it is necessary to rely upon such evidence as this in order to sustain such a view.

Section 57 of the Warnes law provides as follows:

"The tax commission of Ohio may require district assessors, deputy assessors and members of district boards of complaints to meet and confer with other district assessors, deputy assessors, members of district boards of complaints, or with the commission on any matter relating to the assessment and valuation of property for taxation, at such times and places as may be prescribed from time to time by the commission."

Section 67 of the Warnes law provides in part as follows:

"Any expense incurred by the tax commission of Ohio, with respect to the annual assessment of real and personal property in any taxing district, shall be paid out of the treasury of the county in which such taxing district may be located, upon presentation of the order of the tax commission of Ohio certifying the amount thereof to the county auditor, who shall thereupon issue his warrant therefor upon the general fund of the county, directed to the county treasurer, who shall pay the same. * * *"

The cumulative effect of all these provisions read together produces, in my mind, the conviction that the tax commission of Ohio is required to administer the Warnes law, and that furthermore it is required to administer that law by way of securing such information as it may be able to secure with relation to taxable property which ought to appear on the tax list in Ohio.

The foregoing discussion is, as already hinted, upon the assumption that the phrase "the laws which the commission is required to administer," as found in section 1465-18, refers to and embraces laws passed subsequently to the enactment of the Hollinger law as well as to laws in force when the Hollinger law was enacted and to that law itself.

I am satisfied that the principle upon which this discussion is based is well founded, but it is not necessary to rely exclusively upon this principle in order to sustain the position which I have taken. The Hollinger law itself, in its original form, contains provisions which indicate clearly to my mind the scope of the legislative intention evinced in the use of the phrase under examination. I refer to sections 5617-1 and 5617-2, General Code, which were sections 146 and 147 of the Hollinger law. They provide as follows:

"Sec. 5617-1. The commission shall require county auditors to place upon the tax duplicate any property which may be found, for any reason, to have escaped assessment and taxation.

"Sec. 5617-2. The commission may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof fixing a time and place for hearing any person or persons interested to the end that the assessment laws of the state may be equitably administered."

The irresistible inference from the first of these sections is that the tax commission shall in some manner or other find property which has escaped assessment and taxation. How the commission could find such a fact to exist, save by accident, without conducting such investigation as might enable it to make such discoveries in some systematic way, I am unable to understand.

Again, the second of these sections, while it may involve the idea of a proceeding before the commission, instituted by some interested party, is certainly not limited to that scope but includes within its purview the thought that the commission in some manner or other will have knowledge of the improper administration of the assessment laws of the state, and that it is to interpose its powers under this section for the purpose of securing the proper administration of those laws.

These sections, then, in and of themselves were sufficient, in the original Hollinger law, to give to the tax commission some degree of administrative power with respect to all the property taxation laws of the state. They were not of ambiguous import. They conferred power upon the tax commission, with respect to ordinary property taxation, far greater, in my opinion, than that possessed by any other single taxing board or officer. The tax commission, under the Hollinger act itself, stood upon the apex of the taxing machinery of the state, not only with respect to the matters and things within the field of its exclusive jurisdiction, such as the administration of the franchise and excise tax laws, the equalization of the value of bank shares, and the valuation of public utility property, but also to the administration of the general property tax laws themselves. These sections, in a word, were sufficient to show that at the time when the Hollinger law was enacted, and by virtue of that law itself, the tax commission was "required to administer" in a sufficient sense all of the tax laws of the state.

Now it must be acknowledged that the sections upon which I have been commenting have been repealed. This fact does not alter the case. When the Hollinger law was enacted the phrase upon which I have been commenting acquired a certain meaning embracing the administration of the property tax laws of the state. The repealing question was effected by the Warnes law itself, and as I have already pointed out the tax commission's powers and duties under the Warnes law did not differ substantially from the powers and duties which the commission had under the Hollinger act. The difference between the two laws might be summed up by the statement that under the Hollinger act the commission was to act independently, and it was under the necessity of instituting proceedings to compel local officers to comply with its independent orders; while under the Warnes law the commission is given direct charge and control over every act of the local assessor, and in addition is given such inquisitorial power as to make it clear that the commission is to aid and assist the local officers, by securing whatever information as to the existence of taxable property, which it may, by exercising any power which the statutes give to it, properly secure.

So, I think, it is clear that ever since the enactment of the Hollinger law (and as a matter of fact I think the same thing was true under the Langdon law of 1910 creating the commission, the tax commission has been required to administer the general property tax laws of the state in one degree or another and in one manner or another. It must have been in the contemplation of the legislature in using, in section 1465-18 of the Hollinger law, the phrase "the laws which the commission is required to administer," that the commission might find it desirable to use the power to propound additional questions in the reports required of corporations and public utilities, with a view to securing a more perfect administration, by and through the tax commission, of the general property tax laws of the state.

For all the foregoing reasons, therefore, I conclude that within the intendment of section 1465-18, General Code, the Warnes law is a law which the tax commission is required to administer, and that any information respecting the existence

in Ohio of taxable property, is information which the commission may require to enable it to carry into effect the provisions of the Warnes law. Being such information, it is of the character which the commission may require in the form of returns prescribed by it.

Therefore, the requirement which the commission has made is properly included in the blank form which it has prescribed for the report of foreign corporations, and failure to comply with such requirement constitutes a violation of section 12924-1, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1233.

COUNTY TREASURER HAS NO AUTHORITY TO EMPLOY AN ATTORNEY TO MAKE COLLECTION OF TAXES UNDER SECTION 2667, GENERAL CODE—PROSECUTING ATTORNEY NOT ALLOWED ADDITIONAL COMPENSATION FOR MAKING SUCH COLLECTIONS.

A county treasurer has no power to employ an attorney, other than the prosecuting attorney, to make collection of taxes under section 2667, General Code.

When actions are brought by the prosecuting attorney to collect taxes under section 2667, General Code, he is not entitled to an allowance of compensation therefor, in addition to his salary as prosecuting attorney.

COLUMBUS, OHIO, November 7, 1914.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of September 16th, in which you inquire:

> "I would like an opinion as to whether or not the county treasurer has the right to employ an attorney in actions commenced by him under the provisions of section 2667, General Code, and if so, would the provisions of section 2672 govern the amount of the fees for such attorney?
>
> "Is the prosecuting attorney compelled to act as attorney in cases commenced under section 2667 without compensation? What is meant by the word 'expenses' in sections 2672 and 2673?"

The sections to which you call attention read:

> "Section 2667. When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed in the same way mortgage liens are enforced.
>
> "Section 2672. When lands or lots or parcels thereof, advertised for and offered at both delinquent and forfeited tax sales and returned as unsold at both, have become forfeited to the state by reason of the unpaid taxes thereon, the county treasurer may contract with a suitable person to collect

the taxes or assessments thereon at a compensation deemed just and proper, subject to the approval of the county commissioners, but not to exceed twenty-five per cent. of the amount collected and shall be payable therefrom. Such allowance shall be apportioned ratably by the county auditor, among the funds entitled to share in the distribution of such taxes, and the expense of collection under the contract shall be borne by the person so contracting, who may proceed under this and the preceding sections, or as otherwise provided by law.

"Section 2673. When requested so to do by the auditor of state, if a county treasurer refuses or neglects to enforce a lien for such taxes and assessments, or either, and penalty thereon by civil action as hereinbefore provided, the auditor of state may direct the prosecuting attorney of the county to enforce such lien, in a civil action in the name of the state. Such suit shall be brought and prosecuted as hereinbefore provided. For such services the prosecuting attorney shall be allowed by the county commissioners from the amount collected not to exceed twenty-five per cent. thereof. The expense of such collection shall be borne by the prosecuting attorney, and all allowances shall be apportioned ratably by the county auditor, among all the funds entitled to share in the distribution of such taxes."

In answer to the last part of your inquiry, it is necessary to consider section 2917, which reads:

"Section 2917. The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

From a consideration of all these sections, and especially when considered in the light of section 2912, which reads:

"Section 2912. If a vacancy occurs in the office of prosecuting attorney, the court of common pleas shall appoint a prosecuting attorney. In case of sickness or other disability of the prosecuting attorney, preventing him from discharging his duties, the court shall appoint an assistant prosecuting attorney to perform the duties of the office until the disability is removed or a prosecuting attorney is elected or appointed and qualified. A person appointed prosecuting attorney or assistant prosecuting attorney, shall give bond and take the oath of office prescribed for the prosecuting attorney, and the assistant prosecuting attorney shall receive such compensation as the court fixes and the county commissioners allow."

I am constrained to hold that the county treasurer has no right to employ an attorney to prosecute actions brought under section 2667, G. C. Such being my conclusion, an answer to that part of your question reading "would the provisions of section 2672 govern the amount of the fees of such attorney" is rendered unneces-

sary. I take it that by your question "is the prosecuting attorney compelled to act as attorney in cases commenced under section 2667, without compensation," you intend to inquire whether if such suits are brought by the prosecuting attorney, he must prosecute them without compensation in addition to his salary, and an attempt will be made to answer your question as so understood.

To answer this question it becomes necessary to consider section 3003, the last paragraph of which reads:

> "No prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars. Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

and to further call attention to that part of section 2673, supra, which reads:

> "For such services the prosecuting attorney shall be allowed by the county commissioners from the amount collected, not to exceed twenty-five per cent. thereof."

The last paragraph of section 3003 as above copied, is first found in the codification of 1910, although similar provision is found in the act of March 31, 1906, 98 O. L., 161, where the matter is dealt within the following language:

> "Such salary is to be paid in equal monthly installments, out of the general fund. Such salary shall be in full and in lieu of all compensation consisting of salaries and fees heretofore paid to prosecuting attorneys for their services as such, and in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether the same relates to either criminal or civil matters."

This language is clear, free from all doubt or ambiguity, and of such character that it must be concluded that if the language last above copied from section 2673 was then in the Revised Statutes, its provisions were superseded by the amendment of section 1297, made March 31, 1906. So far as I have been able to ascertain, the language above quoted from section 2673 first found a place in our laws in section 1104, R. S., when amended on April 23, 1904, 97 O. L., 402.

This makes the language of the act of March 31, 1906, as codified in 3003, G. C., the later enactment and controlling, which compels the conclusion that the prosecuting attorney is not entitled to an allowance, in addition to his salary for prosecuting actions brought by the county treasurer, under favor of section 2667.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1234.

ABSTRACT OF TITLE FOR OHIO UNIVERSITY, ATHENS, OHIO.

COLUMBUS, OHIO, November 11, 1914.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title and deed from Adda P. Phillips and husband, to the president and trustees of the Ohio university, for the following described real estate, situate in the city of Athens, Athens county, Ohio, to wit:

"Beginning at a point in the east line of inlot No. 74, and 96 feet south of the northeast corner thereof, being the southeast corner of the lot conveyed June 17, 1882, to Augusta F. Warden by John Welch, by deed recorded in Vol. 53, page 81 of the Records of Deeds of said Athens county; thence west along the south line of said Warden lot to the west line of said inlot No. 74; thence south to a point 9 feet north from the southeast corner of inlot No. 75 in said city; thence west 24 feet; thence south 4½ degrees, west 39½ feet, more or less, to the northwest corner of that part of inlot No. 77 in said city conveyed by John Welch and wife to Della B. Sleeper by deed dated April 9, 1886, and recorded in Vol. 61, page 64, Athens County Deed Records; thence east 59 feet, more or less, to the southeast corner of that part of said inlot No. 77, conveyed by Della B. Sleeper to John Welch by deed dated April 9, 1886, and recorded in Vol. 64, page 349, of the Records of Deeds of said county; thence north 3½ feet; thence east along the north line of the lot conveyed February 28, 1882, by John Welch to Della B. Sleeper by deed recorded in Vol 52, page 172, of said records, to Court street; thence north along said Court street to the place of beginning.

"Excepting from said premises a right of way 10 feet wide over the west end of that part of inlot No. 74, herein conveyed, and an extension of the same south across that part of inlot No. 77, herein conveyed, as an appurtenance to those parts of said inlot No. 77, and inlot No. 170 lying south of that part of inlot No. 77 hereby conveyed."

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby. There are no liens or incumbrances against said real estate excepting the taxes for the year 1914, due December 20, 1914, and June 20, 1915, respectively, the amount of which is as yet undetermined.

Subject only to the payment of said taxes, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in Adda P. Phillips to said premises. The deed is in proper legal form, is duly signed, acknowledged and witnessed, and conveys to the state of Ohio a title in fee simple to the real estate therein described.

The abstract and deed are herewith returned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1235.

TRANSCRIPT OF THE PROCEEDINGS OF COUNCIL OF THE VILLAGE OF NILES, OHIO, IN THE MATTER OF THE ISSUANCE OF BONDS FOR THE IMPROVEMENT OF STREETS IN SAID VILLAGE.

COLUMBUS, OHIO, November 12, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the commission's request I have examined the transcript of the proceedings of the council of the village of Niles, in the matter of the issuance of bonds in the aggregate sum of $10,500 in anticipation of the collection of special assessments for the improvement of Arlington street in said village from Water street to Williams street. I have also examined the original bonds which are in the possession of the treasurer of state.

I am of the opinion and hereby certify that said bonds have been issued in accordance with the provisions of the law, and that the same constitute a good and valid legal obligation against the city of Niles, to be paid in accordance with the terms specified therein.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1236.

RIGHT OF DIRECTORS OF LONGVIEW HOSPITAL TO PAY FOR PUBLICITY CAMPAIGN, RELATIVE TO BOND ISSUE, FROM FUNDS AT THEIR DISPOSAL.

It is not legal for the directors of Longview hospital to pay from funds at their disposal for publicity campaign carried on by them relative to a bond issue.

COLUMBUS, OHIO, November 12, 1914.

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

GENTLEMEN:—I have your favor of November 7, 1914, in which you ask opinion of me as follows:

> "The directors of Longview hospital before the election of 1912 published newspaper advertisements in all the Cincinnati papers appealing to the voters to authorize a bond issue of $500,000.00, the proceeds of which bond issue were to be used for new building and for other improvements at Longview hospital.
>
> "Kindly give us your written opinion as to the legality of the expenditure made by the directors for such advertisement."

The statutes provide for the government of Longview hospital by a board of five directors, and other officers appointed by said board. The funds at the disposal of said board of directors for the purposes of said institution are derived from various sources (section 2033, G. C.); but however derived such funds are in every sense public moneys, and as other public moneys, can only be expended in some manner authorized by law. It is sufficient to know as a predicate to the only possible answer to your inquiry that the said board of directors of this institution

are nowhere in the law authorized to expend public moneys coming into their hands for the purposes indicated in your communication. The authorization by the voters of Hamilton county of the bond issue in question was undoubtedly a matter of vital interest to the welfare of the institution and any interest taken by the directors in securing a favorable vote on this bond issue was entirely proper and laudable. But, inasmuch as there is nothing in the law pertaining to the affairs of this institution, or elsewhere, authorizing the board to expend money for the purpose of publicity in the then proposed bond issue, the answer to your question must be that there was no authority for any action of the directors expending public money for this purpose, and if this was done, said action on the part of the directors was clearly illegal.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1237.

UNDER THE EXEMPTION PROVISION OF THE INHERITANCE TAX LAW, NIECES AND NEPHEWS MUST BE OF THE BLOOD OF THE DECEDENT.

Under section 5331, *General Code, prior to amendment* 103 *O. L.*, 465, *nieces and nephews must be of the blood of the decedent.*

COLUMBUS, OHIO, November 13, 1914.

HON. FRANK P. ANDERSON, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have previously acknowledged receipt of the letter of Messrs. Brandon & Ivins, attorneys at law, embodying the request in which you join that I advise you on the following questions:

> "1. When did senate bill No. 13, section 5331, passed April 15, 1913, approved May 5, 1913, and filed with the secretary of state May 8, 1913, Laws of Ohio, 103, pages 465 and 456, become effective as a law of this state?
>
> "2. Under the repealed section 5331, which exempted nieces and nephews from the collateral inheritance tax, must nieces and nephews necessarily be of the blood of the testator? In other words, if A and B are husband and wife, would a devise from A to a child of B's sister be exempted from the collateral inheritance tax under the former section, provided it exceeded $200 value?"

With respect to the first question I beg to state that the same is answered by my opinion to the Hon. Thomas L. Pogue, prosecuting attorney, Cincinnati, Ohio, a copy of which is enclosed herewith. You will observe that it is my opinion that the act referred to became a law on the day on which it was approved by the governor, viz., May 5, 1913.

Your second question is, I think, answered by the cases of in re Wolf, 48 Bul. 211 and in re Bates, 7 N. P. 625. Both of these cases hold, as you will observe, that the nieces and nephews, in order to be exempt as to their inheritances from the operation of the law, must be of the blood of the decedent.

Accordingly, I so hold.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1238.

ALL PERSONS COMMITTED TO ANY INSTITUTION UNDER THE CONTROL AND MANAGEMENT OF THE OHIO BOARD OF ADMINISTRATION SHALL BE CONSIDERED AS COMMITTED TO THE CONTROL, CUSTODY AND CARE OF SUCH BOARD—COMMITMENT BY JUVENILE COURT OF DELINQUENT BOYS TO THE BOYS' INDUSTRIAL SCHOOL SHALL BE MADE AS BEFORE THE PASSAGE OF THE JUVENILE RESEARCH ACT—SECTIONS 1841-1, ET SEQ., 2087 AND 2093, GENERAL CODE, APPLY AS BEFORE THE PASSAGE OF THE JUVENILE RESEARCH ACT.

By reason of the provisions of section 2 of the act of the legislature, passed April 9, 1913, providing that all persons committed to any institution under the control and management of the Ohio board of administration, shall be considered as committed to the control, custody and care of such board. Commitments by juvenile courts of delinquent boys to the boys' industrial school shall be made as before the passage of the juvenile research act, section 1841-1, et seq., General Code. Sections 2087 and 2093, General Code, providing for the manner and cost of transporting boys to the boys' industrial school, apply as before the passage of the juvenile research act.

COLUMBUS, OHIO, November 13, 1914.

THE HON. GEORGE S. ADDAMS, *Judge Juvenile Court, Cleveland, Ohio.*

DEAR SIR:—Under date of July 2, 1914, you write asking my opinion with respect to the cost and expense of transporting boys committed to the boys' industrial school at Lancaster, Ohio. You inquire particularly as to the present application of section 2087, General Code, in view of the act of the legislature passed March 25, 1913, authorizing and directing the Ohio board of administration to provide for and maintain a "bureau of juvenile research."

Said section 2087, General Code, above noted, and section 2093, General Code, the provisions of which are likewise pertinent to the question at hand, provide as follows:

> "Section 2087. Any youth upon being sentenced to the boys' industrial school, within five days after such sentence, unless the court giving such sentence shall otherwise order, shall be conveyed to the school by the sheriff of the county in which the conviction was had, or by a suitable person designated by the court giving the sentence, and deliver into the custody of the superintendent of the school, with a statement of the offense for which he was convicted, his age, and a copy of the sentence.
>
> "Section 2093. The person other than the sheriff, deputy sheriff or other officer receiving a fixed salary from the county, shall receive as compensation for delivering a youth to the school, two dollars, two cents per mile each way from his home to the school by the usual route of travel and in addition thereto his actual and necessary expenses incurred, to be paid out of the county treasury upon the certificate of the proper officer of the court which committed him and the warrant of the county auditor, unless convicted of a crime the punishment of which is confinement in the penitentiary, in which case the costs in the case and the expense of his transportation upon a like certificate shall be paid out of the state treasury."

Sections 1841-1, 1841-2 and 1841-3, General Code, as enacted by the act above referred to, provide as follows:

> "Section 1841-1. All minors who in the judgment of the juvenile court, require state institutional care and guardianship shall be wards of the state, and shall be committed to the care and custody of 'the Ohio board of administration,' which board thereupon becomes vested with the sole and exclusive guardianship of such minors.
>
> "Section 1841-2. The 'the Ohio board of administration' shall provide and maintain a 'bureau of juvenile research' and shall employ competent persons to have charge of such bureau and to conduct investigations.
>
> "Section 1841-3. The 'the Ohio board of administration' may assign the children committed to its guardianship to the 'bureau of juvenile research' for the purpose of mental, physical and other examination, inquiry or treatment for such period of time as such board may deem necessary. Such board may cause any minor in its custody to be removed thereto for observation and a complete report of every such observation shall be made in writing and shall include a record of observation, treatment, medical history and a recommendation for future treatment, custody and maintenance. The 'the Ohio board of administration' or its duly authorized representatives shall then assign the child to a suitable state institution or place it in a family under such rules and regulations as may be adopted."

The question made by you with respect to the present application of section 2087 and, I infer, of section 2093 as well, arises out of the consideration that said section 1841-1 requires minors, who, in the judgment of the juvenile court, require state institutional care and guardianship, to be committed to the care and custody of the Ohio board of administration, while the act is entirely silent with respect to the commitment of said minors to either the boys' industrial school at Lancaster, or the girls' industrial home at Delaware, and upon the consideration that the provisions of said section 2087, with respect to the transportation of boys to the boys' industrial school, seems to be predicated on the fact of their being sentenced to that institution.

I note, however, that section 2 of the act passed by the legislature April 9, 1913, provides that "all persons committed to any institution under the control and management of the Ohio board of administration, shall be considered as committed to the control, custody and care of such board."

Upon consideration of all of the foregoing statutory provisions, I am of the opinion that boys may be sentenced and committed to (i. e., delivered to) the boys' industrial school at Lancaster the same as before the enactment of the so-called "juvenile research act." Upon such commitment the statutory provision above noted will operate to vest the Ohio board of administration with the care and custody of such boys. Likewise, I am of the opinion that with respect to the manner, cost and expense of transporting boys so committed to said institution, said sections 2087 and 2093 govern as before the enactment of said "juvenile research act."

As pertinent to the matter of the transportation of girls committed to the girls' industrial home at Delaware, I herewith enclose a copy of an opinion lately rendered to the Hon. H. C. Wilcox, probate judge at Elyria, Ohio.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

1239.

APPROVAL OF THE PROCEEDINGS FOR THE ISSUANCE BY THE VILLAGE OF CORTLAND, OHIO, OF CERTAIN BONDS FOR THE CONSTRUCTION OF AN ELECTRIC LIGHT AND POWER PLANT.

Approval of the proceedings for the issuance by the village of Cortland, Ohio, of certain bonds for the construction of an electric light and power plant. The so-called Todd law, 102 O. L., 262, being a revision of the entire Longworth act, should be regarded under the circumstances of its enactment as subsequent to senate bill 281, 102 O. L., 153, amending section 3939, General Code, a part of the old Longworth act. Both were passed on the same day; senate bill 281 was signed last in the senate; the Todd law was approved last by the governor, but the opinion is not based upon the order in which the bills were signed or approved, but rather upon the nature of their subject-matter in connection with the other circumstances.

COLUMBUS, OHIO, November 13, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the request of the commission I have examined the transcript of the proceedings for the issuance by the council of the village of Cortland of bonds in the amount of $5,000 for the purpose of purchasing the necessary labor for and erecting an electric street lighting system in the village and supplying electricity to the corporation and the inhabitants thereof.

The first question which is raised by the transcript is suggested by the purpose for which the bonds are issued, which has just been stated. The general assembly at its regular session in 1911 passed two bills amending section 3939, General Code, which specifies certain purposes and improvements for which bonds may be issued by a municipal corporation. These two bills were designated, respectively, senate bill 281, which is found in 102 Ohio Laws, 153, and senate bill 131, which is found in 102 O. L., 262.

Both these bills were passed on the same day, viz.: May 15, 1911; but the senate journal shows that both were signed last in the senate, and that senate bill 281 was signed after senate bill 131 was signed. However, both bills were presented to the governor and signed by him in the inverse order of their signature by the presiding officer of the senate; that is to say, senate bill 131, which was first signed by the president of the senate, was approved by the governor on May 22, 1911, while senate bill 281, which was signed last by the president of the senate, was approved by the governor on May 26, 1911.

The pertinent provisions of the two sections, as so amended, differ as will be seen from the following:

The section as amended, 102 O. L., 153 (the bill last signed by the presiding officer of the senate and first approved by the governor) authorized the issuance of bonds "for erecting or purchasing gas works or electric light works and for supplying light to the corporation and the inhabitants thereof."

The corresponding provision of the other bill was as follows:

> "For erecting or purchasing gas works or works for the generation and transmission of electricity for the supplying of gas or electricity to the corporation and the inhabitants thereof."

That the difference is material arises out of the fact that a strict construction of the one clause leads to the conclusion that bonds may not be issued under it for the purpose of supplying electricity to the inhabitants of a corporation for a pur-

pose other than light; whereas, the other authorizes bonds to be issued with a view to supplying electricity generally; that is, for power as well as for light purposes.

Although the purpose for the issuance of the bonds, as stated in the ordinance shown on the transcript, does not exactly correspond to the language of either of the above statutory provisions, it is well within the power granted by senate bill 131, and possibly in excess of the power granted by senate bill 281.

Ordinarily, the above facts would present a very difficult question, namely, as to which of two laws passed in one order and approved by the governor in the inverse order of their passage, both pertaining to the same subject, and it being clear that it was not the intention that both should remain in effect, is the law. However, I have not stated all the facts surrounding the enactment of this legislation. The relative time of the affixing of the signature of the presiding officer to a bill passed by both houses of the general assembly is a possible criterion by which to determine which of two acts is the later in point of enactment, but as governing the question of legislative intention, it is only one of several rules of statutory interpretation. In the present case, the legislative intention is made clear by considerations which I have not yet mentioned. Senate bill 281 was in form, an amendment of section 3939, General Code. It was introduced, considered and presented by the general assembly on the obvious theory and understanding that there was a section in force designated as section 3939, General Code, the intention being to amend that section, as such.

Senate bill 131, on the contrary, was a re-enactment of the body of laws familiarly known as the Longworth act, and formerly consisting of sections 3939 to 3954, inclusive, of the General Code, but the revision which the legislature desired to make of this statute, considered as a whole, was not worked out, by repealing and re-enacting and so formally amending the sections named, but by repealing all of them and enacting an entirely new act with serial section numbers beginning with section 1 and ending with section 15. The section numbers affixed to the various sections of this act in the present General Code were chosen by the attorney general under authority at that time reposed in him, and not by the general assembly, itself.

So it is that if senate bill 281 be regarded as the later law in point of enactment, it is at least defective in that it purports to be an amendment of section 3939, General Code, whereas at the time, and on this theory, section 3939, General Code, had been absolutely repealed, as such.

Therefore, the only consistent theory to adopt is to hold that the general assembly at least intended that its revision of the whole body of the law should be its last word on the subject, and that senate bill 131, which effected that revision, should repeal section 3939, General Code, as it then stood, including the amendment which had just been made thereto.

I think, therefore, that the only hypothesis upon which the two legislative acts can be made consistent and harmonious is to regard senate bill 131 as the later and controlling law, under the peculiar circumstances of this case, without necessarily considering the more fundamental question as to whether the date of approval by the governor, or the time of signature by the presiding officer, determines which of the two laws is the last in point of enactment.

For these reasons, then, I conclude that the purpose of the issuance of bonds being within the purview of section 3939, as amended by senate bill 131, 102 O. L., 262, section 1, is proper.

The transcript presents another question similar to the one passed upon by this department, in the matter of the bonds of the village of Mason, Ohio, an opinion with respect to which has heretofore been given to the commission. That is to say, the ordinance for providing for the issuance of the bonds was published in but one paper. The transcript shows that the paper in which publication was made

is the only paper printed and published in the village. For the reason set forth in the other opinion referred to, I deem this publication sufficient, notwithstanding the decision of the court of appeals of Muskingum county, therein referred to.

No other questions being suggested by the transcript, I am of the opinion and hereby certify that said bonds have been issued in accordance with the provisions of the law, and that the same constitute a good and valid legal obligation against the village of Cortland to be paid in accordance with the terms specified therein.

I may add that while no form of bonds is attached to the transcript, I have examined the bonds themselves on deposit in the office of the treasurer of state, and find that the form thereof is proper.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1240.

RIGHT OF THE DIRECTOR OF PUBLIC SAFETY TO RECEIVE A SALARY AS CLERK IN THE PUBLIC SAFETY DEPARTMENT.

A director of public safety may not also receive a salary as clerk in the public safety department. Such director of public safety, however, may act in the capacity of clerk of the board of public service and clerk of the waterworks department.

COLUMBUS, OHIO, November 13, 1914.

HON. HARRY W. KOONS, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Under date of October 6th, you request my opinion upon the following proposition:

> "W. is clerk of the board of public service, the board of public safety and the waterworks department of this city; while holding these clerkships W. was appointed director of public safety by the mayor.
>
> "*Query*: Can W. continue to draw salary for the clerkships and also receive a salary as director of public safety?"

Offices are considered incompatible when one operates as a check upon the other, or when the incumbent of one is expected to supervise or superintend the functions of the other; or when the duties are so numerous and conflicting as to render it impossible for one individual to perform the functions of both, or when considerations of public policy prohibit the holding of both positions by a single individual. To these conditions might be added those offices of which the particular provisions of statute relating thereto show a contrary intention, such as the requirement of the devotion of all time to the duties thereof, or for some other palpable reason.

In your case, while W. is acting as director of public safety, it is clear that he cannot also receive a salary as clerk in the same department, for the manifest reason that the director acts as supervisor and is indeed the ruling head over the clerks. As respects the other positions, however, I know of no reason why a single individual may not fill each and all of them at the same time, providing that the duties are such that they will not conflict with respect to time and possibility of performance.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1241.

RULES TO BE FOLLOWED IN DETERMINING THE VALUATION OF AN ESTATE FOR INHERITANCE TAX WHERE THE VALUE OF THE SEPARATE INTERESTS IS SUCH AS TO MAKE EXEMPTIONS EXHAUST THE ESTATE.

When the prosecuting attorney on behalf of the state asks for a valuation of an estate for inheritance tax purposes, and appraisers are appointed, and it subsequently develops that the value of the separate interests is such as to make the exemptions exhaust the estate, leaving nothing to tax, the fees of the appraisers are to be paid in the first instance from the county treasury. Such fees so paid constitute expenses of collection of inheritance taxes, 75 per cent. of which in the aggregate, the county is entitled to deduct at the next semi-annual settlement from the share of the inheritance taxes due to the state.

COLUMBUS, OHIO, November 13, 1914.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have acknowledged receipt of Mr. Jacobs' letter of October 19th, requesting my opinion upon the following question:

> "In a proceeding under the statute for the appraisement of an estate for collateral inheritance tax purposes it is ascertained that the value of the separate interests and the cost of administration are such as to bring into play the statutory exemptions and to leave nothing subject to taxation. From what source are the fees of the appraisers to be paid in such a case?"

Your question invites consideration of the following sections of the General Code:

> "Sec. 5343. The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession of the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. *The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor.* * * *"

There is no limitation of the foregoing language and I am of the opinion that the fees of the appraisers are to be fixed by the probate court and paid out of the county treasury as therein provided in all cases whether the estate proves to be productive of taxes or not.

In order fully to answer your question, however, I think other provisions of the related statutes may be considered. I call attention to section 5646, General Code, which is as follows:

> "The fees of officers having duties to perform under the provisions of this subdivision of this chapter, shall be paid by the county from the county

expense fund thereof, and shall be the same as allowed by law for similar services. In ascertaining the amounts due the state, seventy-five per cent. of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes, shall be charged to the state and deducted from the amount of taxes to be paid into the state treasury."

This section should of course have been amended when the act in 103 O. L., 463, changing the distribution of the collateral inheritance tax in conformity to article XII, section 7 of the constitution as amended, was passed, in order to produce a harmonious system of legislation. The legislature, however, failed to enact such an amendment, and I am unable to reach the conclusion that there is sufficient implication of legislative intention from which to construct an implied amendment thereof.

In my opinion the fees of the appraisers constitute a portion "of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes" for the purpose of section 5346.

The only question is, then, as to whether or not fees which have been paid by the county to the appraisers, in case of an estate which was not productive of taxes, are deprived of this character by reason of such nonproductiveness. In my opinion they are not so deprived of that character.

Section 5340, General Code, which, while not expressly amended when sections 5331 and 5333 were amended, may be regarded as impliedly amended so as to make the distribution for which it provides in part correspond to that required under amended sections 5331 and 5333, provides that the county treasurer shall collect the inheritance taxes, make proper distribution on his books, and pay the proper proportion thereof "into the state treasury to the credit of the general revenue fund at the time of making his semi-annual settlement."

Thus it appears that the inheritance taxes are to be settled for as between the state and the county semi-annually the same as other taxes. In such settlement I do not believe that it is required that the expense of each separate collection be referred to and deducted from the state's portion of each separate tax collection. In other words, I deem it proper under section 5346 for the county treasurer to compute and ascertain at settlement time the *aggregate* "cost of collection and other necessary and legitimate expenses incurred by the county in the collection" of inheritance taxes during the preceding six months, and to deduct 75 per cent. of such aggregate sum from the amounts which would otherwise be due to the state.

This being the case, I am of the opinion that a cost of collection or a necessary and legitimate expense incurred by the county in attempting to collect inheritance taxes should be treated as other costs and expenses incurred in the successful collection of such taxes, for the purpose of the division of expenses between the state and the county, particularly in view of the fact that under the present laws the county officers are charged with the duty of collecting the taxes while the county, as such, receives no benefit therefrom.

I conclude, therefore, that the fees of appraisers appointed under a proceeding under the collateral inheritance tax law which terminates without the collection of any taxes, are to be paid, in the first instance, out of the county treasury upon the warrant of the county auditor, and that when so paid they are to be considered as a part of the costs of collection and other necessary and legitimate expenses incurred by the county in the collection of inheritance taxes. 75 per cent. of which aggregate amount is to be deducted semi-annually from amounts due the state on settlement.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1242.

TAXES CHARGED AGAINST REAL ESTATE CONDEMNED BY THE STATE FOR PENITENTIARY PURPOSES AFTER THE DATE OF THE ATTACHMENT OF THE TAX LIEN AND BEFORE MAKING UP OF THE DUPLICATE.

Taxes charged against real estate condemned by the state for penitentiary purposes after the date of the attachment of the tax lien and before the making up of the duplicate are not collectible from the original owner and the lien therefor is extinguished by the superior title taken by the state.

COLUMBUS, OHIO, November 13, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 21st, requesting my opinion upon the following question:

> "In the early part of this year the state condemned a farm in Madison county for a site for a new penitentiary. The commission desires your opinion as to whether or not the former owner of said farm, against whom condemnation proceedings were had, is liable for the taxes upon the farm which became a lien in February, 1914. If not, is the state liable for such taxes, and if so how are they to be paid?"

The land in question was acquired by the state sometime after February, 1914, under the provisions of an act of the general assembly passed April 19, 1913, 103 O. L. 247, and particularly in pursuance of section 10 thereof which requires the attorney general under certain circumstances to proceed in the manner provided by law for the appropriation of property by municipal corporations, "to appropriate said property for the state" and to "exercise all the power and discharge all the duties as representative of the state of Ohio which are imposed by law upon the city solicitor with regard to such proceedings on behalf of such municipal corporations."

It is further provided in said act that "All the provisions of sections 3681 to 3697, inclusive, of the General Code, shall, in so far as the same are appropriate and applicable, govern the proceedings herein."

Sections 3681 to 3697 inclusive, of the General Code, need not be quoted here; suffice it to state that they provide a procedure to be instituted by the city solicitor for the assessment by a jury of compensation to be paid for the interest condemned and distribution by the court of the amount assessed in accordance with the rights of the claimants of the property taken. These sections are silent upon the subject of taxes, therefore they have none of the following three possible effects:

1. They do not impose upon the person whose land is taken any liability for taxes other than that which would ordinarily exist.

2. They do not of themselves fasten upon the land as taken by the municipality or other agency of the state any lien or liability *in rem* which would not otherwise exist.

3. They probably do not authorize unascertained taxes to be distributed out of the assessed compensation.

The last point may be involved in some doubt as Hoglen vs. Cohen, 30 O. S. 436, is not exactly decisive of the case, being founded upon the interpretation of a statute. At all events, however, it appears from your letter that taxes have not

been paid, although the land has been taken and presumably distribution has been made, therefore, this question seems to be out of the case.

Coming now to the liability of the original owner of the premises about which you first inquired I beg leave to point out that the land was assessed presumably in his name, that is it was so entered on the duplicate between the time when the assessment was made and the time when the taxes in question were charged against the assessment. The land must have been and undoubtedly was transferred on the duplicate to the state of Ohio, and the duplicate would then show a charge, if any, not against the owner personally, but against the state itself.

Whether or not under present Ohio statutes taxes charged on real estate constitute a personal liability of the owner of the land is a doubtful question; but at all events the person liable would be, as held in Creps vs. Baird, 3 O. S. 278, the person "in whose name the lands stand listed when the taxes accrue." So that if there were any personal liability it would be a personal liability disclosed by the duplicate placed in the hands of the treasurer for collection, for the treasurer must sue on his duplicate, and in this case the treasurer's duplicate presumably does not show any charge against the original owner.

Coming now to what may be termed, to avoid difficulty of expression, the liability of the state, I am of the opinion that such liability does not exist. The case is not to be determined upon principles arising out of the exemption of property from taxation after the attachment of the state's lien for taxes does not defeat the collection of the taxes against the land, for though property may be held, for example, by a publicly charitable institution, yet if the lien of the state for taxes properly attached to that property it could be taken in satisfaction of the taxes notwithstanding its exemption from subsequent taxes.

But another principle comes into play and determines the answer to this question. This is what is known as the doctrine of merger. The state's lien for taxes is a species of title or interest in the property, created as a means of enforcing collection of the taxes, and whenever the state acquires a title superior to that title in a given tract of real estate the inferior title is merged into the superior one. An individual cannot have full legal title to real estate and an inferior lien therein at the same time; the one extinguishes the other. The state is governed by the same rules which govern individuals in this particular.

Gasaway vs. Seattle, 21 L. R. A. n. s. 68, and cases cited in the notes thereto.

Foster vs. Duluth, 48 L. R. A. n. s. 707, and cases cited in the notes.

Now it is true that the states lien for taxes represents taxes other than those which come to the state itself. Thus, in the case mentioned by you there are doubtless county and township taxes charged against the property; but this fact is immaterial. The power of taxation is an attribute of sovereignty and emanates from the state. All taxes in this sense are state taxes, and this is especially true under Ohio laws. There is but one lien for taxes—that of the state; there is no separate lien in the county or township or any other local subdivision, therefore for the purpose of the doctrine of merger the distribution of taxes on account of which the lien exists, is immaterial. The title or interest represented by the lien is that of the state and the state only.

On this point I refer the commission to the case of Wasteney vs. Schott, 58 O. S. 410, wherein it was held that the right of action for the recovery of personal taxes resides in the state and is not attributable to the different local and municipal governmental agencies on behalf of which the taxes are levied. As stated by Williams, J., in the opinion at page 416:

"Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state; and while it was probably deemed impracticable to create a lien on personal property for the taxes laid against it, the fund derived from them is expended in common with that arising from real estate taxes, and for the same purposes."

In conclusion, then, I am of the opinion, first, that the original owner of the land is not personally liable for the taxes which have been charged on the duplicate against the land mentioned by you, and, second, that the lien of the state for these taxes as charged against the land has been merged into the higher title taken by the state so that lien can no longer be effectively asserted.

In short, then, the taxes, though properly charged, are wholly uncollectible. The only manner in which the treasuries of the local subdivisions can be reimbursed for the loss is by legislative appropriations; and this is a matter which technically, at least, rests upon the conscience of the general assembly of the state.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1243.

JURISDICTION OF JUVENILE COURT OVER BOYS UNDER EIGHTEEN YEARS OF AGE ARRESTED FOR VIOLATION OF THE HUNTING LAW.

The juvenile court, and not the justice of the peace, has jurisdiction over boys under eighteen years of age arrested for violation of the hunting law.

COLUMBUS, OHIO, November 13, 1914.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—In reply to your letter of October 12, 1914, asking whether the justice of the peace or the juvenile court has jurisdiction over boys under eighteen years of age, arrested for violation of the hunting laws, I beg to submit the following opinion:

As a violation of any state law by a minor under eighteen years raises the same question relative to the respective jurisdictions of the justice of the peace and of the juvenile court, I have attempted to make this opinion sufficiently broad to cover any case.

The law establishing the juvenile court, defining its powers and determining the extent of its jurisdiction, is found in General Code, sections 1639 to 1683 inclusive, and the amendments thereto, as found in Ohio Laws, Vols. 101 to 103.

Section 1642, General Code, Vol. 103 Ohio Laws, page 868, provides:

"Such court of common pleas, probate court, insolvency court and superior courts (as may have been designated juvenile courts, as provided by section 1639, General Code), within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent

minors under the age of eighteen years not inmates of any state institution, etc."

Section 1644, G. C., Ohio Laws, Vol. 103, page 869, defines a delinquent child and is as follows:

"For the purposes of this chapter the words 'delinquent child' include any child under eighteen years of age who violates a law of this state or any city or village ordinance, etc."

It is not necessary to elaborate upon the jurisdiction of the justice of the peace, as it is conceded that he has jurisdiction in criminal cases throughout the county in which he is elected, either to recognize the party complained of to the proper court or, in cases in which he is given final jurisdiction, to render judgment. Therefore, we will assume that in the case to which you refer the justice of the peace would have jurisdiction to try the same and assess a fine unless his authority is otherwise abridged.

Section 1644, G. C., heretofore referred to, undoubtedly gives to the juvenile court authority over minors under eighteen years of age who violate a state law or any city or village ordinance; therefore the question arises, is the jurisdiction conferred on the juvenile court exclusive or concurrent, and does it limit and abridge the jurisdiction and authority heretofore vested in the justice of the peace?

The purpose and intention of the legislature in creating and establishing the juvenile court are nowhere better or more clearly stated than in the case of Travis vs. State, 21st Ohio Circuits, page 494, a portion of which I herewith quote:

"It is not the purpose of the act to punish the child, but to take it out of environments which, if continued, would result disastrously to it as well as to society, and thereby become a standing menace to the state; and to supply it with opportunities for good moral training and physical comforts and support. The parent, guardian, or any one having the custody and control of either, who in any way contributes to the delinquency, or in any respect is responsible for the neglect of any such child, may at the same time be brought into court under arrest. If the charges against such person are sustained, he may be punished, but not the child."

It seems to me that section 1659, G. C., Vol. 103 Ohio Laws, page 874, admits of only one construction, and that is that the legislature intended to take from the justice of the peace, police judges and mayors of villages, although mayors are not expressly named, jurisdiction and authority over minors under eighteen years of age, and to give the exclusive jurisdiction over such minors to the juvenile court. Section 1659 is as follows:

"Section 1659. When a minor under the age of eighteen years is arrested, such child instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or if the child is taken before a justice of the peace or judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officer having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

There seems to be only one case in which the legislature provided for the jurisdiction of any other court than the juvenile court over minors under eighteen years of age. That provision is found in section 1681, G. C., which says that when a delinquent child is charged with the commission of a felony, the juvenile judge may bind such minor over to the court of common pleas to be proceeded against there in the same manner as any other person charged with a felony. Where such minor under the age of eighteen is charged with a felony, the case would first be brought before the juvenile judge; and it seems to me that such judge has the exercise of a sound discretion whether the case should be transferred to the court of common pleas.

Therefore, it is my opinion that the state of Ohio, in the valid exercise of its police powers, intended by the act creating what is known as the "juvenile court" to give to and vest in such court the exclusive jurisdiction over and with respect to minors under the age of eighteen years of age, with the exception in regard to felonies, as provided in section 1681, G. C. If the jurisdiction of the justice of the peace, judges of the police court and mayors of villages were made concurrent with the jurisdiction of the juvenile court, the purpose and spirit of the act would be defeated. It therefore follows, that in the case referred to in your letter, the justice of the peace had no authority to retain and hear the same.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1244.

RIGHT OF COUNTY COMMISSIONERS TO DESIGNATE NEWSPAPERS IN WHICH THE REPORT OF SUCH COMMISSIONERS SHALL BE PUBLISHED.

The county commissioners have the power to designate the newspapers in which the report of such commissioners under section 2507, *General Code, shall be published in accordance with section* 2508, *General Code.*

COLUMBUS, OHIO, November 14, 1914.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 6, 1914, requesting my opinion on the following question:

> "Who causes the report of the county commissioners to be published in accordance with section 2508, General Code? That is to say, who has the power to designate the papers in which such publication shall be made?"

It is a well settled proposition that the county commissioners must make and file each year, a report of their financial transactions as provided by section 2507, G. C., and that the same must be published as provided by section 2508, G. C. If the commissioners fail to make such report, mandamus will lie.

State vs. Commissioners, 12th C. D., page 316.

Section 2508, G. C., provides for the publication of the report of the county commissioners, and imposes certain conditions upon the newspapers, which must be complied with to entitle them to publish such report; but it does not expressly

state who has the authority to designate in which papers, of those having the necessary qualifications, such publication shall be made.

A question similar to this has arisen with reference to the publication of village ordinances. Section 4228, G. C., provides that all ordinances shall be published a certain number of times in newspapers having certain qualifications, etc., but it does not expressly give to any officials the right to designate the papers in which the publication shall be made. In that case the council enacts the ordinances; in this the county commissioners make the report; and in neither instance is the power to select the newspapers in which the ordinances or reports shall be published, expressly delegated.

In the case of Davis vs. Davis, 6 N. P. (n. s.), page 281, the court held that the council of a village has the authority to select the newspapers in which its ordinances and resolutions shall be published, subject to the provisions of R. S. 1536-619 (G. C., 4228), and to direct where all other publications shall be made, except where the statutes expressly provide for the same being done by some other official. These seem to me to be similar cases, and therefore it follows that unless the statutes expressly provide for some other official to select the papers in which the report of the county commissioners shall be published, the commissioners have the power to choose for themselves.

I am of the opinion, therefore, that the county commissioners have the authority to designate the papers in which their report, required to be published by section 2508, G. C., shall be published.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1245.

THE EFFECT OF THE STATUTE REQUIRING THE FURNISHING OF A TRANSCRIPT BY A MUNICIPALITY OR OTHER PUBLIC BODY ISSUING BONDS TO THE SUCCESSFUL BIDDER OF THE BONDS.

The statute, 103 O. L., 179, requiring the furnishing of a transcript by a municipality or other public body issuing bonds to the successful bidder of the bonds affects the rights of the purchaser of the bonds as to make a distinction between him and those purchasing from him without notice and in reliance upon recitals upon the face of the bonds.

COLUMBUS, OHIO, November 14, 1914.

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

GENTLEMEN:—In an opinion of recent date to your department I found it necessary to comment upon the rules by which a municipality may become liable upon bonds issued in violation of the Longworth act. I held, broadly speaking, that under certain circumstances, a municipality might be liable to a bona fide holder of such bonds; and in defining a bona fide holder no distinction was made as between the original purchaser of the bonds and a subsequent taker.

It was not my intention then, nor is it now, to cover every possible circumstance which might arise in attempting to answer such a general question. However, I think in order to complete even the general observation which I was making in

that opinion, I ought to refer to the act of April 23, 1913, 103 O. L. 179, which is in full as follows:

> "Section 1. It shall be the duty of the clerk, or other officer having charge of the minutes of the council of any municipal corporation, board of county commissioners, board of education, township trustees, or other district or political subdivisions of this state, that now has or may hereafter have the power to issue bonds, to furnish the successful bidder for said bonds, a true transcript certified by him of all ordinances, resolutions, notices, and other proceedings had with reference to the issuance of said bonds, including a statement of the character of the meetings at which said proceedings were had, the number of members present, and such information from the records as may be necessary to determine the regularity and validity of the issuance of said bonds; that it shall be the duty of the auditor or other officer, having charge of the accounts of said corporation or political subdivision, to attach thereto a true and correct statement certified by him of the indebtedness, and, of the amount of the tax duplicate thereof, and such other information as will show whether or not said bond issue is within any debt or tax limitation imposed by law.
>
> "Section 2. Any such clerk or officer, or any deputy or subordinate thereof, who shall knowingly make or certify a false transcript or statement in respect to any of the matters hereinbefore set forth, shall be guilty of a misdemeanor and be fined not less than twenty-five ($25.00) dollars, nor more than five hundred ($500.00) dollars, or imprisoned not exceeding one year, or both."

As to bonds issued and sold since the date when this act became effective, which would be some time in July, 1913, it is clear that the act has a powerful influence upon the rights of the original purchasers. On the one hand, should they accept the issue without any transcript at all, they would buy at their peril and could not be bona fide holders; again, if the information is sufficient to "show whether or not such a bond issue is within any debt or tax limitation imposed by law," and itself discloses the invalidity of the bonds, the original purchasers cannot have the status of bona fide holders, and while the bonds were in their hands they could not be regarded as valid obligations of the municipality.

On the other hand, if the transcript should be false and should show that an issue of bonds, in point of fact invalid because of the violation of the debt limit, was valid, then, in my judgment, such a recital, except possibly as to the facts described in the former opinion (as being those, with notice of which all persons are charged) would be one upon which the original purchaser could rely.

It is not my purpose to analyze the statute nor to state in detail what its effect in any conceivable case might be. I wish merely to point out its existence and to state that it evidently creates a distinction between the original purchaser of bonds and those who purchase from them; for, of course, the transcript required by the statute is not attached to each bond but is merely furnished to the successful bidder.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1246.

LAKE VIEW CEMETERY ASSOCIATION OF CLEVELAND, OHIO, NOT EXEMPT FROM TAXATION UPON LANDS WHICH IT HOLDS AND WHICH ARE BEING USED WITH A VIEW TO PROFIT—RESIDENCE OF CEMETERY SUPERINTENDENT EXEMPT FROM TAXATION.

The Lake View Cemetery Association of Cleveland, Ohio, is not exempt from taxation upon lands which it holds and which are not being used with a view to profit, but which have never been laid out and allotted or otherwise prepared for use as a burial ground.

A building for the residence of the cemetery superintendent, constructed by the association upon the lands set apart and actually used for burial purposes and otherwise conceded to be exempt, is itself exempt from taxation.

COLUMBUS, OHIO, November 14, 1914.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 13th, enclosing letter addressed to you by a member of the board of district assessors for Cuyahoga county and submitting, for my opinion, the following questions:

The Lake View Cemetery Association of Cleveland, Ohio, owns about three hundred acres of land contiguously situated, of which approximately one hundred acres is allotted and prepared for use as a cemetery; while the remaining two hundred acres has never been allotted and has been permitted, since its acquisition a number of years ago, to lie idle without being used for any purpose whatever. That is to say, on the one hand, no part of the unallotted land has ever been leased or otherwise used with a view to profit; while, on the other hand, it has never been used, either directly or indirectly, for cemetery purposes, or prepared for use for such purposes, unless the mere holding of the land, with the intention and purpose ultimately to prepare them for use for burial purposes, constitute such a use or otherwise affects the question submitted.

On these facts the question is made as to whether or not the two hundred acres of unallotted land, so owned and held, is taxable.

Again, the cemetery association in question has, within the last year, erected a building to be used as a residence by the superintendent of the cemetery. The building has been erected upon that portion of the cemetery which is otherwise devoted to burial purposes.

Is the building, together with the grounds upon which it is located, taxable?

The correspondence enclosed with your letter discloses that the district assessors rely upon section 10093 of the General Code as ground for the conclusion that in no event may the cemetery association in question hold more than one hundred acres of land exempt from taxation (or for any other purpose); that the cemetery association claims the right to hold the three hundred acres in question, all of it exempt from taxation, under authority of an act passed April 6, 1870, supplementary to the then existing act providing for the incorporation of cemetery associations (corresponding to sections 10093, et seq., of the General Code), and conferring upon cemetery associations "in any county containing a city of the first class" authority to hold five hundred acres of land (other similar corporations being limited to one hundred acres) "three hundred acres of which shall be exempt from all taxation;" and that the district assessors take the view that the said supplementary act is unconstitutional.

In the view which I take of the question which is submitted, on the facts as stated to me, I do not find it necessary to determine whether or not the act of April

6, 1870, is constitutional. This is a question which appears to me to be somewhat doubtful in view of the decision in Norton vs. Township Trustees, 8 C. C., 335, affirmed by the supreme court, 54 O. S., 682, on the one hand, and the familiar later decisions of which State, ex rel., vs. Jones, 66 O. S., 453, is a type, on the other hand. While inclined to the view that regardless of the question as to the title of the Lake View Cemetery Association to the land which it holds in excess of one hundred acres in extent, its claim of special exemption, as founded upon the act of April 6, 1870, cannot be maintained for constitutional reasons, I do not express an opinion on this point, because I find it sufficient, for the purposes of the question submitted, to consider what result would follow from the application of said act of April 6, 1870, assuming it to be constitutional.

In German Evangelical Protestant Cemetery vs. Brooks, Treasurer, 8 C. C., 439, there is presented a case arising under this very act, which then constituted section 3581, R. S. The circuit court of Hamilton county, interpreting the language "for the sole and exclusive use of a cemetery * * * three hundred acres of which shall be exempt from taxation" per Smith J., says at page 442:

> "This section was intended to limit the number of acres which should be exempted, and not to allow its use for other than cemetery purposes. It must still be for the sole and exclusive use of a cemetery."

In other words, the mere fact that a cemetery corporation in a county containing a city of the first class, might own three hundred acres of land would not be decisive as to the question of exemption from taxation. Only such land so owned and held as might be "for the sole and exclusive use of a cemetery" would be entitled to exemption.

Elsewhere in the opinion of the court the meaning of what was then section 2732, R. S., and is now section 5350 of the General Code, is considered. The court seems to regard the two statutes as substantially identical in meaning. Indeed this view seems to be the only one which can be accepted. Said section 5350 of the General Code, as it is at the present time, provides as follows:

> "Sec. 5350. Lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by a person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof, shall be exempt from taxation."

It is, of course, obvious that the phrase "used exclusively as graveyard or as ground for burying the dead" is synonomous with the phrase "for the sole and exclusive use of a cemetery."

The facts before the court in Cemetery vs. Brooks, supra, were as follows:

The cemetery association in June, 1889, purchased a tract of about twenty-eight acres of land with the view and intention of thereafter using them for cemetery purposes, in connection with other lands adjoining the same, then actually in use as a graveyard or grounds for burying the dead. After such proper steps were taken toward the actual improvement for cemetery purposes of this particular tract of twenty-eight acres by surveying, etc., in the summer of 1891, the platting of the ground was finished.

During the summer of 1890 the association rented the twenty-eight-acre tract for pasturage.

The county auditor placed the tract in question upon the duplicate for the year 1891. During that year the use for pasturage has been discontinued and it is clear, from what is said at page 441, that the fact that it had been previously used with

a view to profit, did not determine the question of exemption in the mind of the court, the language being:

> "In the year preceding that for which the tax was levied, it was used for a pasture. This, of course, would not, of itself, make the land liable for taxation the following year, but it only shows that at that time, at least, it had been set apart and used for burial purposes."

The real test employed by the court to determine when lands acquired by a cemetery association, with a view to using them for the interment of the dead become exempt from taxation, is disclosed by the following language:

> "We are of the opinion that on the day on which the lien of the state for taxes levied for all purposes for the year 1891, attached to all real property subject to such taxes, viz., the day preceding the second Monday in April of that year, this tract of twenty-eight acres was not being used exclusively as a graveyard or grounds for burying the dead. At that time, although the title to the same was in the cemetery, it had not, in fact, been appropriated to that purpose. Though some preliminary work had been done on the grounds, the platting was not completed until the summer of 1891, and presumably no lots had been sold therein until after the platting was completed, and certainly no interment had been made therein, and before this the lien of the state, for the taxes, had attached to the land, and could not be avoided for that year by the subsequent use of the land for burial purposes.
>
> "There are quite a number of cases in Ohio which explicitly declare that statutes exempting property from taxation must be construed strictly, and that where language is used in such a statute, exempting from taxation property used exclusively for certain purposes, or like terms, that to justify such exemption in a given case, it must certainly come within the terms of the statute; see 8 Ohio 89; 19 Ohio, 110; 25 Ohio St., 229; 29 Ohio St., 201; 36 Ohio St., 253. * * *
>
> "If at that time the land had been prepared for burial purposes, lots sold or offered for sale, we think it would have presented a different case, and we would, in that event, have been unwilling to hold that the mere occupation of the old house upon the premises, by the workmen engaged in caring for and protecting it, even if something was deducted from their wages for the use of it, would have made the whole or that part of the property liable to taxation. We think that these views are supported by the cases cited in argument: See 118 Mass., 358; 60 Iowa, 717; Cooley on Taxation, 203; 86 Ill., 336; 50 Md., 352; 3 Ex. Rep., 344; 120 Mass., 212; 8 Kan., 344. * * *"

It is clear, therefore, that upon a consideration of what is now section 5350 of the General Code, together with the act of April 6, 1870, the circuit court, in the case cited, held that land purchased and held by a cemetery association, with a view to its ultimate use for cemetery purposes, does not become exempt from taxation until it is prepared for such use by the making of such improvements, as the necessity of the case may require, and particularly by platting and laying out the grounds; and that this conclusion is not affected by the fact that between the time when the lands are acquired and the time when they are prepared for use, they are not leased or otherwise used with a view to profit, but are held in a state of idleness with the continued intention that they shall be ultimately devoted to the use which would exempt them from taxation.

So far as I am able to gather from your letter and the correspondence enclosed, the two hundred acres of land held by the Lake View Cemetery Association, concerning which inquiry is made, has been, as stated by the council for the association, "*held* exclusively for cemetery purposes," but it has never been "*used* exclusively for cemetery purposes," which is necessary to satisfy the requirement of the statute. This appears from the fact apparent in the letter of counsel that this portion of the land of the association is "unallotted;" and that it is in such condition that "on several occasions people have applied for leases," which applications have been refused on the ground that such leasing would render the land subject to taxation. The fact that the land is unallotted and in a condition suitable for use other than for cemetery purposes, although no such use is actually made of it, together with the admitted fact that no part of the land in question is actually used for the interment of the dead, indicates quite clearly, to my mind, that within the rule laid down by the decision cited, the two hundred acres in question is not exempt from taxation. Accordingly, I so hold.

This conclusion is reached in full view of the provisions of section 5362, General Code, which is as follows:

> "Real estate held or occupied by an association or corporation, organized or incorporated under the laws of this state, relative to soldiers' memorial associations, monumental building associations, or cemetery associations or corporations, which in the opinion of the trustees, directors or managers thereof, is necessary and proper to carry out the object intended for such association or corporation, shall be exempt from taxation."

While I am inclined to doubt the constitutionality of this section as apparently going beyond the grant of power in article XII, section 2 of the constitution, to exempt from taxation "burying grounds," I am of the opinion that it is clearly inconsistent with section 5350, supra. The one seems to grant exemption from taxation to all real estate held or occupied by a cemetery association, which, in the opinion of the trustees thereof, is necessary to carry out the object intended for such association; the other limits the exemption of burying grounds to "lands used exclusively as graveyards or grounds for burying the dead." I do not believe the attempted exemption of section 5362 can be regarded as cumulative of that expressed in section 5350, General Code. Inasmuch as section 5350, General Code, has been amended and re-enacted repeatedly since section 5362 was enacted in its original form, I am of the opinion that to the extent that they are inconsistent, section 5350 controls and should be regarded as the law applicable to such associations.

The case of Cemetery vs. Brooks is also decisive of the other question submitted through you by the district assessors. The following is found in the opinion of the court, page 441:

> "While this is so, we suppose that it should have a reasonable construction in other respects—for instance, that if a cemetery association has land prepared for and set apart for the burial of the dead, that it is not essential to make it exempt from taxation, under our law, that the whole of it be used in this way. It would seem that there might be necessary and proper buildings thereon, as chapels, offices, etc., and it may be even a place of residence for those in charge; and that the fact that a very considerable part of the ground was not used for the mere purpose of burial, but was used for avenues and plats, useful or ornamental, if not used for profit, would not render the whole or any part of the land liable to taxation."

This statement is purely dictum. However, authorities are cited from other states at page 442 which support the view here announced. I am of the opinion that the phrase, "lands used exclusively as graveyards or as grounds for burying the dead," read in connection with the phrase "lands for the sole and exclusive use of a cemetery," includes a building situated in a cemetery if used as a residence for the custodian or superintendent, and not leased or otherwise used with a view to profit.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1247.

A MEMBER OF A CIVIL SERVICE COMMISSION RESIGNING HIS OFFICE MAY NOT BE REAPPOINTED FOR THE UNEXPIRED PORTION OF HIS TERM.

A member of a city civil service commission, who resigns because of the inadequacy of the salary attached to the office, could not be reappointed for the unexpired portion of his term, the council after his resignation having raised the salary.

COLUMBUS, OHIO, November 14, 1914.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of June 27, 1914, Hon. R. Clint Cole, city solicitor of Findlay, Ohio, inquires:

> "When our civil service commission was first established here, the members were given a salary of $25.00 per year.
>
> "The laws have so enlarged their duties as to make that sum entirely inadequate. The council last fall in passing the salary ordinance for officers for the succeeding two years, raised the salary of the members of the civil service commission to $100 per year, but by reason of the fact that the members had already been appointed for a term certain they could not under the statute take advantage of that raise.
>
> "One of the members recently resigned because of the inadequacy of his salary. The query now is, if that member were to be reappointed, would he be entitled to the increase in salary."

It is admitted by Mr. Cole that the salary of a civil service commissioner for a city cannot be changed during the term for which he was appointed. This is in keeping with the holding of this department in an opinion recently given to the state civil service commission. The sole question in the above inquiry is the right of a member of the civil service commission to resign and then to be appointed for the unexpired term at an increased salary.

The rule is stated at page 1427 of volume 29 of Cyc., as follows:

> "But where the compensation is fixed by the constitution, or where there is a constitutional provision prohibiting such change during the term of an incumbent, no change of salary during such term is permissible, and, where a similar provision is contained in a statute, the powers of municipal

corporations are subject to the same limitation. * * * *Such a limitation may not be avoided by the resignation of an incumbent and his reappointment at an increased salary."*

In support of the proposition italicized, the case of Greene vs. Hudson County, 44 N. J. L., 388, is cited.

To permit an employe or officer who is appointed for a definite term to resign his position and then to be reappointed for the unexpired term at an increased salary, would be doing indirectly what the statute provides shall not be done directly.

Therefore, a member of the municipal civil service commission who has resigned cannot be reappointed for the unexpired part of his term at an increase in salary.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1248.

CIRCUMSTANCES UNDER WHICH IT IS THE DUTY OF COUNTY COMMISSIONERS TO REPAVE APPROACHES TO BRIDGES AND RELAY SIDEWALKS IN A CITY WHERE SUCH BRIDGES WERE DESTROYED BY A FLOOD—CITY MUST PAY FOR DAMAGE TO ABUTTING PROPERTY OWNERS WHERE GRADE OF THE BRIDGE IS CHANGED.

When certain bridges within a city have been washed out and destroyed by a flood and the city determines to straighten, deepen and widen the river channel on account of which the county commissioners enter into contracts for the construction of bridges to replace those destroyed, and upon the basis of said proposed river improvement, and include in their contracts for construction of bridges the construction of the necessary approaches and the relaying of the sidewalks thereon, and the matter has progressed to such extent that it is expedient on the part of the city to repave such approaches and relay such sidewalks, it is the duty of the county commissioners to repave said approaches and relay said sidewalks, because of said above stated facts.

In making a river improvement where it becomes necessary to extend the new bridges, beyond where the old ones connected with the streets, and in doing so the bridge floors are elevated above the level of the floors in the old bridges, thus necessitating a change in the established grades of such streets and the council makes such changes, any damages accruing to abutting owners on account of such change of established grade is payable by the city and not by the county.

COLUMBUS, OHIO, November 14, 1914.

HON. CLYDE C. PORTER, *City Solicitor,* HON. RUSSELL M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

GENTLEMEN:—I have your several communications of September 11st, 5th, 10th and 11th, 1914, with enclosures, in which my opinion is asked upon certain differences arising between the city of Tiffin and the commissioners of Seneca county, concerning the widening and deepening of Sandusky river through said city, the construction of bridges across the same at Sandusky, Market and Perry streets, the change of grades of said streets and damages to abutting property owners on account of changes of grade in front of their properties. The facts, as I have them from your correspondence, the papers submitted, and a conference with both of you on September 15, 1914, are:

"*First.* Prior to the year 1913, the city of Tiffin by proper proceedings, established street grades on said named streets; said streets were graded, paved and sidewalks laid thereon to conform to such established grade and abutting owners improved their property in like conformity thereto.

"*Second.* The county of Seneca built bridges on said streets across Sandusky river, with the approaches thereto, at such elevation as to be readily accessible from said streets as so improved.

"*Third.* The flood of 1913 destroyed each of said bridges, a great deal of nearby and adjacent property and left the channel of said stream badly encumbered with driftwood, debris, parts of said bridges, and the like, so as to very materially hinder and impute the flow of water down said stream.

"*Fourth.* The city of Tiffin concluded, in order to avoid a repetition of the injuries occasioned by said flood to improve said Sandusky river by deepening and widening the channel thereof, removing obstructions, and generally improving the bed of said stream.

"*Fifth.* In the prosecution of this improvement, the city secured the services of competent engineers, who prepared plans, specifications and drawings for the same together with plans of bridges to replace those washed away. These plans were reported to and approved by the council; the attention of the county commissioners was called to the same; they concurred in the improvement and it contracted for the bridges in conformity to the plans and specifications furnished by said engineers, including therein the grading, pavement and pavement on the bridge approaches, and the removal of obstructions from the channel. The widening of the bed of the stream necessitated the construction of the new bridges of greater length than were the old ones which had been washed away.

"*Sixth.* Whether the increased length of the bridges and change of location of abutments compelled the changing of the street grades, may or may not be important, but in any event, while there was power in the commission to fix the level of the bridges and the grade of the approaches thereto, it was bound to act reasonably in so doing and while so acting, its right or power to act is not the subject of question. It did so act. No question is made as to their good faith, neither is it charged that they acted wantonly, unreasonably or regardless of the rights of abutting owners, or the interests of the city. To the contrary it must be conceded that the city acquiesced in the elevation of the bridge floors, by changing the street grades at all bridge ends but one, to conform to the increased height of the bridge floors, and in other ways. The council further recognized the power of the commissioners to act as they did and the validity of their actions by passing a resolution on July 24, 1913, as follows:

"'*Resolved,* By the city council of the city of Tiffin, state of Ohio, that the mayor and city auditor be and are hereby authorized and directed to execute and deliver to the commissioners of Seneca county, Ohio, a bond in the name of the city of Tiffin, in the sum of sixty thousand dollars ($60,000), providing that the city of Tiffin shall, will and truly indemnify and save harmless the said county of Seneca from any and all damages, liability, costs, charges and expenses, including attorney's fees, and defend all actions and suits brought against the said county and county officials, on account of the lengthening of the bridges and making such bridges of greater length across the Sandusky river.'

"Prior to this (on July 17, 1913), a resolution was passed by the city council as follows:

"'*Resolved,* By the council of the city of Tiffin, state of Ohio, that the county commissioners of Seneca be hereby authorized to proceed with the erection of a bridge at Washington street, in the city of Tiffin, Ohio, according to their own bridge plan as in their best judgment seems to be fit and proper, and that the city of Tiffin declare the necessity of widening the river and to purchase whatever private property be necessary for the proper erection of said bridge either by condemnation proceedings or otherwise, and that the clerk serve a copy on the county commissioners.

"'Adopted July 17, 1913.'

"Seventh. The city passed a resolution and the necessary vote was taken authorizing the issue of $300,000 of bonds to pay for this improvement, of which, one-half has been sold.

"Eighth. Still later, some difference arose as to the dividing line between the liability of the city and that of the county, the city solicitor presented a question as to whether the city or council should pay for replacing pavements on the sidewalks and repaving the streets on approaches to the bridges; this question was answered June 8, 1914, and the prosecuting attorney, Mr. Knepper, not being in accord with its conclusions, asks that it be reconsidered and the city solicitor asks for an opinion covering all or nearly all the phases of the case."

The primary rights of the parties are not difficult of ascertainment. It is the duty of the county to construct all bridges, together with the necessary approaches, and the city to construct sidewalks, or cause the same to be done, and to pave streets within the corporation, where its council once determines to do so.

The city fixes street grades and is liable in damages to abuttors for any charge of an established grade.

While there is no provision of law requiring a county, when it rebuilds a bridge, to make the level of the ends conform to street grades, nor to reinstate the street to its former condition of usefulness, yet it is only fair, if acting on their own initiative when a bridge is so built, as to necessitate the repaving and regrading of a street and the relaying of pavements or sidewalks leading to the bridge, that it should render access to such bridges and egress from it to the street, substantially as good as before the raising of the level of the bridge.

This seems to have been the attitude of the commissioners when dealing with this matter and making contracts for these bridges. Indeed, it seems clear that the making of the improvement in its broadest and greatest sense rested with the city council, when it determined to widen, deepen and improve the channel of the Sandusky river, and fixed upon the plans which should control the doing of the same, it took the initiative in so far as the length of the bridges was concerned; the length of the bridges necessitated their extending beyond the abutments of the old bridges and into the streets of the city, as theretofore existing. In other words, while the language of one of the resolutions of council as above copied, would indicate a belief on the part of the council of its right to dictate to the commissioners as to the character of bridge they might build at Washington street, it does not follow that the council possessed any such powers, or that such idea, if it existed, or the passage of that resolution, had any effect upon the legal standing of the parties. From an examination of all the papers presented and statements made, it would seem that at all times prior to the arising of the difference now existing, the city council and the county commissioners were acting in harmony, each with a full and clear understanding of what the other was doing and the legal rights of each in regard to the same; while so acting in harmony, the deepening and widening of the river channel was regarded as the paramount undertaking and the com-

missioners undertook to act in conformity to the plans and specifications of the river improvement. As provided by council, while so doing it made its bridges longer than the ones destroyed, located the abutments and piers so as to comply with the changed width of the river, and made a contract for the construction of one of the bridges, at least, to include the replacing of street paving and sidewalks on the approaches. This action cannot be taken as fixing the legal rights of the parties or as doing more than controlling the matters to which they were directly applicable.

Matters in connection with this improvement progressed to such extent that a suit was brought in the U. S. court in Toledo, in which it was stated in a memorandum opinion, filed by Judge Killitts:

> "The county commissioners, we may assume, were trespassers. As such they were beyond all question, acting at the suggestion of the city and were the agents of the city * * * the fact remains that what has been done was clearly for the city's benefit, and was so greatly to the injury of the Baldwin property that it were grossly inequitable to permit the city to escape responsibility."

This statement of Judge Killitts is in harmony with what has been said in regard to the relative relation of the city and county. The facts as now before me are much more in detail than when I rendered the opinion to Mr. Porter on June 8, 1914, yet the change is not of such character as to call for a change or modification of that opinion based as it was, upon the assumption that "the pavement on the approach to the bridge was not destroyed by the flood, and the paving in question was not made necessary by the flood, but by the action of the commissions in raising the level of the bridge."

I am, therefore, constrained to hold that the legal rights, duties and obligations of the city and county are to prevail with the exception of paving the approaches to the bridges, and replacing sidewalks thereon, which has been assumed by the commissioners in their contracts to construct the bridges. To restate the matter, the city is liable for all damages to property because of the river improvement and the change of street grades. The county must build the bridges and approaches, repave the approaches and reconstruct the sidewalks on the approaches.

This opinion must not be construed as a general rule, applicable to what may be considered similar cases, but only applying and controlling in this particular case and because of the peculiar circumstances surrounding or connected with it.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1249.

NOTARY FEES ARE PROPER ITEMS OF COST IN CASES IN WHICH THE PLEADING IS FILED.

The fees of a notary public for administering an oath on an affidavit of verification to a pleading are taxable as costs in the case in which the pleading is filed.

COLUMBUS, OHIO, November 17, 1914.

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

GENTLEMEN:—Your letter of May 7th asks my opinion on the following questions:

> "Is the charge of a notary public for making the affidavit verifying a pleading a proper item of costs in the suit or action on which said pleading is filed?"

In numerous decisions the supreme court and other courts of this state have held that in the absence of statute the right to tax expenses of litigants as costs in the case for which judgment may be recovered against the opposite party does not exist.

State vs. Auditor, 77 O. S. 333.
Farrier vs. Cairns, 5 O. 45.
Railway vs. Bartram, 11 O. S. 457.
McDonald vs. Page, Wright, 121.
State vs. Commissioners, 6 O. D. N. P. 240.

It is true enough that statutory authority for the taxation and recovery of costs must exist, but I have found it impossible to give a literal application of the language of Judge Summers in State vs. Auditor, *supra,* when he says:

> "Costs * * * may be defined as being the statutory fees to which officers, witnesses, jurors *and others* are entitled for their services in an action or prosecution, *and which the statutes authorize to be taxed* and included in the judgment or sentence."

The difficulty which I have encountered arises out of the fact that there is no statute or group of statutes prescribing what items shall be taxed as costs. It is true that the taxation of some items as costs is expressly authorized, but if the principle laid down by Judge Summers be literally applied it would follow, upon the maxim that the expression of one thing is the exclusion of others, that unless one could point to a statute authorizing a particular item to be taxed as costs, the power to tax such an item as costs does not exist, and if this be the fact, all the more important items of cost which are being taxed and have been taxed for years without question as costs in cases, would have to be eliminated.

For example, no one disputes the statement that the fee of the clerk of courts for filing a petition, and other services incidental thereto, may be taxed as costs. Such fees are prescribed by section 2900, General Code, but this section will be searched in vain for any provision authorizing the taxation of any of the fees therein provided for as costs. The same may be said of section 2901, which perhaps should be read in connection with section 2900. Although section 2901 refers to taxing costs of certain kinds it contains no direct authority to tax the more im-

portant items of cost such as docketing the cause, indexing the cause, filing the pleadings, etc.

Turning now to the chapter on fees and costs, and still having in mind the fee of the clerk of the court as costs, it appears that sections 3005 to 3024 inclusive, fail to make any provision for taxing the fees of the clerk as costs.

Sections 3025 and 3026 provide for taxation of costs generally, as follows:

> "Section 3025. In all actions, motions and proceedings, in any of the courts of this state, the costs of the parties shall be taxed and entered of record separately.
>
> "Section 3026. On the rendition of judgment, in any cause, the costs of the party recovering, together with his debt or damages, shall be carried into his judgment, and the costs of the party against whom judgment is rendered shall be separately stated in the record, or docket entry. No party in whose favor judgment for costs is rendered in a cause, may release, satisfy or discharge, in whole, or in part, any of such costs, unless previously paid by him to the clerk of the court, or to the person entitled thereto, or they shall have been legally assigned, or transferred to such party by the person, or persons in whose name or names such costs stand taxed upon the record or docket."

These sections provide for taxing costs, but they do not define what are taxable costs.

In fact, I find no statute authorizing the court to tax any fees of the clerk of court (with possibly a few minor exceptions) as costs.

Therefore, if such an explicit statute is necessary, it would follow that the clerk of the court is not entitled to have his fees taxed as costs in the case, unless some statute expressly authorizes a particular item to be so taxed.

There are, as already stated, some statutes authorizing specific items of expense to be taxed as costs. For example, legal advertising is authorized to be taxed as costs by section 3005, General Code. Compensation of appraisers, commissioners or arbitrators is expressly authorized to be taxed as costs by the provisions of section 3006-1. Allowance by the court to a sheriff, coroner or constable for removing and preserving personal property taken in replevin is to be taxed as costs by virtue of the express provision of section 3009, General Code. The fee of the police officer required by an examining court to take charge of the defendant during examination, except as officer of the examining court, is to be taxed as costs under the express authority of section 3010. Fees of witnesses in civil causes are to be taxed as costs under the express authority of section 3012.

Section 2845 specifying the fees of the sheriff payable otherwise than from the county treasury affords an interesting study in this connection. It is lengthy and practically complete in itself as a provision for the subject which it is intended to cover. It contains no provision applicable to all the fees provided for therein to the effect that they, or any of them, shall be taxed as costs, but it does contain certain specific provisions applicable to specific fees. But at the end of the section it is provided that:

> "When any of the foregoing services are rendered by an officer or employe whose salary or per diem compensation is paid by the county, other than from the sheriff's fee fund, the legal fees provided for such services in this section shall be taxed in the costs in the case and when collected shall be paid into the general fund of the county."

Obviously a strict application of the *dicta* found in the decisions would lead to the conclusion that no sheriff's fees could be taxed as costs except when the services are rendered by an officer or employe whose salary or per diem compensation was paid by the county, other than from the sheriff's fee fund; and such a holding would create a distinction between the taxability of costs made by a deputy sheriff, whose compensation is paid from the sheriff's fee fund, and the sheriff's fees otherwise earned, as by the sheriff himself.

I cannot bring myself to the conclusion that taxable costs are to be limited to those items of expense, direct and specific authority for the compensation of which can be found in the statutes. The practical result of the application of such a principle would be grotesque.

It is obvious to me, therefore, that the principle as it is found in the decisions must be interpreted before it can be applied. It being admittedly true that there must be statutory authority for the taxation of costs, the inquiry must be pursued a step further and directed to the solution of the question as to *what constitutes such statutory authority.* The answer to this question can be suggested by assuming that there is statutory authority for the taxation of the ordinary clerk's fees as costs and inquiring what that authority is.

Without quoting numerous sections, which are familiar, I point out that in order to maintain an action in a court of law or equity and secure the remedy to which he is entitled, an aggrieved party is required by law to file a petition. He is also required by the law to pay or become obliged to pay to the clerk a certain sum for the service of filing the petition and recording its filing. This is not a matter of contract between the clerk and the litigant. The clerk is an officer and the charge he exacts is an official fee.

To my mind the provision of statute which the courts say is necessary in order to support the taxation of the clerk's fees as costs is found in the statutory requirement that a certain specific fee be paid to a certain specific officer as such, for a service, the rendition of which is a necessary condition to the maintenance of the action or defense.

Without taking up other cases, such as fees of the sheriff, I deem it sufficient for the purposes of your inquiry to lay down certain principles by which in a given case it may be determined whether a given item of expense is taxable as costs, such principles being derived, so to speak, from the above consideration of the case of the fees of the clerk. They are as follows:

(1) There must be no statute making a direct provision for or against the taxation of items of the kind or class as costs. For if there were such statutes the principles which follow would not apply at all.

(2) The recipient of the money expended, or as to which a liability is incurred, must be an *officer.*

(3) The service of the officer or some similar officer having like powers must be required as a condition of the prosecution or protection of the substantive rights of the litigant in the courts.

(4) The fee of the officer must be *fixed by law.*

The fees concerning which you inquire satisfy all of these conditions. No statute expressly or by implication either authorizes or prohibits taxation of any item of cost on account of the verification of pleadings. Pleadings are to be verified, else the relief prayed for cannot be obtained or the defense interposed cannot be maintained. As to the effect of failure to verify the pleading the decisions of the lower courts of the state seem to disagree, but it is at least clear that on motion a pleading without verification must be stricken from the files. Therefore, in the sense in which I have defined the principle, verification is a required thing.

Moreover the affidavit of verification must be sworn to before a person authorized to administer oaths. Clearly such a person acts in the capacity of an officer

for the purposes of the case. Clearly too, the clerk of the courts, for example, is in the same category with a notary public, and if the right of the notary to have his fees taxed be denied, the denial must extend also to that of the clerk.

Again the compensation of the notary is fixed by law, being in this respect "the same fees as are allowed by law to justices of the peace for like services." Section 127, General Code.

Inasmuch, therefore, as the law imposes upon the litigant the necessity of invoking the services of the notary or some other officer having similar power; inasmuch as the law itself fixes the fee of the notary, thus depriving the notary's compensation of any contractual character; inasmuch as the notary fulfills every practical and legal criterion of a public officer, I am of the opinion that the statutes provide for his fees as necessary incidents in the prosecution or defense of a civil action, just the same as they provide for the fees of the clerk or sheriff as such; and that within the principle laid down by the decision the statutes do authorize taxation as costs of the notary's fees in connection with an affidavit verifying a pleading in the suit or action in which such pleading is filed.

This opinion is, of course, intended to cover the exact question submitted by you, and nothing else. It must be obvious that each specific kind of service that a notary public or any other officer might be called upon to perform in connection with litigation must be considered with respect to the question of taxable costs, by itself.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1250.

COUNCIL HAS THE RIGHT TO DELEGATE TO HEADS OF DEPARTMENTS AND TO COMMITTEES OF COUNCIL THE RIGHT OF APPROVING CLAIMS.

The duty of approving claims is ministerial and administrative in its nature, and council by virtue of its statutory duty to control the finances, and by virtue of its legislative power, may delegate the performance of the duty of approving claims to the heads of departments, and to committees of council.

The appointment of cemetery trustees by the village is discretionary with the mayor and the terms of section 4175, *General Code, respecting the appointment of such trustees as directory.*

COLUMBUS, OHIO, November 17, 1914.

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

GENTLEMEN:—Under date of August 1st, you request my opinion as follows:

> "The village of Bay, Cuyahoga county, Ohio, has in its appropriation ordinance provided that the clerk of said village shall draw his warrant in payment of claims presented to him if approved by the head of the department for which the indebtedness was incurred, or if approved by certain committees of council. The solicitor of said village holds that such approval is sufficient and the council is not required to act upon same. We submit his brief in support of his contention and would ask your written opinion upon the question.
>
> "Is it mandatory upon the council of a village owning a cemetery to appoint cemetery trustees, or is the matter simply discretionary with the council and may they appoint an employe (sexton or superintendent) and vest him with the powers of allowing bills, etc?"

It will not be disputed that the approval of a claim must be viewed as an administrative act, rather than a legislative act. The legislative power of a village is vested in council by section 4215 of the General Code, and the executive power is vested in the officers and heads of departments of a village by section 4248 of the General Code. Unlike cities wherein the administrative power is expressly excluded from council by virtue of section 4211, General Code, council in a village is not expressly prohibited from exercising administrative duties. By virtue of section 4240 of the General Code council in both cities and villages is expressly given the management and control of the finance and property of the corporation, except as may be otherwise provided, and it follows, therefore, with reference to villages that in the absence of any other provision of relinquishment or delegation of its power by council that the proper body to contract and to expend moneys where the statutes themselves do not expressly provide otherwise, is the village council.

See Davis vs. Davis, 6 O. N. P., n. s., 281.

For the same reasons council of a village, since it is given control of the finances of the village, may undoubtedly under the exercise of its legislative power, require claims presented against the village to be submitted to the council for approval before payment. A careful search of all relative provisions, however, fails to convince that there is anything in the statute which expressly makes it incumbent upon council to so approve all claims.

The case of Knauss vs. Columbus, 13 Ohio Dec. N. P., 200, presents authority for the conclusion that where a duty is expressly required by statute to be performed by a designated officer or board, such officer or board is without power to delegate such duty to another department. Such a rule is based upon the well recognized form of construction that the "expression of one is intended to exclude the other." It is logical to conclude that the statutes when placing a duty on a designated officer intend that the duties shall not be performed by another. Such a rule, however, does not operate against another well recognized rule that officers are permitted to delegate ministerial and executive duties incidental to their office, but which are not expressly required by statute to be performed by the officers themselves.

20 Am. Eng. Enc. of Law, 2nd Ed., p. 1213.
Dillon on "Municipal Corporations," 5th Ed., sec. 244.
Hitchcock vs. Galveston, 96 U. S., at p. 348.
Harcourt vs. Park, 62 N. J. L., 158.
Edwards vs. City, 61 Howards, p. 463.
Kamrath vs. City, 53 Hun., 206.

The definitions universally distinguish the legislative from the executive power by confining the former to the making of the law and the latter to its carrying out or its execution. The council of a village is expressly made the legislative power, and it seems manifest that by virtue of this legislative power council may enact a legislative provision wherein it authorizes the execution or administration of the details to a delegated officer or committee, and the above quoted authorities settle such a proceding upon these grounds.

In this connection section 4285 of the General Code, is entitled to consideration. This section is as follows:

> "The auditor shall not allow the amount set aside for any appropriation to be overdrawn or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require

evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

Here by express provision of statute the auditor, or in a village the clerk, by virtue of section 3795, General Code, is encumbered with the primary responsibility of investigating the claims presented, and of seeing to it that they are valid and proper. This statute, however, by its terms, cannot be construed to make the auditor the exclusive investigating authority. It does, however, support the argument that the statutes do not unalterably require council itself to approve claims. Furthermore the provisions of section 4284 and 4286 of the General Code requiring the clerk in villages and the auditor in cities to examine and audit the accounts of all offices and departments, and requiring all offices and departments to make reports of receipts and expenditures to the auditor, also clearly indicate that the control of accounts is readily contemplated by the statutes to rest with the offices and departments themselves, rather than exclusively with the council.

In conclusion, therefore, I am of the opinion that by virtue of this authority to control the finances, as well as by virtue of its general legislative power, council is empowered to work out the administration of expenditures and the keeping of accounts by legislative rule as it best deems fit, and in so doing may reserve the power of approval of claims to itself, or if it deems it to better advantage, may delegate the power of approving such claims to the committees, officers or other individuals.

I am of the opinion, therefore, that the plan of the ordinance submitted by you is one that is authorized by the statute and must be viewed as a valid enactment.

Answering your second question:

Section 4175, General Code, provides in part as follows:

"The mayor of a village owning a public burying ground or cemetery may appoint a board to be known as the board of cemetery trustees. Such board shall consist, etc. * * *"

When it will support the manifest legislative intent, it is well recognized that the word "may" may be construed as mandatory. A consideration of these statutes, however, fails to convince that in the present instance such construction is the proper one to abide by. Circumstances may readily be imagined which would fail to justify the appointment of a board of trustees. The village may be small, the functions pertaining to the cemetery may be meagre and simple, and it is quite possible that the appointment of a board of trustees would be regarded as entirely unnecessary and superfluous. This view is quite substantially supported, however, by the language of section 4177 of the General Code, which provides that "the mayor of a village, where a board of cemetery trustees is so appointed, may remove from office any member of such board for misconduct, neglect of duty, or malfeasance of office." The language of this provision clearly recognizes the possible existence of a village where a board of cemetery trustees has not been so appointed, and which nevertheless maintains a cemetery. The language "where a board of cemetery trustees is so appointed," in this provision, would be entirely superfluous in the absence of such assumption, and had the legislature intended that every village having a cemetery would necessarily have a board of trustees the words "where a board of cemetery trustees is so appointed" would most naturally have been substituted by the words "not having a cemetery."

I am of the opinion, therefore, that the appointment of a board of cemetery trustees is discretionary with the mayor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1251.

DISPOSITION OF INTEREST ON THE PROCEEDS OF A BOND ISSUE FOR THE PURPOSE OF CONSTRUCTING A COUNTY MEMORIAL BUILDING.

The proceeds of a bond issue for the purpose of constructing a county memorial building is a trust fund and all accretions or anything by way of profit on a trust fund belong to that building; consequently, a depository interest upon the proceeds of a bond issue for the purpose of constructing a memorial building follows the fund.

COLUMBUS, OHIO November 17, 1914.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Clark County, Springfield, Ohio.*

DEAR SIR:—On February 17, 1914, I gave an opinion upon the following question:

> "What disposition shall be made of the depository interest upon the proceeds of a bond issue for the purpose of constructing a county memorial building?"

In that opinion I held that such moneys are county moneys and are in the possession of the county treasurer and required to be deposited in the county depository under section 2736, of the General Code.

Upon the urgent request of General J. Warren Keifer I have reconsidered the question discussed in that opinion. At the time the opinion was issued there was not unanimity of opinion amongst counsel in the office, and I was not free from doubt myself when I concurred in the opinion as written by the distinguished attorney who prepared it.

Indeed, the opinion work in this office has been so unusually heavy and at times I have had to work under such great pressure that it has been exceedingly difficult for me on a few occasions to do justice to myself. I reversed only a very few of the opinions issued from this office and these usually have been in cases where the situation was unusual and I had not a fair chance to hear from both sides to the controversy, but I believe in being right rather than in being obstinate.

General Keifer was kind enough to submit to me the brief that he proposed for relator on application for a mandamus and withheld filing a suit in this case until I might have a full and fair opportunity to come to a conclusion free from the usual pressure of the office. I have considered both carefully the opinion prepared by Mr. Laylin of my own department, and I have likewise heard fully from counsel who entertained Mr. Laylin's views, and the brief prepared by General Keifer to which I have referred, and believing that its reasoning is absolutely sound I follow it and adopt it as my own.

The memorial building fund of Clark county, arising from the sale (December 30, 1912) of $250,000.00 of bonds as required by law to "be placed in the county treasury to the credit of a fund to be known as "memorial building fund." Such fund to "be paid out upon the order of the board of trustees, certified by the chairman and secretary." G. C., section 3063.

It will be noted that neither the auditor nor the commissioners of the county have any duty to perform with reference to or any control over this fund. It is the proceeds of the sale of $250,000.00 of bonds previously (1912) authorized to be issued by the county to provide a

"Memorial Building to commemorate the services of the soldiers, sailors, marines and pioneers of the county." (General Code, 3059.)

The board of trustees was appointed by the governor and its powers are defined by sections 3059-3069 of the General Code.

Not until the memorial building has been completed have the county commissioners any authority over it. They must levy a tax to create a sinking fund to pay the bonds, etc., General Code, sections 3068, 3063.

If, on its completion, any

"Unexpended balance of the fund remains in the county treasury it shall be placed and kept to the credit of such sinking fund." G. C., Sec. 3063.

As showing that the fund is not county funds to be treated, controlled, divided and disbursed by direction of the county commissioners, we call attention to the fact that the said "board of trustees" may turn the entire fund so raised over to the "state armory board" to be expended by it, in large part for state purpose, G. C., section 3663-1.

DEPOSITORIES—COUNTY.

In a chapter relating to county treasurers there is a subdivision relating to a "county depository," General Code, sections 2715-2745. The provision for depositories was made with no reference to funds other than those usually and ordinarily arising for political purposes. The money authorized to be deposited in any depository is "the money of the county;" that is, arises on and after a tax levy for the county and its political divisions. General Code, section 2715.

The law clearly shows that the deposits in active or inactive depositories must be money controllable by the usual county officials and must be such as may be drawn on (principal or interest) *"for the purpose of meeting the current expenses of the county."* This is the pertinent language used:

"The deposits in active depositories, as provided for in the next preceding section shall at all times be subject to draft for the purpose of meeting the current expenses of the county. The deposits in inactive depositories shall remain until such time as the county treasurer is obliged to withdraw a portion or all of same and place it in the active depositories for current use." General Code, 2715-1.

No inactive depository has been designated in Clark county under section 2715 of the General Code. There is only provision for depositing money accumulating in the county treasury, not needed for immediate use, arising from taxation. The withdrawal of only such money is provided for. General Code, section 2751-1.

This memorial building fund is a trust fund, and the general rule is that all accretions or anything by way of profit on a trust fund belongs to such fund. This applies to public funds, and, doubtless, no public fund or any benefit or profit therefrom can be transferred to any other fund, unless by express authority of law. For specific provisions relating to procedure for transfer of public funds, see sections 2296, et seq., G. C. These sections contemplate transfers from one fund to another fund, both of which are under the control of the same board. (Infirmary Directors vs. Commissioners, 6 N. P., n. s., 347; 18 O. D., 403.)

The only provision for applying or apportionment of interest on funds deposited in county depositories is in section 2737, General Code. In this section it is first

provided how the interest on "undivided tax funds" shall be apportioned. The only other provision relates to "interest arising from the deposit of funds belonging specifically to the county." This provision, following the provision as to the "undivided tax funds" evidently means the county's share of the tax funds after the division of it. "Funds belonging specifically to the county" is not applicable as a description of the proceeds of a sale of bonds issued expressly for and completely set aside for the purpose of a "memorial building fund." Section 3063, G. C. In the absence of a clear and positive declaration that the interest on this fund shall go to another fund that has no connection with this fund, the interest should stay with the fund from which it was raised. Particularly is this so since the "memorial building fund" is entirely separate from all the ordinary business and funds of the county, especially the "general fund of the county." Moreover, the interest belongs in that fund because the unexpended balance thereof goes to the sinking fund created to pay the bonds from which the fund was realized. Section 3063, G. C. In no other way can this interest be as properly applied as by keeping it in the "memorial building fund" from which it was derived. There ought to be a strong reason based on a clear and positive requirement of law to send it to the "general fund of the county."

Different rates of interest are provided for deposits in active and inactive depositories. And deposits may be made for a long term in an inactive depository which would take the control of the "memorial building fund" from the board of trustees. G. C., 2716.

It must not be overlooked that the provisions of law (G. C., 2737) for the apportionment of interest to the county general fund arising from the deposit of "funds belonging specifically to the county" applies alone to funds arising from taxation belonging to the county and not to funds which are solely applicable to a particular purpose wholly outside of a political governmental purpose. Public funds arising directly from taxes may be called county funds.

Before or after the fund is deposited neither the county commissioners nor any of its officers could authorize the expenditure of any of it, as we have seen, and the board of trustees alone could expend and draw it out of the county treasury, or, as we have also seen, turn it bodily over to the state for armory purposes, and to be expended by state authority in connection with other state funds. (G. C., 3063-1, 3063-3.)

It was never contemplated that any moneys coming into the county treasury for particular uses not derived from taxes duly levied for ordinary county purposes, and controlled and expended by special statutory authority, wholly independent of the general county authorities, should be deposited on interest to build up the county expense fund.

The commissioners are required by law to levy a tax to raise money for such purposes, and they can only be expected to do this in contemplation of interest that might be received on the ordinary funds derived from taxation. As the memorial building fund is to be paid out only on "the order of the board of trustees" it cannot be classified as a county fund for deposit at all under the statute. (G. C., 3063; also 2715, 2715-1.)

That a debt contracted by law in pursuance of a vote of the people and ultimately to be paid through taxation does not make it a county fund or a fund raised by taxation within the meaning of the Ohio depository law. G. C., 2715-1. Nor "money of the county" as mentioned in G. C., 2715. Money arising from the sale of bonds to be applied to a particular use is not county money because it is to be paid by taxation on the property of the county. The bonds themselves draw interest.

The provision of law making "deposits in active depositories * * * at all times to be subject to draft for the purpose of meeting the *current expenses of the*

county" conclusively shows that only moneys which by law, may be so used, can be treated as within the meaning of the depository law. G. C., 2715-1.

Of course, no part of the "memorial building fund" could "at all times be subject to draft" to pay "current expenses of the county." It, until the memorial building is completed and turned over to the county, is only paid out on the order of the board of trustees. G. C., 3063. The funds deposited—the principal thereof —must at all times be subject to be drawn on for current uses. No deposit can legally be made by the commissioners that would place the memorial building fund beyond the control of the board of trustees, and applicable for such uses.

Public funds of different kinds may be transferred from one to another provided they are each under the control of the commissioners. G. C., 2296. (Infirmary Directors vs. Commissioners, 6 N. P. (n. s.) 347.)

This tends to show that the county commissioners have no authority to call a fund for a specific purpose, especially a purpose outside of any governmental political division or district, a county fund for any purpose. As well might it be claimed that money going to the state arising from taxes levied on the people of the county be called a part of the county fund, and deposited at interest for the county.

The provision of law (G. C., 3063) directing the memorial building fund to be deposited in the county treasury was only one of convenience and not because it was subject to any control by the treasurer, auditor or commissioners, or would in any way produce revenue for the county. It might have been deposited in any other safe place. Its deposit, wherever that might be, would not change its purpose or authorize any accumulations derived therefrom to be appropriated for any other use.

Plainly, the apportionment required to be made by the county auditor of interest is only such as accrued from the principal of each political fund to the proper use. (G. C., 2737.) The required apportionment of accrued interest leaves no room to doubt as to what, and only to what, funds of the county treasury (authorized to be placed in a depository) the accruing interest to become a part of. (G. C., 2737.)

First, the county auditor is required to apportion "all such interest realized on the money belonging to the undivided tax funds" to the

> "State, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political divisions or districts bear to the entire amount collected 'for such undivided tax funds and deposited,' etc."

So far it is difficult to see that the auditor is required to apportion any interest to the county general fund. But the same section further provides:

> "All interest apportioned as the counties share together with all interest arising from the deposit of funds belonging specifically to the county shall be credited to the general fund of the county."

How can it be said, in reason, that the memorial building fund, raised from the sale of bonds, and specifically designated in the law as such fund, belong "specifically to the county?" Is it now specifically declared a fund for a particular use or purpose, clearly distinguishable from funds "specifically belonging to the county," raised for general purposes? Is it not more specifically designated as a fund outside of funds "specifically belonging to the county" than township, city, village, road, bridge and other public funds?

The manifest use of the phrase, "belonging specifically to the county" was to distinguish public funds raised by taxation for particular public county purposes

and uses from other funds, likewise so raised, for general county uses, exclusively controlled and expended by county authorities and commonly known as county general expense funds. The funds raised by separate county tax levy for bridges, roads, etc., are applied to general public uses, yet they are not treated as funds "specifically belonging to the county" or regarded as belonging to the county general expense fund.

For the foregoing reasons it is my opinion that the interest follows the fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1252.

STATUS OF MUNICIPALITIES AND TOWNSHIPS IN COUNTIES VOTED DRY UNDER COUNTY LOCAL OPTION LAW—HOME RULE AMENDMENT.

1. *Status of municipalities and townships in counties voted dry under the county local option law, after the going into effect of the so-called home rule amendment, is the same as though no county local option law election has been held; and local option elections can be held in such townships and municipalities under existing statutes providing therefor.*

2. *The so-called home rule amendment, by virtue of article II, section 1b of the constitution, takes effect thirty days after the election at which it was approved.*

COLUMBUS, OHIO, November 17, 1914.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In your communication of November 5, 1914, assuming the adoption of article 15, section 9a, commonly called the home rule amendment, you state:

> "Prior to the election, this county was dry by virtue of an election held under the county local option law—Rose law. Prior thereto, elections had been held in various municipalities and townships under provisions of the municipal and township local option law. Most of them at that time voted dry, so that when an election was held under the county local option law, the latter only effected two townships and one municipality.
>
> "The question now arises as to the status of the last mentioned places, in the event of the adoption of the home rule amendment, as well as the status of all other municipalities and townships in the county, on this question.
>
> "Further, can township and municipal elections now be held on the wet and dry question in those municipalities and townships? Also, when does the home rule amendment, if carried, go into force and effect?"

In an opinion to the Home Rule Association of Cincinnati, under date of August 8, 1914, construing the so-called home rule amendment, I held:

> "That the adoption of the proposed constitutional amendment would not interfere with or repeal either the Sunday law, sales to minors law, the sales to drunkards laws or similar regulatory laws, nor prevent the passage of similar laws in the future.

"Furthermore, it is my opinion that local options for municipal corporations and residence districts, as well as local option for townships, applicable to each township in the state, whether it contains a municipal corporation or not, is not interfered with by the amendment. In fact, the only so-called local option law affected is the Rose county option law."

You state that two townships and one municipality of your county were "wet" and were voted "dry" by the county local option law. The effect of the amendment, since it repealed the county local option law, was to place the two townships and one municipality in the same condition that they were prior to the county local option law. All townships and municipalities in your county which were voted "dry" under the Beal municipal local option law or by the Beatty township local option law, remain dry unless otherwise determined at a proper election. Since the so-called home rule amendment did not effect in any way the township and municipal local option laws, they are in the same position as they were prior to the adoption of the amendment, and in such townships and municipalities, elections can be held on the "wet" and "dry" question, under the existing statutes providing therefor.

Answering your last inquiry, I would say that the so-called home rule amendment to the constitution, by virtue of article II of the constitution, takes effect thirty days after the election at which it was approved. At the expiration of thirty days the license law will apply, and the territory that was not made dry theretofore by regulatory laws, outside of the Rose county local option law, will be in the same situation at the end of thirty days as all wet territory is. You understand, of course, that since the license law applies, there could be no traffic in intoxicating liquors unless the persons desiring to engage therein received licenses therefor under the provisions of the law.

Trusting this answers your inquiry, I am,

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1253.

THE EXPENSE OF PRINTING OR MAILING OF COPIES OF A PROPOSED CHARTER FOR THE CITY OF CINCINNATI IS NOT ILLEGAL, IF AUTHORIZED BY COUNCIL.

An expense for printing more copies of the proposed charter for the city of Cincinnati than were necessary to supply the electors who had voted at the previous election is not illegal, if authorized by council.

The expense for mailing copies to women electors, who had voted for members of the board of education at the previous election is illegal, if undertaken by the city auditor or any other executive officer without authority of council, but council may authorize such or other reasonable distribution of such public documents by mail.

COLUMBUS, OHIO, November 19, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of June 19th submitting for my opinion thereon the following question:

"Copies of the proposed charter, submitted by the charter commission of the city of Cincinnati, were mailed to women voters who had voted for school board members at the previous election. If this expense is illegal may findings for recovery be enforced against the board, or official, directing such expenditure, including the cost of printing said extra copies and the postage on same?"

Article XVIII, section 8 of the constitution, self-executing in this respect, provides as follows:

"* * * Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each *elector* whose name appears upon the poll or registration books of the last regular or general election held therein. * * *"

Of course it is clear that the word "elector," as used in this sentence, means one having the qualifications of an elector, determined by article V, section 1 of the constitution. Women having the right to vote for candidates for members of the board of education are not "electors," although their names may appear upon the poll books of the last regular election.

While I have generally characterized section 8 of article XVIII of the constitution as self-executing, in order that its mandate may be complied with, it is necessary for the council of a municipal corporation to appropriate the necessary money. In any such appropriation or other essential legislation the council may lawfully, I think, provide for and authorize the printing of as many copies of the proposed charter, as in the exercise of reasonable discretion the council may deem advisable. That is to say, there is no limitation in the constitution, or otherwise, to the effect that there shall be *printed* any definite or limited number of copies of the proposed charter, and council, or the proper officer, is vested with some discretion in this particular.

Therefore, I am of the opinion, that merely because certain copies of the charter were sent to women it does not follow that there could be a finding for recovery on account of *printing* that many copies. If the officers whose duty it was, under the ordinance providing for the printing of such copies, to let the contract or to make or audit payments on account thereof, have exceeded their authority, as defined by such ordinance, then a different question might arise. The facts necessary to support a final conclusion upon this phase of your question are not stated by you.

With respect to the expense on account of postage, however, the question is somewhat different. I am of the opinion that so far as article XVIII, section 8 of the constitution is concerned council is without power to authorize any municipal agent to mail copies of a proposed charter to any persons other than those specifically referred to therein. However, in spite of the rule that a municipal corporation has only those powers which are expressly granted, and those which are to be necessarily inferred from the grant of powers, I am of the opinion that it is competent for the council, by making proper appropriations, to authorize any reasonable expenditure for postage for the purpose of bringing to the notice of the citizens of the municipality or other interested parties generally, any matter of public interest. For example, the annual report of the city auditor or the sinking fund trustees or other public documents of a similar character might be distributed among the citizens, and such other interested parties as municipal bond buyers, and council might authorize and direct the city auditor or clerk of council or other proper officer to incur postage expense on such behalf.

Wherefore, while the section of the constitution is itself the measure of the right of the "clerk" (in the case of a city, the auditor; section 4283, General Code,

and related provisions) to incur any expense on account of postage in the absence of appropriate legislation on the part of council, I am of the opinion that if council, in which is vested the local legislative power, authorizes for distribution by mail all the copies of the proposed charter ordered to be printed, such legislation would be valid and would constitute sufficient authority to the officer in question.

I am clearly of the opinion that the power to authorize such additional expenditure rests exclusively in the council. No other board or official has authority to direct the same. But if in the case you mention it is found that council has not acted, I would advise against a finding for recovery against the city auditor or the official actually making the expenditure, unless it appears that he has not acted in good faith.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1254.

A PERSON SERVING AS PROBATE JUDGE, WHO HAS BEEN ELECTED COMMON PLEAS JUDGE FOR A TERM BEGINNING JANUARY 1ST, 1915, MAY CONTINUE TO ACT AS JUDGE OF THE PROBATE COURT UNTIL IMMEDIATELY PRIOR TO HIS ENTRANCE UPON THE TERM AS COMMON PLEAS JUDGE.

One serving as probate judge, who has been elected common pleas judge for a six-year term, beginning January 1st, 1915, is not required to resign upon receiving a commission, and taking oath as common pleas judge, but may continue to act as judge of the probate court until immediately prior to his entrance upon the term for which he has been elected as common pleas judge. He cannot hold both offices and must resign as probate judge before beginning the term to which he was elected as common pleas judge.

COLUMBUS, OHIO, November 19, 1914.

THE HON. ELI SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Under date of November 13th, 1914, you write that the Hon. W. A. Joseph, who is at present probate judge of Clermont county, was on November 3d elected common pleas judge of the county for the six-year term beginning January 1, 1915, and that you and he are uncertain as to whether he will have to resign the position of probate judge within twenty days from the receipt of his commission issued by the governor, or whether he can hold the position of probate judge until January 1, 1915.

It is upon this state of facts that you ask my opinion.

Section 1690 of the General Code, as amended 103 O. L., 417, provides:

> "Each commission issued by the governor to * * * a judge of the common pleas * * * shall be transmitted by the secretary of state to the clerk of the common pleas court of the county wherein such judge resides. Such clerk shall receive and forthwith transmit it to the person entitled thereto. Within twenty days after he has received such commission, such person shall take the oath required by the constitution and statutes of this state and transmit a certificate thereof to such clerk signed by the officer administering such oath."

Section 140, of the General Code, requires the deputy state supervisors of elections of the proper county to forward by mail to the secretary of state a certificate of election of an officer such as the one in question together with the requisite fee which is to be paid by the person demanding the certificate. Upon receipt of such certificate and fee by the secretary of state, the governor shall issue and forward the proper commission to the clerk of the court of common pleas who shall deliver the same to the officer entitled thereto. The fact that action is to be taken immediately by the deputy state supervisors of elections indicates that it is the intention of the statute that all the actions required by the sections referred to shall be taken at the earliest convient moment. If this is done it is apparent that Judge Joseph will take oath some time prior to January 1st, 1915, and consequently it will be seen that the question for determination is whether he can receive the certificate and take oath as a common pleas judge while he is still acting as judge of the probate court.

Section 14, of Article IV, of the constitution provides that judges of the common pleas court

> "Shall receive no fees on perquisites or hold any other office of trust or profit under the authority of this state or of the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

It will be observed that under the language last quoted the common pleas judge cannot hold any other office of profit or trust under the authority of the state or of the United States, which, of course, would include within its inhibition service as probate judge, but although the person qualifies and takes the oath of office, it does not necessarily follow that he is such officer within the meaning of the constitutional language. In order that he may be the common pleas judge within the meaning of this section, he must have entered upon his term of office. It is the intent of the constitution to preclude him from holding both offices at the same time, and as he does not enter upon his service as common pleas judge until January 1st, 1915, I see no objection to his continuing to act as probate judge until that date. The predecessor of Judge Joseph will act as common pleas judge until January 1st, 1915, and therefore it must follow that the latter cannot be serving in the same capacity at the same time. He will not be common pleas judge until the date last named, even though he should qualify and be prepared to act at the expiration of the term of whom he has been elected to succeed. The qualification and taking of oath is merely a step preparatory to entrance upon office and serving therein. Of course, it will be necessary for him to resign as probate judge prior to serving as judge of the common pleas court, as he could not hold these two positions under section 14, of article IV, of the constitution, as these two offices have not been combined in your county under the provisions of section 7, of article IV.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1255.

A PERSON CONTRACTING TO OVERSEE A PARTICULAR PIECE OF WORK CONSTRUCTED BY STATE HIGHWAY DEPARTMENT NOT WITHIN CLASSIFIED CIVIL SERVICE—THE SAME RULE APPLIES TO DAY LABORERS.

One contracting to act as superintendent or resident engineer to oversee a particular piece of work constructed by the state highway department is an independent contractor and not within the classified civil service of the state. If such superintendent is regularly employed the year around, to serve wherever and whenever directed by the state, he would then become an employe of the state within the classified civil service.

Day laborers employed for a few days on a particular piece of work, with no idea of permanency in employment or continuity of service, whose employment discontinues with the completion of such piece of work, are not within the classified civil service.

COLUMBUS, OHIO, November 20, 1914.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of July 21, 1914, you state that the state highway commissioner has submitted to your department the question of whether or not those performing labor in the building of new state highways are within the classified civil service of the state.

Enclosed with your communication is a letter from the secretary of the state highway department, together with form of contract and bond used by such department. It seems that under this contract a superintendent is employed for the purpose of superintending and directing the construction of the highway which the state is engaged in constructing. He pays all bills and keeps accurate account of the disbursements, together with the cost of the improvement. It is not stated whether the work that is done is under independent contract or directly by the state, which is to employ the men and pay them. I assume, however, that the latter state of affairs exists, as, if the work were done by an independent contractor, there would be no question raised as to civil service, because the employes of such contractor would not in any event be in the service of the state.

Under subdivision 1, of section 1, of the civil service act, the term "civil service" is construed to include mechanics, artisans and laborers in the service of the state. The superintendent himself, if he merely be hired for the one contract or by the job, may also be said technically to be in the service of the state, but his employment is more in the nature of an independent contract than otherwise, and I do not believe that it was the intention of this act to include independent contractors within the classified civil service. As they are employed only for a particular piece of work and their time of service is limited with no definite idea of re-employment or continuous service, they do not seem to come within the spirit of the act or within its terms with reference to the eligible list.

In defining classified service the competitive class is treated as inclusive of all positions and employments now existing or hereafter created in the state for which it is practicable to determine the merit and fitness of applicants by competitive examinations. The use of the words "existing" and "created" indicates that there must be some permanency about the position, and the words "positions" and "employments" in this connection seem to refer to work having a fixed character in the administration of the government.

Section 9 of the act in question requires the putting into effect of rules for the classification of offices, positions and employes in the classified service. If an employment be in the nature of an independent contract it would seem that this section would not be applicable, because it would be very difficult, if not impossible, to classify service under a contract of that character.

Section 16, with reference to transfers and reinstatements, would also be applicable, because that provides for the reinstatement of one who has been separated from the service without delinquency or misconduct on his part. This would result in the continuous application for reinstatement in service by one who had contracted to do a particular piece of work and who had completed the same. It is not reasonable to surmise that the general assembly had any such intention as this.

The same argument may be adduced with reference to section 17, prohibiting discharge. When the work is done there is no further reason for the existence of the employment. Of course, if the superintendent is continuously employed to work on any highways that the state may be constructing and he is not hired for a particular piece of work, then, of course, this rule would not obtain, as he would be holding a regular position in the state service.

As I take it, however, your main question is with reference to the laborers employed by the superintendent. As they are paid by the state, even though the money comes directly from the superintendent, who merely acts as a state agency in distributing the same, this would not prevent the application of the civil service act to such employes. If, however, the laborer is merely employed for a particular piece of work, with no idea of continuity or continuance in service, I do not believe that he comes within the spirit of the civil service act, and I think he should be exempt from inclusion within the classified civil service. One who is regularly employed to do this character of work by the state would still be within the classified service, even though he was at times laid off, if the state could call upon him and require his services at any time it so desired; but when his employment is for a particular piece of work in a particular locality, or where he is hired merely as a transient for a few days, I do not think that he comes within the law. There must be some degree of permanency about the nature and scope of the employment in order that the provisions of the civil service act shall obtain with reference to such employment.

In addition to this, it seems to me that it is not practicable to determine the merit and fitness of applicants by competitive examination for day laborers who are only to be hired for a few days in a particular capacity, at the end of which time their services are to be discontinued with no idea of re-employment.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1256.

RIGHT OF COUNCIL BY ORDINANCE OR RESOLUTION TO LEGALLY PAY FROM CITY FUNDS JUDGMENTS MADE AGAINST PUBLIC OFFICERS THROUGH FALSE ARRESTS—REGULAR PATROLMEN MAY RECEIVE ADDITIONAL COMPENSATION WHERE THEY HAVE WORKED MORE THAN THE NUMBER OF HOURS STIPULATED BY THE DIRECTOR OF PUBLIC SAFETY.

1. *While council cannot by ordinance or resolution legally pay from city funds judgments rendered against police officers because of false arrest, and cannot legally reimburse a police officer from city funds for expenses incurred in defending damage suits for such false arrests, nevertheless, in view of the uncertainty of the law, no finding should be made where payments have been made. The holding herein should be given prospective effect. In the future findings should be made and actions instituted to recover such payments hereafter made. Such recovery may be had against the officers who have been reimbursed from city funds for judgments and expenses. As to whether recovery may be had from a police officer when council directly pays the judgment creditor, quaere.*

2. *Regular patrolmen, who have worked the number of hours stipulated by the director of safety may receive extra compensation for overtime, when council in fixing the compensation of such officers specifies that they shall be paid at the rate of so much per diem. Such overtime should be paid proportionately to the number of hours' work as compared with the number of hours designated by the director of safety as a full day's work. Council should, however, by ordinance definitely and specifically fix the number of hours which shall constitute a day's work for such patrolmen.*

COLUMBUS, OHIO, November 24, 1914.

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

GENTLEMEN:—Some time ago you submitted the following inquiry:

"1. May council, by ordinance or resolution, legally pay from city funds judgments rendered against public officers through false arrest?

"2. May council, by ordinance or resolution legally reimburse the police officer from city funds for expenses incurred in defending a damage suit for false arrest?

"3. May regular patrolmen be legally compensated for overtime when the ordinance fixing the compensation of said patrolmen specifies a per diem compensation, but does not state the number of hours that shall constitute a day or make any mention of overtime? Printed rules of the safety department designate the regular hours of each department, and extra pay has been made to patrolmen for time served in excess of the number of hours designated in the rules.

"4. If city funds have been disbursed on the above three accounts, can recovery be had against said police officers?"

Your first and second questions may be discussed together. As a general rule, it may be stated that where a municipal officer incurs a loss in discharging a duty imposed upon him by law, in a matter in which the corporation is interested, the municipal corporation has power to appropriate funds to reimburse him, provided he acts in good faith, unless such action on the part of the municipality is forbid-

den by statute. There are decisions which have gone so far as to state that even if the officer exceeded his legal rights and authority, the same rule should obtain, and it has been held that if a mayor, in the performance of the duties of his office, in good faith, exceeds his authority, and as a result judgment has been rendered against him for false imprisonment, it is proper for the city to indemnify him for the expense of such judgment. It seems to be generally recognized, however, that the test in such cases is whether the act done by the officer is one in which the city had an interest—that is, it must affect municipal rights or property, as well as be in good faith.

"McQuillan on Municipal Corporations, Sec. 514, pp. 110-113.
"Dillon on Municipal Corporations, 5th Ed., 307."

The true rule is very well stated by Mr. Mecham in section 879 of his work on "Public Offices and Officers." After saying that it is well settled that towns or cities have power to indemnify their officers against liability incurred in the bona fide discharge of their duties, and may raise money for this purpose or appropriate to it money raised for general purposes, even though the result may show that the officers exceeded their legal authority, the learned author states that the subject must be one concerning which the municipality has a duty to perform, an interest to protect, or a right to defend, and in which it has a corporate interest. He says:

> "Where, however, the subject-matter is one in which the municipality has no interest, and in reference to which it has no duty or authority; where it has no direction or control over the officer, it is not responsible for his fidelity, gains nothing by his diligence and loses nothing by his want of care; where the duties are imposed specifically upon the officer by statute, and the municipality has no duty to perform, no right to defend, and no interest to protect, in such cases the right to indemnify does not exist, and any attempt to do so, or any vote or contract to that effect, will be void."

In Miller vs. Hastings Borough, 25 Pa. Super Ct., 569, the facts presented showed that a jury in acquitting a borough policeman of the charge of assault and battery imposed half of the costs upon him. While the suit was pending the council moved

> "That our police be supported with all that counsel command in case now pending in court."

The court held that this motion was not a sufficient basis for a suit by the policeman to recover his costs and attorney fees. The salient feature of the case is, however, the statement that the borough authorities had no power to expend public money in defense of borough officers indicted under the law, *when the borough itself was not involved.* This holding is based upon the theory that police officers in the preservation of peace are not agents or servants of the borough, their powers and duties being derived from the state to which they are primarily responsible.

The New Hampshire cases very well illustrate this. The following are typical:

"Cove vs. Epping, 41 N. H., 539.
"Merrill vs. Plainfield, 45 N. H., 126.
"Gilbert vs. Berlin, 84 Atl., 235."

The same line of distinction is to be found in Massachusetts:

"Flood vs. Leahy, 183 Mass., 232.
"Vincent vs. Nantucket, 12 Cushing, 103.
"Minot vs. Roxbury, 112 Mass., 1.
"Dunn vs. Framingham, 132 Mass., 436.
"Leonard vs. Middleborough, 198 Mass., 221.
"Hixon vs. Sharon, 190 Mass., 347."

The following is taken from the last case cited:

> "The cases in which it is held that a town cannot expend money to reimburse its officers or agents for losses are those in which the expenditure relates to objects concerning which it has no duty to perform, no interest to protect, and no right to defend."

In Chapman vs. New York, 168 N. Y., 80, the court of appeals of New York held that the payment from the funds of the county or city of expenses incurred by a police officer in successfully defending charges preferred against him for official misconduct would constitute their application to an individual, and therefore the statute authorizing such application was unconstitutional and void as violative of that provision of the constitution prohibiting a city, county, town or village from incurring indebtedness for other than county, city, town or village purposes. The following language from the opinion is pertinent:

> "When a citizen accepts a public office he assumes the risk of defending himself against unfounded accusations at his own expense. Whoever lives in a country governed by law assumes the risk of having to defend himself without aid from the public even against unjust attempts to enforce the law, the same as he assumes the burden of taxation. As it was said in the matter of Jensen, it is 'a part of the price he pays for the protective influence of our institution of government.'"

The court say that asking for aid to pay the expense of a defense already made from one's own resources is like asking for aid in the payment of taxes or in the discharge of any public burden. It is not a city or county purpose, but a mere gift.

The doctrine justifying payment under circumstances similar to those set out in your questions, is, perhaps, as well stated in Sherman vs. Carr, 8 R. I., 431, as anywhere. This is one of the leading cases on the subject. Judge Bradley in that decision gave as a reason justifying the payment of compensation the fact that if the power to indemnify the officer did not rest in the municipality, the said officials would perform their duties at the peril of individual responsibility for all their mistakes, no matter how honest and intelligent they might be, and also at the peril of the possible mistakes of a jury. As a result of this the officer would naturally become too cautious, if not timid, in the exercise of his powers. The answer to this reasoning is obvious. The case itself recognizes the very great evil of imposing upon the municipality the duty of reimbursing the officer, and consequently leaves it to the discretion of the governing body of the city. If it be a discretionary matter, the officer cannot, with any degree of confidence, act in the belief that he will receive compensation. The whole matter will be left to the whim and caprice of those in charge of the municipal finances, and therefore the policemen would have from the municipality, but an unsubstantial prop, and, to paraphrase a well-

known quotation, his hopes would oft prove dupes and his fears would not be liars. One cannot conceive of an officer more efficiently performing a duty which he is paid to do because a municipality *might* in its generosity reimburse him for the loss which he has incurred in endeavoring to do that work.

It is suggested in the foregoing case that the municipal officer is put at the peril of the possible mistakes of a jury. While this may be true, we have no more right to assume that the jury has made a mistake in rendering judgment against him, than we have to assume that the municipality would make a mistake in reimbursing him. When judgment has been rendered against him for false arrest or false imprisonment, there must necessarily have been a finding that he violated statutory or common law. If he did this, it would seem that it would not be right for a political subdivision of the state to pay him for his breach of duty.

Another matter to be taken into consideration in this connection is that the salary of the officer is supposed to compensate him not only for the work that he does, but for the risks that he runs—in other words, his liability to actions for false arrest or false imprisonment are perils incident to the position which he occupies, and at the time he accepts his office or employment he is presumed to bear this in mind, and his wages are supposed to be fixed with this consideration in sight.

The case of city of Chicago vs. Williams, 182 Ill., 135, holds that a city is not liable for torts committed by its officers in the exercise of police power, and that it is not the duty of the corporation counsel to defend at the city's expense a suit to recover damages for false imprisonment brought against police officers. It is true that in this case there was only a discussion of the legal liability of the city, and the question of its moral obligation was not considered, but nevertheless the reasoning seems to sustain the view here taken.

It has been contended that the right to pay claims of this character rests upon the equitable duties of a municipality—upon its moral obligation—to protect its officers in the faithful discharge of their duties. It must be remembered that in Ohio municipalities have only those powers expressly granted or necessarily implied, and in this respect they differ from the cities of many other states. In addition to this, in maintaining a police department, the municipality acts as an agency of the state, and not in its private corporate capacity. These officers act for the state, and on its behalf in making arrests, especially in state cases, which in their very designation present the state as prosecutor. The decisions are uniform in this state upon this question, and it has been repeatedly held that the municipality, when it acts as a state agent, is not liable for the torts of its officers. If it is not liable for the torts of its officers, how can it be said that there is a moral obligation upon it to pay damages arising out of delicts of such officers. While it is true that there are certain moral obligations resting upon municipal corporations, which may be recognized by payment, nevertheless those decisions must not be extended beyond their terms. They were based upon peculiar circumstances, and no general rule can be deduced therefrom.

Observe that the municipal mayor's and police courts have criminal jurisdiction throughout the county and arrests made under their authority may and frequently do occur beyond the limits of the municipality. Under such circumstances, if false arrests take place, why should the municipality have the right to reimburse the officer mulcted in damages. He is not acting for or on its behalf in making such arrest. That surely cannot be a corporate function.

The direct question has been decided in Lunkenheimer vs. Comptroller et al., 23 W. L. Bull., 433, wherein an action was brought by a taxpayer to enjoin the payment of $200.00 to one Hewitt, who was employed as attorney to defend the chief of police in proceedings in contempt, also in testing the constitutionality of the law, and in defending the chief of police in an action for damages growing out

of false arrest. In holding that a perpetual injunction should be granted, Judge Bookwalter says:

> "In the damage suit it was also an individual burden he had assumed. The municipality is not liable in damages for the neglect or wrongdoing of a police officer. Moreover it would be unreasonable to imply that funds raised by taxation for police purposes should be used in the defense of an officer prosecuted individually for neglect or misconduct."

Section 3784, of the General Code, provides that each municipal corporation shall have special powers to levy and collect taxes upon real and personal property within the corporation *"for the purpose of paying expenses of the corporation, constructing improvements authorized, and exercising the general and special powers conferred by law."*

Now it cannot be contended that the payment of the expenses referred to in your first and second questions is the payment of expenses of the corporation. On the contrary, the matter was one with which the corporation had no concern. It was not a party to the action wherein the officer was mulcted in damages, and the judgment against him was no corporate expense, nor was the expense of defending him. It was not the construction of an improvement, and the only general or special power conferred by law with reference to the police department is that to be found in section 3617, authorizing the municipality "to organize and maintain police and fire departments." I cannot see how the payment of the judgment for false arrest is a direct or implied exercise of the power either to organize or to maintain the police department. Section 3800 provides for the erection of a contingency fund to provide for any deficiency in any of the detailed appropriations which may lawfully and by any unforeseen emergency happen. If there was no authority to appropriate moneys for purposes such as those referred to in your letter, there would be no authority for paying such expenses out of a contingent fund, and as we have before stated, we can find no such authority in the statutes.

Section 4383, of the General Code, provides in part:

> "Council may provide by general ordinance for the relief out of the police or fire funds of members of either department temporarily or permanently disabled in the discharge of their duty."

We cannot assume that the general assembly used this language without reason or necessity, and consequently it must have been the legislative idea that this power was not vested in the municipality in the absence of statute. Otherwise, there would have been no necessity for the enactment of the law. Yet there is just as much reason for saying that this implied power rested in the municipality as to contend that cities have the power to pay judgments rendered against their police officers. If the latter tends to make officials more courageous and efficient in the performance of their duties, so would the former. What reason can be advanced for reimbursement for financial damage that cannot be advanced for compensation for personal injuries? If the one did not exist in the absence of statute, it would seem clear that the other cannot. There being no statute authorizing financial relief against judgments for false arrest or false imprisonment, it follows, in my judgment, that council cannot by ordinance or resolution legally pay from city funds judgments rendered against police officers by reason of their having made false arrests; nor may it reimburse the police officer for the expense incurred in defending a damage suit for false arrest, when judgment has been rendered against the officer.

I understand that the third question which you ask is based upon a state of

facts arising in the city of Columbus, and consequently I have obtained the ordinance and rules of the director of public safety in that city, in order that I might have the concrete facts before me in answering the question.

The eighth paragraph of section 1 of the ordinance of May 19th, 1911, reads thus:

> "One hundred and thirteen patrolmen, each of whom shall receive a salary *at the rate of* $2.75 *per day,* and shall give bond in the sum of $1,000.00."

The language of this ordinance is peculiar in that it provides for compensation at the rate of $2.75 a day. The word "rate" is used in this connection as a relative term—it is the measure of a thing by its relation to some standard. It establishes a basis upon which the value of the service is to be estimated. The standard in this case is a day, and therefore the next question to be determined is what is the meaning of a day as used in the ordinance. Without any further specifications or description it would, no doubt, be held to mean all of the time during which the policeman was on duty, regardless of the number of hours—that is to say, it might be defined to be the whole or any part of a twenty-four hour day within which he was ordered to work. This ambiguity, however, has been removed by the following order of the director of public safety:

> "That ten hours work in any twenty-four hours will constitute one day's work for any member of the division of police, except as to those who are specifically designated to work fewer hours or on different shifts for the good of the department."

The chief of police states that this general order was issued during the first part of January, 1912, and is the same regulation that has been in force since 1905. In the absence of any designation by council in the ordinance as to what shall constitute a day, it seems to me that the director of public safety has authority to make a rule such as the one here quoted, and that such rule may be resorted to for the purpose of ascertaining what shall constitute the policeman's day. Construing the ordinance and the rule together, I am of the opinion that a policeman is entitled to pay for the time he works at the rate of $2.75 a day, and that the day upon which this computation is to be made shall consist of ten hours. As the ordinance does not specifically state that his per diem compensation is to be in full of all services performed in any twenty-four hours, and as the director of public safety has specified that ten hours' work shall constitute one day's work, the policeman is entitled to extra compensation for all services performed in excess of the aforesaid ten hours. This compensation is to be fixed at the rate of $2.75 for ten hours' work. The words "at the rate of" indicate clearly to my mind that the ordinance contemplates payment for overtime, in case the director fixes the hours of labor, and that such overtime is to be computed in the manner herein specified.

Of course, you must understand that the director of safety would have a right at any time to change this order, or to make an exception thereto with reference to a certain class of patrolmen. With these latter class of cases this opinion cannot deal, as we have not any rule before us except the general order hereinbefore quoted.

Succinctly stated my position upon this question is that when the regular patrolman have served the time prescribed for their day's work, such work was ended, and they were entitled to their regular per diem compensation. If at the expiration of such day they were called upon by the proper official to perform further police duty,

there being no alteration or change, suspension of or exception to such rule, the policemen are entitled to extra compensation for the time served by them, under such direction, in excess of the number of hours designated by the rule, such extra compensation to be computed for the time actually served at the rate of $2.75 per diem.

The difficulty of the whole question arises from the failure of council to fix the number of hours constituting a day's work for patrolmen, and it is really the governing body which should determine this. Therefore, I would suggest that council should by ordinance definitely and clearly legislate upon this matter, so that all doubt and ambiguity may be removed.

In reply to your fourth inquiry, I desire to say that the supreme court of this state has held, in

"Walker vs. Dillonville, 82 O. S., 137."

That an action may be brought to recover money illegally paid out of the public treasury. See also lower court's report of the same case in 30 C. C., 623.

The rule is stated in section 527, of McQuillan on "Municipal Corporations:"

> "Usually compensation illegally paid to an officer or employe may be recovered by the public. Thus money paid by a municipal corporation to one of its officers in excess of his lawful salary or fees may be recovered by the corporation in an action against the officer for money had and received to its use, although the payments were made on the order of officials properly charged with such duty with a full knowledge of the facts and without fraud. The defense of involuntary payment is not available in such case, for the knowledge of the officer of the authority of the officials who made illegal payments must be presumed. Such illegal acts are *ultra vires*, outside of the agency of the officials, and are not binding on their principals, the people. Therefore, such unwarranted payment of excessive compensation or fees cannot be ratified."

As there is no authority to reimburse police officers for judgments and expenses paid by them in cases wherein juries have returned verdicts against them for making false arrests, it follows that such payment constitutes an unwarranted diversion of public funds and action lies to recover such funds for the municipality. In view, however, of the difference of opinion heretofore obtaining regarding this question, and the fact that payments were made in good faith and with reason for treating them as authorized, I do not think it would be equitable or just to make findings against those who have so acted. Hence, this opinion should be treated as prospective in its operation upon this subject, and officials should be warned that payments of this character *hereafter* made will be not only improper, but will result in findings being made and actions instituted to recover money spent in this manner.

You will observe that in the foregoing opinion I have not answered the quesiton of whether recovery can be had against police officers when council has paid judgments rendered against them. From this question I infer you have in mind a state of affairs where the person who recovered judgment has been paid out of the municipal treasury. My reason for not answering this question is that cases of this kind cannot properly be answered in general, as the varying facts of each case should be presented before asking that I rule thereon. If you have in mind any particular case of this character you may submit same and I shall give you my opinion in regard to that concrete case.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1257.

PETITION FOR MUNICIPAL LOCAL OPTION ELECTION UNDER THE BEAL LAW—WHEN SUCH PETITION MAY BE ENTERTAINED.

A petition for a municipal local option election under the Beal law may be entertained before the repeal of the county local option law by the recent constitutional amendment.

COLUMBUS, OHIO, November 24, 1914.

HON. KENNETH G. COOPER, *City Solicitor, Bellaire, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your communication of November 23, 1914, in which you state:

> "On or about December 18, 1911, Belmont county was voted dry under the Rose law. The city of Bellaire is in Belmont county.
>
> "As I understand it, the home rule amendment does not go into effect until December 3, 1914, and that until that date the Rose law is in effect.
>
> "I am informed that a petition under the Beal law will be filed with the Bellaire city council on Tuesday evening, November 24, 1914.
>
> "The question I desire to ask is whether council has jurisdiction to receive petitions for a Beal law election, said petition being filed before the home rule amendment goes into effect, and Belmont county being now dry?"

I infer from your statement that the city of Bellaire has not voted under the municipal option law and is dry by virtue of the provisions of the county local option law.

I have heretofore held that the home rule amendment upon its adoption goes into effect thirty days after the election at which it is voted upon, by virtue of the specific provisions of section 1b of article II of the constitution.

Section 6115, General Code (99 O. L. 37), being part of section 8 of the so-called "Rose county local option law", reads:

> "After three years from the date of an election held under the provisions of this subdivision of this chapter, another election may be petitioned for and shall be ordered by the county commissioners or common pleas judge, as provided therein."

Section 6116 of the General Code, also a part of section 8 of the "Rose county local option law," provides:

> "The foregoing sections of this subdivision of this chapter shall not affect, amend, repeal or alter in any way any other law or ordinance which prohibits throughout a 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."

It is readily apparent upon reading these two sections, in connection with the fact that the county local option law, the municipal local option law and the township local option law are all separate and distinct acts, that the election spoken of in section 6115, General Code, is a county local option election, and after the holding of one election under the county local option law a period of three years

from the date of that election would have to elapse before another *county local option* election might be petitioned for.

Section 6127 of the General Code provides that when qualified electors in a number equal to forty per cent. of the number of votes cast at the last preceding general election for state and county offices petition the council of a municipality divided into wards for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such corporation, such council shall order a special election to be held therein not less than twenty days nor more than thirty days from the filing of such petition with the mayor or from the presentation of such petition to the council. The filing of such petition confers jurisdiction upon council, and it is their duty to proceed under the law. The fact that the repeal of the Rose county local option law has not become effective would not in any way militate against the duty of the council to order the election. Section 6115 of the General Code does not prevent the filing of a petition of any kind within the three years; it only prohibits the petitioning for another county local option election.

I am, therefore, of the opinion that your council has jurisdiction to receive petitions for a Beal law election at this time; and that the fact that the Rose county local option law may still be considered in effect would not prevent the reception of such petitions. In fact, since the two laws are entirely separate and distinct, even if the county local option law would continue to be in effect, I can conceive of good reasons why the electors of a municipality might desire to vote upon the question of whether the municipality would also be dry under the Beal law—for instance: it might be desired to conduct prosecutions under the municipal local option law rather than under the county local option law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1258.

ORDINANCE OF CITY OF TOLEDO, PROVIDING THAT EMPLOYES OF THE DEPARTMENTS OF THE CITY GOVERNMENT SHALL BE PAID THE PREVAILING WAGE RATE EXTANT IN THE CITY, DOES NOT COMPLY WITH SECTION 4214, GENERAL CODE.

An ordinance of the city of Toledo, which provides that employes in any of the departments of the city government shall be paid the prevailing wage rate extant in the city does not comply with section 4214, *General Code, requiring council to fix the compensation of all employes in the city government, since the same is not sufficiently definite and certain, and such ordinance operates as a delegation of power to fix such compensation, to the heads of the departments.*

COLUMBUS, OHIO, November 27, 1914.

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

GENTLEMEN:—Under date of August 25th you request my opinion as follows:

> "The council of the city of Toledo, Ohio, has fixed the compensation of employes in all the departments of the city of Toledo, Ohio, known as laborers, in the following language:
>
> "'That all employes hereafter employed in any of the departments of the city of Toledo, and paid by the hour or day, be paid at least the current

and prevailing rate of wages paid in the city of Toledo by private individuals and corporations, and the officers of the city of Toledo so employing said persons, are hereby authorized and directed to place such employes upon the pay roll of the city of Toledo at not less than such prevailing rate of wages. Passed August 3, 1914.'

"Does the phraseology of said ordinance comply with the requirements of the law that council shall fix the compensation to be paid in the various city departments?"

Section 4214, General Code, is as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

By this provision the legislature expressly makes council the specific body which is to fix the respective salaries and compensation of the employes in the city government. By a well settled rule of construction the requirement of statute which places a duty upon a specifically designated officer or board requires the particular officer or board to perform the duty in question and operates as a prohibition against a delegation of that duty to any other officer or board. The rule is founded upon the well-known principle that the expression of one excludes all others.

I am of the opinion that the method followed by the council of Toledo necessarily operates in part as a delegation of the determined duty of fixing compensation to officers other than the city council. The prevailing wage may or may not be a fixed quantity in the city of Toledo. Under the plan attempted, the duty of determining what is the prevailing rate is left to the officers of the city employing the persons in question. Such a plan clearly cannot be accorded recognition as a definite fixing of compensation by the council and by the council alone. The statute above quoted is intended to impose upon council a clean-cut and specific jurisdiction over the matter in question.

I am of the opinion, therefore, that the method attempted to be followed by the adoption of a blanket establishment of a general rule of wage lacks the definiteness and certainty which the plan of the statutes comprehended.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1259.

WHEN THE COMMISSIONERS OF A COUNTY FILE THEIR FINANCIAL REPORT WITH THE COMMON PLEAS COURT, THE COURT HAS FULL CHARGE OF SUCH REPORT—NO PROVISION IS MADE FOR THE DISPOSITION OF SUCH REPORT.

When the commissioners of the county file a report of their financial transactions with the common pleas court, in accordance with section 2507, General Code, such report becomes part of the files of the court, and there is no duty whatever incumbent upon the court with reference to such report. The statutes nowhere provide what shall be done with such report after the same is filed with the court.

COLUMBUS, OHIO, November 27, 1914.

HON. OTWAY J. COSGRAVE, *Presiding Judge, Court of Common Pleas, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of October 20th, wherein you set forth that the county commissioners have filed with the court of common pleas, in accordance with section 2507 of the General Code, a detailed report of their financial transactions during the year preceding; and inquire what disposition must be made by you of this report.

Sections 2507, 2508 and 2509 of the General Code are as follows:

"Sec. 2507. On or before the third Monday in September of each year, the county commissioners shall make to the court of common pleas of the county a detailed report of their financial transactions during the year next preceding such date. Such report shall be in writing, and itemized as to amount, to whom paid, and for what purpose.

"Sec. 2508. Such report shall be published immediately in a compact form one time in two newspapers of different political parties, printed and of general circulation in such county. If two such papers are not so published, the publication shall be in one paper only. In addition to such publication, the report shall be published in the same manner in one newspaper, if there be such, printed in the county in the German language and having a bona fide general circulation of not less than six hundred among the inhabitants of such county speaking that language.

"Sec. 2509. Each county commissioner shall forfeit and pay into the county treasury five dollars for each day that the making and filing of such report is delayed after the third Monday in September."

These provisions make clear that it is mandatory upon the county commissioners to file such report with the court of common pleas, and to publish the same in accordance with section 2508, under penalty prescribed by section 2509.

Sections 2510 to 2516, General Code, as they existed prior to the enactment appearing on page 111 of 103 Ohio Laws, which repealed them, provided for the submission of such report to a committee for purposes of investigation. These sections were repealed, no doubt, for the reason that the auditor's office is now required, by statute, to make examination of the commissioners' accounts.

The sole purpose which can be ascribed to the provisions of the statute as they now appear, in the requirement of a report, would seem to be the presentation of the same to the public.

I nowhere find any provision whatsoever for disposition of the copy of the

report which is filed with the court of common pleas, under section 2507. The only possible conclusion, therefore, is that the court of common pleas has nothing whatever to do with such report other than to make the same part of its files.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1260.

DISPOSITION OF AN INTERCOUNTY BALANCE STANDING TO THE CREDIT OF A TOWNSHIP OR DISTRICT BOARD OF EDUCATION —COMPENSATION THAT MAY BE ALLOWED TOWNSHIP CLERK FOR TIME EXTENDED BY HIM WITH STATE EXAMINER—HOW COMPENSATION OF TREASURER IS COMPUTED.

1. *Where a balance standing to the credit of a township or school district in a depository or ordinary bank account, made in the name of such township or school district, exceeds the balance with which the clerk and the treasurer have charged the latter, and the same cannot be accounted for, the difference belongs to the township or board of education in the name of which the deposit has been made.*

2. *The township clerk may be allowed special compensation by the township trustees for time spent by him with the state examiners at the time of the examination of the accounts, providing a fixed annual salary has not been fixed for the clerk by the trustees to cover all miscellaneous township services, and provided the account so allowed does not cause the total compensation of the clerk from the township treasury to exceed* $150 *in any one year. A township treasurer whose lawful compensation is wholly on the fee basis may not be allowed any such additional compensation for like services.*

3. *In computing the compensation of the township treasurer, which is based upon moneys paid out by him on the allowance of the trustees, prior payments to him by way of partial compensation are not to be considered as "moneys paid out" upon which his percentage is computed.*

COLUMBUS, OHIO, November 27, 1914.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have acknowledged receipt of a letter, under date of October 23d, from Hon. Frederick W. Green, assistant prosecuting attorney, in which my opinion is requested upon the following questions:

"1. The township funds have been deposited in the name of the township and in accordance with the township depository law. The school funds have been deposited in the name of the board of education, but not in accordance with any depository provision, although disbursements are made in accordance with the provisions of section 4768, General Code. The state examiners have been unable to reconcile the amount on deposit with the balance disclosed by the accounts of the clerk and the treasurer, i. e., the actual bank balance exceeds the ledger balance. In such condition, is the excess on hand to be deemed a part of the public funds, or may the treasurer retain it as his own?

"2. By order of the township trustees, both the township clerk and

the township treasurer have been allowed special compensation for time spent by them with the state examiners at the time of the examination of their accounts. In case of the clerk, such compensation is in addition to the annual salary which has been fixed by the trustees and in the case of the treasurer, such compensation is in addition to the two per cent. allowed by statute. Is such special compensation allowable?

"3. In computing the compensation of the township treasurer, are prior payments to him by way of partial compensation to be considered as 'moneys paid out', and therefore included in the aggregate upon which to compute the two per cent. to be allowed to him?"

In stating your first question you do not make plain whether the discrepancy exists in the township account or in the account of the board of education or both. However, to my mind this is immaterial. Funds deposited in a bank in the name of a public subdivision, whether under the depository law or not together with all increments thereof, belong to the subdivision in the name of which they are deposited. Eshelby vs. Board of Education, 66 O. S. 71.

It might be that from error or otherwise the treasurer has deposited in the name of the subdivision, and with its money, some money which belongs to him; if so, he must suffer the consequences, at least, unless he can separate the amounts and identify that which is his by showing the source from which it came. The fund in the meantime is a trust fund and the doctrine applicable generally to the commingling of other funds with a trust fund applies.

In short, I am of the opinion that under no circumstances may a public treasurer retain as his own the difference between a bank balance in an account carried by him in the name of the subdivision which he serves and the account with which he stands charged as treasurer on the books of the subdivision; such difference belongs to the subdivision itself.

Your second question is answered by consideration of sections 3308 and 3318, General Code, which provide for the compensation of the township clerk and township treasurer respectively as follows:

"Sec. 3308. The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars.

"Sec. 3318. The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

The question with respect to the clerk under the foregoing section is not quite the same as that with respect to the treasurer. The two questions will, therefore, be considered separately.

Section 3309, supra, authorizes the trustees to allow reasonable compensation to the clerk for any township business the trustees require him to perform. The possible intent of this section is that an annual compensation shall be fixed to cover all possible services. I do not believe, however, that the statute can be construed so narrowly; and it is my opinion that the trustees may allow compensation to the clerk for particular services as well as fix an annual compensation for all services.

Much depends upon the manner and form of the allowance by the trustees to the clerk of an annual salary such as that described by you. If the allowance proves to be for all services in attending to miscellaneous township business and is made, so to speak, in advance or by standing order, then I would be of the opinion that it would not be lawful for the trustees to allow special compensation for any particular township business. If, however, the form of the order is such as to indicate clearly that the compensation allowed is intended to cover certain kinds of services only, or is not intended to cover services of the kind inquired about by you, then it would be lawful for the trustees to make an additional allowance for such services, provided they may be regarded as constituting "township business."

I am of the opinion that the assistance rendered to the state examiner is in the nature of "township business," and if the clerk were ordered by the trustees to render such assistance, he would be entitled to special compensation therefor, unless on the principles already stated all services of the kind were covered or provided for in a general allowance.

It is true that in a sense it is incumbent upon the clerk for his own protection to assist the examiner in going over his own books, which constitute practically the only books of the township; but if the examination is made, as it generally is, of all the offices of the township, its scope would be wider than a mere auditing of the clerk's books, and would affect the acts of the trustees, the treasurer and other township agents. So that if the trustees require the clerk to attend at the examination and assist the state examiner, I would be of the opinion that the services rendered by the clerk might be considered as township business for which special compensation might be allowed unless a general order provides compensation for this class of services.

Of course, if by your question you mean to intimate that the allowance made to the clerk for his services in question was in excess of the sum of $150.00 referred to in section 3308 the answer is obvious. In such event the allowance is illegal on that account alone.

As to the treasurer, it is clear that section 3318, which is the only one authorizing any compensation to be paid to the treasurer, does not permit special compensation of this sort. Debolt vs. Trustees, 7 O. S. 237.

I am of the opinion, in answer to your third question, that the treasurer may not be allowed fees under section 3318 upon moneys retained by himself or allowed to himself as fees thereunder. Such retention or allowance would not constitute the "paying out" of "moneys belonging to the township treasury" within the meaning of the section; but at all events the fees of a public officer are not to be computed upon his own fees as a general principle.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1261.

CONSTRUCTION OF SECTION 4782, GENERAL CODE, IN REFERENCE TO THE ESTABLISHMENT OF DEPOSITORIES FOR SCHOOL FUNDS OF SCHOOL DISTRICTS AND THE DISPENSING OF THE TREASURERS OF THE SCHOOL MONEYS.

Construction of section 4782, General Code, as amended, 104 O. L., 159, relative to the establishment of depositories for school funds of school districts, and the dispensing of the treasurers of the school moneys belonging to such school districts, when such depositories are established. Said section further provides that the clerk of the board of education of such district shall thereupon assume the duties of such treasurers.

If the board of education fails to establish a depository as required by said section 4782, supra, then an action of mandamus lies against such board to compel such board to comply with the provisions of said section, and any person interested in the schools may bring such action in the name of the state, as provided in sections 12296 and 12287, General Code.

COLUMBUS, OHIO, November 27, 1914.

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

GENTLEMEN:—Under date of July 10, 1914, your department submitted for an official opinion thereon, the following request:

> "If a board of education fails or refuses to pass a resolution dispensing with its treasurer, as required by section 4782, what action, if any, should be taken against it for failing or refusing to pass such resolution?
>
> "What official should bring the action, if one is brought?"

Under date of August 26, 1914, this department in an opinion rendered to Hon. Clare Caldwell, city solicitor, Niles, Ohio, construed said section 4782 of the General Code, as amended, 104 O. L., page 159. I am enclosing herewith a copy of that opinion as bearing somewhat upon the question which you submit in your inquiry for an opinion. The opinion holds that said section as so amended, makes it mandatory upon the respective boards of education of the state to dispense with their respective treasurer upon the creation of depositories for school funds. The original section, prior to its last amendment, employed the word "may" in place of the word "shall" and therefore was merely directory in its operation, and it was then optional with the board of education whether or not it should dispense with its treasurer of the school moneys belonging to its respective school district, when a depository was established for such school funds, as authorized by law. By virtue of said change, however, it is apparent that it was the legislative intention to make said section mandatory in case a board of education established a school depository for school funds. Said section 4782 as amended, 104 O. L., page 158, now reads:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, *shall* dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

Your question is, what action, if any, should be taken against a board of education for failing or refusing to pass the resolution provided for in said section. My answer is that an action for a writ of mandamus should be brought, compelling a board to comply with the provision contained in section 4782, supra. Section 12283 of the General Code, defines "mandamus" as follows:

> "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

You further ask what official should bring action, if any is brought. Replying thereto, section 12286 provides that the application for such writ of mandamus must be by petition in the name of the state, on the relation of the person applying, as follows:

> "The application for the writ must be by petition in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice."

Section 12287 of the General Code, provides that:

> "* * * It may issue on the information of the party beneficially interested."

From the foregoing quoted sections relating to the subject-matter of "mandamus," it is apparent that any person interested in the schools may bring such action in the name of the state, as provided in sections 12286 and 12287. While the city solicitor in city school districts, and the prosecuting attorney in all other school districts except city school districts, is made the legal adviser and counselor of all boards of education of their respective districts, nevertheless, I doubt whether it is the official duty of such solicitor or prosecuting attorney to bring actions in mandamus for the enforcement of the provisions contained in said section 4782, supra. It is, however, the duty of such legal advisers to advise their respective boards as to their respective duties under and by virtue of the provisions contained in said section 4782, supra. The duty of bringing such action does not devolve upon any official, for the reason that there is no statutory provision requiring any official to bring such action, unless such duty devolves upon the legal adviser of the board of education as above pointed out, in case the board of education refuses or fails to pass such resolution in accordance with said section 4782, supra, and the opinion rendered to Hon. Clare Caldwell, above referred to.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1262.

CONSTRUCTION OF SECTIONS 2746 AND 2749, GENERAL CODE, IN REFERENCE TO THE TIME WHEN TAXES SHALL BE COLLECTED BY THE COUNTY TREASURER.

The dates fixed by sections 2746 and 2749, General Code, for the receiving of taxes are directory.

COLUMBUS, OHIO, November 27, 1914.

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

GENTLEMEN:—I have your letter of October 21st, in which you state:

> "We are enclosing you herewith letter received from the treasurer of Stark county, Ohio, and we would respectfully ask your written opinion as to whether the dates fixed by section 2746 and section 2749, General Code, are mandatory or directory."

The letter enclosed and referred to, states that because of the delay in securing the tax duplicates, the treasurer will be unable to comply with the provisions of law in regard to making collection of taxes outside of his office, in the manner and within the time provided by sections 2746 and 2749, General Code, and asks whether, if collection under these sections was deferred until January, the bureau would criticise the delay of the treasurer.

The evident desire of the treasurer is to accommodate the taxpayers in the manner prescribed by law, and to know in advance of action whether he would be subject to future criticism. This is not only a proper position to take, but is highly commendable, as many officers might be inclined to place the burden upon those responsible for the delay and compel all payments to be made at the office of the treasurer, thus depriving a great many taxpayers the privilege of making payment of taxes at a much more convenient place, and saving them the trouble and expense of a trip to the office of the county treasurer.

Sections 2746 and 2749, General Code, read:

> "Sec. 2745. When, in his opinion, necessary, the county treasurer may open not to exceed one office in each township for the receiving of taxes. Such office shall be in a city or village in which is located a bank of deposit. The treasurer, his deputy or clerks, may attend at such office and receive taxes on any day or days prior to the twentieth day of June and the twentieth day of December of each year. They may remove from the county treasury to the place of collection records necessary for the receiving of taxes upon the day or days so fixed for that purpose.
>
> "Sec. 2749. On or before the tenth day of January and the tenth day of July each year, the county treasurer shall file with the county commissioners an itemized statement of expenses incurred in the receiving of taxes, as herein provided, as follows: Transportation to and from the place of collection, office rent, and publishing, printing and posting of notices. When allowed by the county commissioners, such expenses shall be paid from the county fund, but the total expense so paid in any year shall not exceed one hundred dollars."

These sections, together with sections 2747 and 2748, constitutes the act of March 12, 1909, 100 O. L., 76, and it was enacted for the benefit and accommoda-

tion of taxpayers; and the doing of the same was left to the opinion of the county treasurer as to its necessity. Opinion here is nothing more nor less than discretion, and no discretionary act is mandatory in any sense; the only part of these sections possessing mandatory features, is that prescribing the time within which the treasurer shall present his expense account, but as there are no extraneous conditions requiring these accounts to be presented on or before the tenth of January and July, nor any penalty attaching for non-performance, no sufficient reason can be found for holding this law to be mandatory.

To my mind, a law enacted for the accommodation of any portion of the citizens of a state, to be put in operation at the discretion of *an officer,* can never be construed as mandatory unless there are requirements of law necessitating the doing of the thing at the time or in the manner prescribed, in the absence of which such laws must be held permissive or directory.

Yours very truly,
TIMOTHY S. HUGAN,
Attorney General.

1263.

CLERK OF THE BOARD OF EDUCATION MAY NOT BE EMPLOYED AS TEACHER BY SUCH BOARD.

Construction of section 7705, General Code, as amended, 104 O. L., 144; also section 4747, General Code, as amended, 104 O. L., 139.

Said sections prohibit a clerk of the board of education from being employed as teacher by the board of which such teacher is the clerk.

COLUMBUS, OHIO, November 27, 1914.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Under date of August 8, 1914, you submitted to this department an inquiry for an official opinion thereon, which may be stated as follows:

> "Can a teacher or principal of a high school, as designated in section 7705 of the General Code, as amended volume 104 Ohio Laws, at page 144 thereof, be elected and act as clerk of the board of education, as provided for in section 4747 of the General Code, as amended in 104 O. L., at page 139?"

Replying to your inquiry, I wish to say that section 4747 of the General Code (104 O. L., page 139) provides as follows:

> "The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year, and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

Section 7705 of the General Code, as amended (104 O. L., page 144), provides as follows:

> "The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of

appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located, except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

None of the provisions contained in the foregoing sections, nor are there any other statutory provisions which expressly prohibit the clerk of the board of education from being employed as teacher by the board of which such teacher is the clerk. The positions are not inconsistent unless there is a conflict between the duties of the two positions. Under the provisions of section 7786 of the General Code, supra, it is made the duty of the clerk of the board of education to require teachers employed by the board, to make the reports therein enumerated, and to file the same with him before an order may be drawn by such clerk for the payment of the salaries of such teachers. The clerk is the sole judge of the performance of this duty and it would be within his power to draw an order for the payment of his own salary without having made such report, and thereby violate the plain provisions of said section 7786, supra.

I am, therefore, of the opinion that one person may not be clerk of the board and teacher at the same time.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1264.

REQUIREMENT OF AN INITIATIVE PETITION CALLING FOR AN ISSUANCE OF BONDS FOR HOSPITAL PURPOSES UNDER SECTION 3947, GENERAL CODE—TWO-THIRDS VOTE REQUIRED.

When an initiative petition is filed calling for the issuance of bonds for hospital purposes, and under section 3947, General Code, a two-thirds vote of the electors would have been required, the mere fact that section 4227-1, General Code, provides that an ordinance approved by a majority vote shall not be subject to the veto of the mayor, does not obviate the requirement of the two-thirds vote.

When the requisite number of electors of a municipality file an initiative petition calling for an election to determine whether bonds shall be issued for a statutory purpose, it is proper to submit the question of an issuance of such bonds directly to the people without the enactment of a preliminary resolution directing such submission. The filing of the initiative petition takes the place and stands in lieu of such resolution by counsel, and it is unnecessary for the electors to pass by the initiative such resolution submitting the ultimate question to them.

COLUMBUS, OHIO, November 28, 1914.

THE HON. C. A. LEIST, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—Under date of September 18, 1914, you enclose an initiative petition addressed to the city auditor of Circleville, Ohio, proposing to the electors of said city for approval or rejection a certain ordinance which is for the purpose of issuing bonds in the sum of $35,000.00 for the purpose of purchasing real estate and erecting thereon a municipal hospital.

You call attention to section 3939, General Code, providing for the issuance of bonds for hospital purposes, and section 3947 which requires a two-thirds vote

on a question of this character. You then ask whether said last named section or section 4227-1, providing for municipal initiative proceedings should obtain, the latter only requiring a majority vote.

You also state that you are uncertain whether the ordinance to be initiated should be one establishing a hospital or providing for the issuance of bonds.

Section 4227-1, as amended 104 O. L. 238, provides in substance that ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or delegated to municipal corporations by the general assembly, may be proposed by initiative petition which must contain the signatures of not less than ten per centum of the electors of the municipality. When a petition of this sort has been filed the city auditor is to certify it to the deputy state supervisors of elections, who shall submit the ordinance to the electors for approval or rejection. An ordinance approved by a majority voting thereon shall not be subject to the veto of the mayor.

Section 3947, as stated in your question, requires a two-thirds vote on the question of the issuance of bonds for purposes specified in section 3939 of the General Code, which latter includes within its provisions the erection of hospitals. It does not seem to me that it was the intent of the general assembly in enacting section 4227-1 to render inapplicable section 3947 providing for the two-thirds vote. That section is in the nature of a special provision governing a particular power vested in the municipalities, and should not be regarded as having been superseded by the grant of initiative power. The language that no ordinance or other measure proposed by initiative petition, and approved by a majority of the electors shall be subject to a veto of the mayor, was not, in my judgment, intended to repeal by implication those provisions of law requiring a two-thirds vote in specified cases.

The more important question involved in this case is whether the ordinance for the issuance of bonds may be submitted directly to the people, the question being whether section 4227-1 does not require that the initiative petition shall, in cases such as that submitted by you, merely embody a resolution declaring it necessary to issue and sell bonds, which would result in compelling the vote first on the passage of that resolution, which would merely put the question up to the people for another vote as to whether the bond issue should be passed.

You will see from this that if such view were adopted it would result in the electors of the municipality twice passing upon the question, the resolution requiring the majority vote and the bond issue requiring a two-thirds vote of the people.

Under section 1-f, article II, of the constitution the initiative powers are reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized to control by legislative action, such powers to be exercised in the manner provided by law. In carrying this mandate into execution the general assembly enacted section 4227-1, which has been hereinbefore explained. The power of issuing the bonds in question has been vested in council which, to my mind, is the same as a grant to the municipality as the council is the body through which it speaks in matters of this character. This is an absolute power in the municipality subject to the exception that the total indebtedness created in any fiscal year shall not exceed one per centum of the total value of all property as listed and assessed for taxation; the net indebtedness created or incurred by council under section 3939 shall never exceed four per centum of the total value of all the property in the municipality as listed and assessed for taxation. Under section 3942, however, in addition to the authority granted in section 3939, the council may issue and sell bonds for any of the purposes set forth in section 3939 upon the approval of the electors in the manner specified. From this it will be apparent that there can be no doubt that the issuance of bonds for the erection of a hospital was an absolute power vested in the municipality, subject, however, to the limitation that in certain contingencies a vote of the people must be required. The

sole object, however, of such limitation is to enable the electors of the municipality to determine whether they are willing to pay for the improvement—whether they deem it a proper and reasonable expenditure, and whether they are willing to accept the burden which it imposes upon them. When the authorization and its exception are read together it will be very apparent that under its powers of government the municipality could issue the bonds without a vote of the people unless those bonds so increased the indebtedness as to bring them within the exception requiring a vote of the people. When the power of initiative was vested in the people of the community it was the obvious intent of the general assembly and in conformity with the spirit of the constitution that they should have the right to legislate for themselves upon this question. When the petition, signed by the requisite number of electors, is filed, it is apparent that they demand that they be permitted to exercise the legislative powers reposed in them. While under the circumstances set out by you it is true that this power was eventually in them, provided the council submitted the matter, it cannot be said that it was not the intent of the constitution and the general assembly to enlarge those powers. The real power of government was to be placed in their hands.

Sections 3942-3946 were really in the nature of a referendum. The statute we here have under consideration provides for the initiative. In any event under sections 3942 et seq., the real power of determining whether the expenditures were to be made was in the people. To say that the enactment of the initiative would require the people to act in the place of council and vote upon the question as to whether or not they should have a proposal submitted to them for passage by their suffrage would be to reduce this measure to an absurdity, which I cannot believe the spirit or letter of the statute and constitution require. As the sole object, under the old law, of the passage of the resolution was to give the electors an opportunity of determining whether the expenditure should be made, I cannot conceive of any reason why this object has not been subserved when the people by an initiative petition are given the opportunity directly of voting upon the adoption of the ordinance. The whole question is presented to them in the ordinance calling for the issuance of bonds. If they adopted that by a two-thirds vote, it is very apparent that they would have voted to submit the question to themselves. The object to be attained by section 4227-1 is to give them an opportunity of expressing their will in regard to the governmental measure, and not to have them decide whether they want to vote on that particular proposition. The sole question in which they are interested is the issuance of the bonds; when they decide that this purpose and object is a desirable one and have by the requisite two-thirds enacted the bond ordinance, they have exercised a governmental power and their action should be sustained. The object of the initiative is to enable the people themselves to have the question presented to them. In this respect the requirement of the filing of a properly signed and verified petition is the sole statutory requisite to enable them to pass upon the ultimate question involved. The initiative supersedes and takes the place of the action of council in passing the preliminary resolution. In other words, the initiative petition is to be treated the same as the resolution of council referred to in section 3942, General Code. The sole object of that was to give the people the opportunity to vote. The aim, purport and scope of the initiative petition is the same, and consequently when the latter is invoked the former does not obtain. From this it follows that when the people petitioned for the issuance of bonds in the manner set out in your inquiry, they have, by such petition, obviated the necessity of any preliminary measure to bring the matter before them. Their call for a vote on the main question has been in lieu of a resolution enacted by themselves to submit the question to themselves.

To sum the whole matter up, it is my judgment that the electors of the municipality have the right by initiative petition to have the question of the issuance of

bonds directly submitted to them, and if two-thirds of those voting upon such question cast their ballots in favor of such issuance, the issuance is a valid enactment, and the bonds may issue.

While as we have herein said it would seem that the most expeditious and proper way of presenting to the electors a question of this character is in the manner outlined in your ordinance, nevertheless, I see no objection to the electors of the municipality initiating a resolution authorizing the submission to them of the ultimate question. If such course were adopted, the preliminary measure to submit the matter to the electors would only need be passed by a majority vote, and when the question was submitted to them for their final determination, then it would require a two-thirds vote wherever the statutes provide thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1265.

MEANING OF THE WORDS "WELL SECURED" AS USED IN SECTION 9735, GENERAL CODE, IN REFERENCE TO SECURITY FOR A DEBT.

The words "well secured" as used in section 9735, General Code, mean that the debt must be secured in such manner that in case the principal debtor should prove worthless, the entire debt could be collected from the security. In other words, that the security is such that one could say the debt would be paid without regard to the financial ability of the principal debtor.

COLUMBUS, OHIO, November 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Some time ago you made the following request for my opinion:

> "Please give us a legal construction of the words 'well secured' as found in section 9735, paragraph 4, House Bill No. 572."

The section to which you refer, as amended, is found in 103 O. L., 270, and is as follows:

> "The board of directors of such corporation may declare a dividend of so much of its net profits as they deem expedient. Before such dividend is declared, not less than one-tenth of the net profits of the company for the preceding half year, or for such period as is covered by the dividend, shall be carried to a surplus until fund amounts to twenty per cent. of its capital stock.
>
> "In order to ascertain the net profits from which such a dividend may be made, in the amount of profit and loss there shall be charged and deducted from the actual profits:
>
> "1. All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the corporation.
>
> "2. Interest paid, or then due, on debts which it owes.
>
> "3. All taxes due.
>
> "4. All losses sustained by the corporation. In computing its losses, debts owing to it which have become due and which are not in process of collection and on which interest for one year or more is due and unpaid,

unless same are well secured, and debts upon which judgment was recovered, but has been more than two years unsatisfied, and on which also for said period of two years, no interest was paid, unless same are well secured, shall be included."

The particular words to which you refer are found in paragraph 4, specifying what shall be deducted from actual profits in order to ascertain the net profits from which a dividend may be made by a corporation. I have been unable to find any definition by a court of these words, but they are words so well known, and so commonly used that it seems to me the only interpretation possible is what the words themselves import.

"Well," used as an adverb, means "in a good and proper manner, justly, suitably for a certain purpose."

The Century Dictionary, among other definitions gives, "In reality, fairly, practically, fully."

The word "secure" as defined by the Century Dictionary means in certain senses "to make sure of payment, as by bond, surety, etc., warrant or guarantee against loss, as to secure a debt by a mortgage; secure a creditor; firmly; in such manner as to prevent failure or accident."

"Well secured," therefore, means that the debt must be secured in such manner that in case the principal debtor should prove worthless, the entire debt can be collected from the security. In other words that the security is such that one could say the debt would be paid without regard to the financial ability of the principal debtor.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1266.

RIGHT OF A BUILDING AND LOAN ASSOCIATION TO REGULATE INITIATION FEES TO BE PAID BY PERSONS BECOMING BORROWING OR NON-BORROWING MEMBERS.

A building and loan association may provide that an initiation fee shall be paid by persons desiring to become borrowing members of such association without requiring such initiation fee from persons who desire to become non-borrowing members.

COLUMBUS, OHIO, November 28, 1914.

HON. JAMES A. DEVINE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your letter of November 10, 1914, you make the following request for my opinion thereon:

"A certain building and loan association provided in its by-laws that an initiation fee of $1.00 per share shall be paid by every member, borrowing as well as non-borrowing. Later this section was amended so as to provide that this initiation fee of $1.00 per share shall be paid by borrowing members only.

"It is claimed by a borrowing member that the association had no right to relieve the non-borrowing member of this payment and at the same time

continue to assess this charge against the borrowing members, his contention being that both borrowing and non-borrowing members must be treated alike."

The powers of building and loan associations are defined in sections 9648 et seq., of the General Code. I find no section bearing directly upon the matter of initiation fees.

Sections 9649 and 9650, of the General Code, are as follows:

"Sec. 9649. To issue stock to members on such terms and conditions as the constitution and by-laws provide. Each member may vote his stock in whole or fractional shares, as the constitution and by-laws provide, but no person shall vote more than twenty shares in any such corporation in his own right, nor have the right to cumulate his votes. But every subscriber for stock in accordance with the constitution of the association, may vote the amount of stock so subscribed for, in no event to exceed twenty shares.

"Sec. 9650. To assess and collect from members and others, such dues, fines, interest and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premium or other assessments shall not be deemed usury, although in excess of the legal rate of interest."

I think under section 9649 building and loan associations would have the power to make a distinction in the matter of initiation fees as between borrowing and non-borrowing members. These two classes of members in a building and loan association are distinct and well known; and so far as the requirement is general as to the class to which it applies, I know of nothing to prevent it.

A borrowing member is not allowed a credit on his loan for the initiation fee he pays; nor would a non-borrowing member be given credit for the same upon his stock payment. As was stated in Meroney vs. Atlanta, etc., Ass'n., 116 N. C., 882:

"These entrance fees are more properly applicable to the discharge of the ordinary expenses of the association, and are not properly to be considered an accumulation of money to be afterwards allowed to the members on any future loan."

It may be that the association considers the privileges granted to a borrowing member, and therefore an initiation fee might be exacted on this ground. This is merely a supposition to illustrate that it is perfectly proper to make a distinction between the classes of members in an association if any reasonable ground therefor exists. In addition, the payment of the initiation fee is optional, that is, a person is not compelled to borrow from an association which has this requirement, but if he does desire to become a member, he cannot complain of the exaction so long as the same exaction is made from all persons in his situation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1267.

STATE INSURANCE FUND—RIGHT OF THE TREASURER OF STATE TO PAY DUPLICATE VOUCHERS ISSUED BY THE INDUSTRIAL COMMISSION.

Since the state insurance fund is to be disbursed by the treasurer of state as its custodian, under rules adopted by the Industrial Commission of Ohio, the industrial commission may adopt a rule that duplicate vouchers may be issued in place of originals lost or destroyed, and the treasurer of state may pay such duplicate voucher.

COLUMBUS, OHIO, November 28, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of May 1st, 1914, you submitted to this department a request for opinion as follows:

> "This department, in payment of awards, issues a warrant (similar to a check) drawn directly against the state insurance fund.
>
> "A number of such warrants have been lost in transitu, so that the claimant in a number of instances is without his compensation. For a while the department issued duplicate warrants, first giving notice to the treasurer of state not to honor the original. The treasurer of state for some time honored such duplicate warrants, but now refuses to do so.
>
> "Is the treasurer of state justified in thus refusing payment of duplicate warrants?"

Under date of January 15, 1914, this department rendered an opinion to the treasurer of state to the effect that there is nothing in the statutes providing for the issuance of duplicate warrants and that, therefore, the payment thereof by the treasurer of state would be at his own risk. The request for such opinion was submitted to this department by the treasurer of state, and he did not at that time advise us of any rule or regulation adopted by your board covering the subject of disbursement of the state insurance fund. However, I am now informed that before any duplicate vouchers were issued by your board an entry relative to the same was made by your board and a copy thereof sent to the treasurer of state.

Section 8 of the act to further define the powers of the state liability board of awards (103 O. L., 75), (the duties of which liability board of awards are under statute being administered by your commission) contains the following language:

> "The state liability board of awards shall adopt rules and regulations with respect to the collection, maintenance and *disbursement* of the state insurance fund."

And under section 9 of said act the treasurer of state is made the custodian of said fund "and all disbursements therefrom shall be paid by him upon vouchers *authorized by the state liability board of awards.*"

From the above it can readily be seen that it was the intention of the legislature to make the treasurer of state the custodian of the fund, but that as such custodian he was to be guided in the disbursement thereof by the rules and regulations of the industrial commission.

Section 25 of said act (103 O. L., 75) provides:

> "The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premium applicable to the classes to which they belong, who have been injured in the course of their employment."

It was, therefore, the intention of the legislature that the injured employes who were entitled to share in such fund should be paid at all events as soon as the industrial commission had determined the amount due, and, therefore, placed in the power of said commission the right to determine for itself the method of disbursement. The treasurer of state, therefore, is not governed by the statute rules of law applicable to his duty as state treasurer, but is governed by the rules as promulgated by the industrial commission, he being by law constituted the custodian of the fund. It is to be understood that the state insurance fund is not in any sense a part of the state funds, but solely a trust fund administered by the state on behalf of the injured and dependents of killed employes.

In view of the fact, therefore, that the treasurer of state is solely the custodian of such funds under rules and regulations adopted by your board, and in view of the fact that your board by proper entry authorize the issuance of duplicate vouchers to replace those which had been lost or destroyed, I am of the opinion that the treasurer of state in paying such duplicate vouchers (as termed by the statute, but which in law amount to warrants) should honor the same, provided, of course, that before presentation to him of said duplicates the originals have not as yet been presented and paid, furthermore, that after the board has notified him of the issuance of the duplicate the original should not be paid at all.

I understand that the board has since adopted a rule that all warrants issued on the state insurance fund bear on the face thereof that the same are void after a certain definite time, and that there are but few duplicate vouchers now outstanding by reason of the foregoing stated rule. That being the case, I am of the opinion that the treasurer of state should honor the duplicate vouchers issued by the industrial commission on the state insurance fund.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

1268.

THE OFFICIAL YEAR OF THE STATE FIRE MARSHAL.

The official year of the state fire marshal closed on November 15th, 1914.

COLUMBUS, OHIO, November 28, 1914.

HON. E. R. DEFENBAUGH, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—You have inquired by verbal request when the fiscal year for the state fire marshal closes.

Section 260, General Code, prior to amendment (103 Ohio Laws, 662) provides in part as follows:

> "In all the departments, institutions, public works and buildings of the state, the fiscal year shall close on the fifteenth day of November of each year, and all annual reports from such departments and institutions shall be made with reference to that date."

Section 843, General Code, provides as follows:

"The state fire marshal shall make an annual report to the governor, containing a detailed statement of his official action and the transactions of his department."

The law provides that the governor shall appoint a state fire marshal, who shall hold his office for a term of two years and until his successor is appointed and qualified, but has not specified when the term of such state fire marshal shall begin. The state fire marshal's department is, as I construe it, fully within the term of section 260, General Code, supra, and, therefore, it is clear that the fiscal year is closed on the fifteenth day of November of this year, and the report required under section 843, General Code, supra, should be made as of that date.

I refer in this opinion to section 260, General Code, prior to amendment in 103 Ohio Laws, 662, for the reason that it is provided in said act that such amendment shall take effect and be in force on and after June 30, 1915. I therefore am of the opinion that you did not intend to inquire relative to the amended section 260, General Code.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

1269.

APPROPRIATION MADE FROM SUNDRY APPROPRIATION BILL TO THE CITY OF COLUMBUS FOR THE PAVING AND REPAVING BEFORE A STATE PROPERTY—WHEN SAME SHALL BE PAID.

The appropriation made in the sundry appropriation bill to the city of Columbus for paving and repaving before state property is not a lump sum appropriation, nor the setting aside of a lump sum out of which the state's proportionate share of the improvement is to be paid. Therefore, the same should not be paid until it is determined what the state's share of the total improvement is, such determination to be made in the same manner as the amount to be paid by the abutting property owners is determined; when so determined, such amount should be paid.

COLUMBUS, OHIO, November 28, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of November 18th you state:

"On page 8 of the sundry appropriation bill passed by the general assembly February 16, 1914, appears the following appropriation:

"CITY OF COLUMBUS.

"Repaving of High street from Broad to State in front of state ground ---------- $5,000 00
"Paving Eleventh avenue along State Fair Grounds---------- 9,500 00
"Cement walks on Eleventh avenue along State Fair Grounds--- 2,500 00

"The city of Columbus has not gone forward with this improvement as contemplated by this appropriation, on Eleventh avenue, by reason of the

fact that the street railway company cannot furnish the necessary funds to do its share of the work.

"It is likely that the unpaid appropriations on February 15, 1916, will be repealed and lapsed into the general revenue fund before the city can certify vouchers on this appropriation. Therefore, I desire an opinion from you as to whether or not it would be the duty of the state auditor to issue vouchers to the city of Columbus for the amounts specified above, before these appropriations lapse."

The appropriation which is made for the city of Columbus as set forth in your letter does not contain any restriction as to the method of paying the same further than is found on page 221, 104 Ohio Laws, at the end of such act. The language therein reads:

"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 be correct and just."

Under familiar rules of law it has been decided that there is no authority to make a valid assessment against property belonging to the state, or at least that there is no method of payment other than by appeal to the legislature.

Such being the case it is apparent that the legislature has decided to recognize the moral obligation of the state to bear its proportionate share of the cost of the improvements referred to, and for that purpose has set aside the amounts as specified heretofore. However, the moneys so appropriated are to be paid out in accordance with the last clause of said appropriation act, to wit: Upon approval of the special auditing committee which is authorized and directed to make careful inquiry as to the validity of the claim and to pay only so much as may be found to be correct and just. The legislature having determined, as it appears to me, that the state should stand its proportionate share of the assessment upon the improvements specified it should only pay the same after the amount thereof has been determined in the same manner as the amounts to be paid by other abutting property owners are determined and that as soon as the same is so determined the claim should be presented to the special auditing committee, which committee should go over carefully and allow the same. It does not appear to me that it was the intention of the legislature that the amounts set opposite the various items hereinbefore referred to were to be paid at all events even though said amounts should exceed the proportionate share of the improvement to be borne by the state, but the same should be paid as soon as it is definitely ascertained what the various amounts are.

Since the amounts so appropriated are contained in a sundry appropriation bill, I do not believe that the legislature will undertake to repeal such a bill, and if not repealed the amounts so appropriated will, of course, be available for two years.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

1270.

ABSTRACT OF TITLE, CITY OF ATHENS TO STATE OF OHIO, ARMORY SITE.

COLUMBUS, OHIO, November 28, 1914.

COL. BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 16th, enclosing for my consideration and approval an abstract of the title to, and deed from the city of Athens to the state of Ohio for, certain real estate, which is to be donated to the state as a site for an armory, and described as follows, to wit:

> "Beginning on the south line of in-lot No. 230 at a point 25 feet east of the southwest corner of said in-lot No. 230; thence east along the south line of in-lots Nos. 230, 229 and 228, one hundred and twenty-five (125) feet; thence north parallel with the east side of in-lot No. 228, one hundred and fifty (150) feet; thence west parallel with the north boundary of in-lots Nos. 228, 229 and 230, one hundred and twenty-five (125) feet; thence south parallel with the west side of in-lot No. 230 to the place of beginning, the said above described premises being a portion of in-lots Nos. 228, 229 and 230 in said city of Athens."

The objections to the title as disclosed by the aforesaid documents are the following:

The deed from the Athens Brick Company is made subject to the payment of Ohio University rents, the lien of which has not been extinguished. I understand the Athens Brick Company has paid to the treasurer of the university the accrued rents, together with interest, and a deed from the state of Ohio to said company for the above described real estate is in course of preparation in the office of the auditor of state. When this deed is executed and delivered to the brick company the latter should make another warranty deed to the city of Athens, free from the incumbrance of the university rents. This deed should be authorized by resolution of both the stockholders and directors of the corporation.

After the city of Athens receives a proper deed from the brick company it should execute a deed to the state of Ohio. While the present deed to the state is in form a fee simple, duly signed, acknowledged and witnessed, the city at the time of its execution did not have a fee simple title, hence, had no power to make such deed. In order to remove all doubt of the sufficiency of the title to be acquired by the state, I have made the suggestion that another deed be procured from the city of Athens to the state.

The certificate of the abstractor is incomplete, in that it does not show whether an examination has been made of the records of the courts of common pleas and appeals of Athens county, Ohio, nor of the United States district court, to determine the pendency of suits, judgments or liens therein against the city of Athens or the Athens Brick Company. However, if it is inconvenient for him to come to Columbus and make an examination of the records of the United States court, a certificate of the clerk of said court, covering the pendency of suits, judgments and bankruptcy proceedings therein, should be attached to the abstract.

The taxes due and payable December, 1914, amount not stated, are listed as a lien against the property. The second installment of taxes, due June, 1915, is also a lien. Both installments should be paid before you accept a deed for this property, and the treasurer's report should be attached to the abstract.

When the above suggestions are complied with I will pass upon the abstract and deed further.

I have forwarded the abstract and deed direct to Hon, S. M. Johnson, Athens. Ohio, for correction in the several respects above indicated.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1271.

CLERK ACTING AS TREASURER BOARD OF EDUCATION—THE STATUS OF TEACHERS OF RURAL SCHOOLS HIRED BEFORE SECTION 7705, GENERAL CODE, AMENDED, WENT INTO EFFECT.

1. *The clerk of the board of education when acting as treasurer of said board because of the dispensing of the latter, shall keep two sets of books, one as clerk, and one as treasurer.*

2. *Teachers who were hired by township boards of education before the new law, section 7705, General Code, as amended, went into effect, for a term which extends beyond such time that said section went into effect, were legally hired, and the rural board of education is now bound to respect such contracts.*

COLUMBUS, OHIO, December 2, 1914.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under date of June 19, 1914, you submitted a request for an official opinion upon the following questions:

> "First. Is the clerk-treasurer of the board of education entitled to any additional compensation for his services as treasurer?
>
> "Second. Should clerk-treasurer keep two sets of books, one as clerk and one as treasurer?
>
> "Third. Has the township board of education any authority to hire teachers? Assuming that they have hired teachers before the new law went into effect, is the county board of education now bound to respect that contract?"

In answer to your first question, permit me to say that I have just rendered an opinion to Hon. B. F. Enos, prosecuting attorney of Guernsey county, Cambridge, Ohio, under date of September 12, 1914, which fully answers your first question, and I am accordingly enclosing a copy of said opinion herewith.

Answering your second question, section 4764, of the General Code, provides that each school district treasurer shall execute a bond with sufficient surety, for a sum not less than the amount of school funds that may come into his hands, etc., before entering upon the duties of his office, as follows:

> "Thereafter such treasurer may be required to give additional sureties on his accepted bond, or to execute a new bond with sufficient sureties to the approval of the board of education when such board deems it necessary. If he fails for ten days after service of notice in writing of such requisition, to give such bond or additional sureties as so required, the office shall be declared vacant and filled as in other cases."

When a depository is established, then by virtue thereof the treasurer of the school moneys is dispensed with under secton 4783 and the clerk of the board of education of the district shall perform the duties of the treasurer, as follows:

> "When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

Section 4773, of the General Code provides that the treasurer of the school funds at the expiration of his term of office, shall deliver to his successor in office, all books, papers, money and other property in his hands belonging to the district, as follows:

> "At the expiration of his term of service, each treasurer shall deliver to his successor in office, all books, papers, money and other property in his hands belonging to the district, and take duplicate receipts of his successor therefor. One of these he shall deposit with the clerk of the board of education within three days thereafter."

The fact that the last quoted section carries the provision that such dispensed treasurer shall deliver to his successor, which is the clerk, all books, papers, money and other property, etc., leads me to the conclusion therefore, that the clerk when so acting as treasurer because of the dispensing of the latter, shall keep two sets of books, one as clerk and one as treasurer.

Answering your third question, section 7705, of the General Code, as amended 104 O. L., p. 144, provides as follows:

> "The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

The only material change made in the amendment of said section was to include a provision to the effect that the local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located, except by majority vote, etc. The original section, giving the local board of education of each village, township or special district the power and authority to employ teachers in the public schools of such district, the relationship between a board of education and its teachers being that of a contractual nature, to wit, employer and employe, therefore such contracts of employment come within the purview of section 28 of article II of the constitution of Ohio, which provides as follows:

> "The general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts."

I note that your third question refers to the county board of education, and I assume that you mean to say the rural board of education, so that your question would read as follows:

> "Has the township board of education any authority to hire teachers? Assuming that they have hired teachers before the new law went into effect, is the rural board of education now bound to respect that contract?"

Inasmuch as I can find no statutory provision which anywhere refers to the county board of education having any control over or anything to do with the hiring of teachers in township or rural districts, I therefore make the above assumption that you meant rural in place of county board of education. As based upon said assumption and for the foregoing reasons, it is my opinion that teachers who were hired by township boards of education before the new law, to wit, section 7705 as amended, went into effect, for a term which extends beyond such time that said section went into effect, were legally hired and the rural board of education is now bound to respect such contracts. In other words, teachers cannot be employed under said section 7705 until the terms of such before mentioned teachers are terminated under the contracts made prior to the date of the going into effect of the new school code. Township boards of education still retain their authority to hire teachers, subject to the limitation set forth in section 7705, as amended, supra.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1272.

COUNTY BOARD OF EDUCATION MAY USE ITS DISCRETION IN DETERMINING WHETHER OR NOT IT IS NECESSARY IN CHANGING RURAL SCHOOL DISTRICTS TO HAVE THE COUNTY SURVEYOR CHANGE THE LINES.

Under the provisions of section 4736, General Code, it is discretionary with the county board of education to determine whether or not there is any real necessity for calling upon the country surveyor for his aid in changing rural district school lines and transferring territory from one rural or village school district to another. If the county board determines that it is necessary to call in the assistance of a surveyor, then such board must call the county surveyor, and it is mandatory that the county surveyor shall make a survey for such board and prepare a map so designating the changes made in the changing of rural district lines and in the transferring of territory from one rural or village school district to another upon receiving a formal request to do so from such board.

COLUMBUS, OHIO, December 2, 1914.

HON. CARL SCHULER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Under date of December 1, 1914, you submitted to this department for an official opinion thereon, the following request:

> "According to the provisions in section 4736, General Code, must a survey be made by the county board through the county surveyor before

districts can be thus rearranged or territory transferred? In other words, is the statute on this subject directory or mandatory?"

Relative to the matter about which you inquire, I desire to say that section 4736, of the General Code, as amended 104 O. L., page 138, specifies the powers and duties of county boards of education, as follows:

> "The county board of education *shall as soon as possible after organizing make a survey of its district.* The board *shall arrange the schools according to topography and population* in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting *to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor.* In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. *In changing boundary lines and other work of a like nature the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board.*"

The first sentence of said section provides in effect that the county board of education shall, as soon as possible after organizing, make a survey of its district. The term "survey" as employed in this part of the section, means a general survey or examination of the districts making up the county school district, by the county board of education, and does not mean a technical detailed survey of the entire district in the sense of a survey as made by a surveyor. However, I assume that your question is in regard to the proposition of whether or not a survey must be made by the county board through the county surveyor, before the county school boards can change district school lines and transfer territory from one rural or village school district to another. Said section contains a provision in the third sentence thereof, to the effect that the county board shall have power by resolution, at any regular or special meeting, to change school district lines or transfer territory from one rural or village school district to another. A map designating such change shall be entered on the records of the boards and a copy of the resolution and map shall be filed with the county auditor.

It further provides in changing boundary lines, that the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation.

The power of determining property valuation is somewhat discretionary on the part of the board, but must be made as nearly equal as possible. The act of changing school district lines and transferring territory from one district to another, may be done by resolution on the part of the board of education. However, a map designating such changes shall be entered on the records of the board and a copy of such resolution and map filed with the county auditor. These are all acts that may be done by the board of education, as pointed out by the section above quoted, to wit, 4736 of the General Code.

The only limitation in said section governing the above mentioned powers of such boards is contained in the last sentence of said section, which provides in

effect that such county board of education in changing boundary lines and other work of a like nature, shall ask the assistance of the county surveyor, and the latter is thereby required to give the services of his office *at the formal request of the county board.*

The language employed in the last sentence of said section, seems to indicate that it is somewhat within the discretion of such county boards as to whether or not they shall call upon the county surveyor for his assistance by formally requesting the same. That is to say, if such county board resolves to change school district lines and transfer territory as provided in said section, and can do so without having to formally request the assistance of the county surveyor, then the mere act of the adoption of such resolution to so change district boundary lines and transfer territory from one district to another, makes effective such change provided a map designating such change is entered on the records of the board and a copy of the resolution and map are filed with the county auditor. However, if such board of education, after exercising its reasonable discretion, comes to the conclusion that it is necessary to have the assistance of the county surveyor in making a survey, before changing school district lines or transferring territory, and preparing a map designating such change or transfer, then it can call for the assistance of the county surveyor by formally requesting the same. Up to the point of determining whether or not there is real necessity for calling upon the county surveyor for his aid in changing rural district school lines, and transferring territory from one rural or village school district to another, I would say that section 4736 is directory rather than mandatory, and the board may forego making any formal request upon the county surveyor for his assistance. On the other hand, if such county board determines that it is necessary to call in the assistance of a surveyor, such board must call the county surveyor, and I would say as my legal view of the matter, that the section is mandatory in the requirement that the county surveyor shall make a survey for such board and prepare a map so designating the changes made in the changing of rural district lines and in the transferring of territory from one rural or village school district to another, upon receiving a formal request to do so from such board.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1273.

NO STATUTORY PROVISION FOR DISSOLUTION OF BOYS' HIGH SCHOOL DISTRICTS.

There is no provision of statute whereby joint high school districts may be dissolved.

COLUMBUS, OHIO, December 3, 1914.

HON. J. J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Under date of September 24, 1914, you request my opinion as follows:

> "The Auglaize township school district, the school district of the village of Harrod, and the special school district of Westminster, Ohio, four years ago formed a joint high school. This summer, by a vote of the people, the village school district of Harrod, Ohio, was dissolved and became a part of the Auglaize township school district. The Auglaize township school district now desires to do away with the joint high school; whereas, the special school district of Westminster desires that the same be retained as heretofore. Kindly advise me how this school district can be dissolved. If a vote were taken by the special school district of Westminster and the township school district of Auglaize, the Auglaize township school district would be unanimous for doing away with the joint high school and the Westminster school district would be unanimous for retention of the high school. I am unable, in our General Code, to find any provision for the dissolution of a joint high school. This high school was formed under the provisions of section 7669 of the General Code. I have examined this matter very carefully and am unable to find any section of the General Code or any decision which decides this proposition."

Section 7669, General Code, mentioned by you, provides:

> "The boards of education of two or more adjoining township school districts, or of a township district and of a village or special district situated partially or wholly within the township, or of any two or more of such school districts, by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

While the statute provides a clear method whereby adjoining rural school districts or a rural and a village school district may unite for high school purposes, there is no provision whereby such districts can be dissolved after forming such union.

There being no statutory provision for this purpose, the only thing that can be done is to look to the legislature for a legislative enactment providing for such dissolution, such as is provided for the decentralization of district schools in centralized township districts.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1274.

RIGHT OF THE DISTRICT TAX ASSESSOR TO RECEIVE PAY, AS PROPRIETOR OF A NEWSPAPER, FOR PUBLICATION UNDER SECTION 6252, GENERAL CODE.

There is no statute prohibiting a district tax assessor as a proprietor of a newspaper accepting and receiving pay for publication under section 6252, General Code.

COLUMBUS, OHIO, December 3, 1914.

HON. T. M. POTTER, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I have your letter of October 7, 1914, as follows:

> "Section 6252 of the General Code provides, in reference to the publication of the sheriff's proclamation of elections, that the proclamation shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat.
>
> "We desire your information as to the following matter: Two newspapers of opposite politics are published at New Lexington, the county seat of Perry county. The proprietor of one of the newspapers is now the deputy district tax assessor of Perry county, Ohio, holding said position by appointment under the act creating the same.
>
> "The question is, can the district tax assessor, as proprietor of said newspaper, accept said publication and receive his pay for it?"

Sections 12910 and 12911 of the General Code, provides that any person holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance, for the use of the county, township, city, village, board of education or public institution, with which he is or is not connected, shall be imprisoned in the penitentiary not less than one nor more than ten years.

These sections dealing only with contracts for the purchase of property, supplies and fire insurance, are clearly without application in this case.

Section 12912 forbidding certain officials to be interested in contracts, applies only to officers of a municipal corporation, members of council or township trustees, so that section too fails of application in the case submitted by you.

A careful examination of the statutes fails to reveal any other section or sections applying to the situation presented, and I am, therefore, of the opinion that the district tax assessor, as proprietor of a newspaper, can accept legal advertising and receive pay for the same.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1275.

TRANSCRIPT OF THE PROCEEDINGS OF THE COUNTY COMMISSIONERS OF COLUMBIANA COUNTY IN THE MATTER OF BOND ISSUE FOR THE IMPROVEMENT OF INTERCOUNTY HIGHWAYS.

COLUMBUS, OHIO, December 3, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the request of the commission I have examined the transcript of the proceedings of the county commissioners of Columbiana county and the township trustees of Perry township in said county in the matter of the issuance of bonds of Columbiana county in the sum of $3,900.00 for the purpose of providing funds for the improvement of intercounty highway No. 86 in said township and county.

I hereby certify that I am of the opinion that the proceedings taken by the board of county commissioners of Columbiana county and the said board of township trustees of Perry township in said county are in accordance with the provisions of the statutes of Ohio in such case made and provided, and that said bonds have been issued in accordance with the provisions of law and constitute a good and legal obligation against the county of Columbiana in accordance with the terms specified therein.

The bonds themselves have been submitted to me and this opinion constitutes an approval of the form of the bonds as well as of the proceedings which have been taken in the matter.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1276.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—AUTHORITY OF THE GOVERNOR AND THE DIRECTING COMMISSIONER TO TAKE FULL CHARGE OF THE OHIO EXHIBIT AT THIS EXPOSITION.

Under the provisions of an act of the general assembly, dated May 31, 1911, the governor and the directing commissioner of the Panama-Pacific international exposition are the sole and exclusive judges of the manner and method of exhibiting the live stock, agricultural products, resources and opportunities of the state at the exposition, and they may in their discretion install such exhibits as they deem proper. The matter of adequately representing the state at the exposition rests entirely with them.

COLUMBUS, OHIO, December 3, 1914.

THE HON. D. B. TORPY, *Directing Commissioner, the Panama-Pacific International Exposition, Columbus, Ohio.*

DEAR SIR:—Under date of December 3, 1914, you submit the following:

> "At a meeting of the Ohio commission to the Panama-Pacific international exposition, held at the office of Governor James M. Cox, December 2, 1914, the writer was requested to ask for your written opinion as to the proper interpretation of the following statute passed by the last general assembly of the state of Ohio at its extraordinary session—being part of a bill to make sundry appropriations:

"'Panama-Pacific international exposition:

"'Exposition commissioner for the purpose of installing, maintaining and exhibiting the live stock, agricultural products, resources and opportunities of this state at the Panama-Pacific international exposition in San Francisco in the year 1915.....$25,000.00.'"

In order that the question involved may be clearly understood, it will be well briefly to refer to the history of the legislation creating the commission to have charge of the installation and maintenance of an exhibit of the products and resources of the state of Ohio at the Panama-Pacific international exposition.

On May 31, 1911, the general assembly passed an act for this purpose providing that the governor of the state was appointed a commissioner to be known as the Panama-Pacific international exposition commissioner, for the purpose of installing, maintaining and exhibiting the products and resources of this state at the international exposition to be held in San Francisco in 1915. This act contains the following language:

"as such commissioner he shall have full and exclusive charge and control of said exhibit, and the maintenance and installation thereof, with power to appoint and employ deputy commissioners, and all other persons necessary for the purpose of carrying out the provisions of this act, upon such terms and salaries as he shall deem to be fair and reasonable."

In the same act an appropriation was made for the purpose of paying the expenses of the commissioner.

On January 28, 1914, another act was passed to make further provision for the purposes outlined in the first statute. This may be found in 104 O. L. 4. After reciting that the governor had been authorized to act as Panama-Pacific exposition commissioner for the purposes named, with power to have full and exclusive charge and control of the exhibit and its maintenance and installation and the power to appoint deputy commissioners, and that a board of deputy commissioners and a directing commissioner had been so appointed, it provided that the governor was authorized and empowered to appoint a special commissioner as directing commissioner with such exclusive powers and duties as the governor might confer upon him. The sum of $100,000.00 was appropriated in this act for the purpose of erecting a building. The board of deputy commissioners and the directing commissioner were required to make a report of their proceedings and expenditures to the governor monthly, to be by him transmitted to the general assembly with such suggestions as he might deem important regarding the provisions for complete and creditable representation of the state at such international exposition. At the same session of the general assembly an appropriation was made in the language specified in your question.

It seems clear to me from a reading of these statutes that the governor as exposition commissioner was to have the sole and exclusive charge and control of the exhibit and its installation; and that he was later vested with authority to appoint a directing commissioner upon whom he might confer such powers and duties as might be deemed expedient and proper by the governor.

Under language such as this, it seems to me that the governor and the directing commissioner under him are the sole and exclusive judges of the manner and method of exhibiting the live stock, agricultural products, resources and opportunities of the state at the Panama-Pacific international exposition, and that they may, in their discretion, install such exhibits as they deem proper. In other words, they are vested with the discretionary power of determining what is best

to exhibiting resources of the state of Ohio, and their judgment in matters of this kind is absolutely final. What they deem proper to exhibit should be exhibited and what they think improper and inadvisable to be shown cannot be made part of Ohio's exhibit. The matter of adequately representing the state at the exposition rests entirely in them.

Trusting that this fully answers your inquiry, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1277.

LIABILITY OF COUNTIES IN CASE OF SUIT BROUGHT AGAINST THE COUNTY COMMISSIONERS IN THEIR INDIVIDUAL CAPACITY FOR DAMAGES.

A county is not liable for the costs in suits brought against county commissioners in their individual capacity for damages, nor for the fees of attorneys employed by the commissioners to defend them in such suits. Claims of this character cannot be paid from the county treasury.

COLUMBUS, OHIO, December 4, 1914.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your letter of October 3d, which reads as follows:

> "Sometime ago suit was instituted by David E. Griffith, former probate judge of this county, against each one of our commissioners individually for damages which Judge Griffith claimed on account of the commissioners refusing to permit Judge Griffith to issue from his office certain documents in connection with marriage licenses for which he was charging a personal fee. The commissioners in this connection acted as they supposed within their power as commissioners and these suits have recently been withdrawn it appears at defendants' costs. The costs in each action amount to about $12.75. At the time of preparing for a defense in these cases, there being three of them, the commissioners felt, owing to the local situation, that it would be better to employ outside counsel rather than have the prosecuting attorney handle the matter, which was done, this incurring attorneys' fees. As I understand the matter no resolution was adopted by the commission concerning any part of this transaction in view of the fact that the action was taken on or about the time that two members of the old commission retired. The commissioners feel that under the circumstances they ought not to be required to pay these charges from their personal funds and believe they should be paid by the county.
>
> "Kindly consider this question and advise what position I may consistently take on this question in view of the statutes governing claims upon the county."

Under section 2408 of the General Code county commissioners are liable in their official capacity for damages received by reason of their negligence or carelessness in not keeping any road or bridge established by them in proper repair. It has been held by our supreme court that the liability against county commissioners in their official capacity, for damages, cannot be extended beyond the plain terms of

the statute creating it. See Ebert vs. Commissioners, 75 O. S. 474; and Commissioners vs. Storage Company, 75 O. S. 244. In view of these holdings the county commissioners would not be liable in their official capacity in damages on account of their action in refusing to permit the probate judge to issue certain documents from his office; and it follows from this that the county is not liable for the payment of these costs; and the same should not be paid from the county treasury.

The prosecuting attorney is by statute constituted the legal adviser of county officers. If it is necessary to employ additional counsel to assist the prosecuting attorney this can be done under the provisions of section 2414, General Code, by the county commissioners upon the written request of the prosecuting attorney. The services of counsel so employed are limited to assisting "the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

Since the suits in question were brought against the commissioners in their individual capacity, and not in their official capacity, they would not be authorized to pay the fees of the attorneys employed to defend them from the county treasury, even though the prosecuting attorney had made a written request for such assistance, and a resolution providing for the employment of counsel had been duly passed by the county commissioners.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1278.

DIRECTOR OF PUBLIC SERVICE CANNOT DELEGATE POWER OF EXECUTING CONTRACTS TO HIS SECRETARY.

The director of public service cannot delegate to his secretary the power of executing contracts because the statutes expressly stipulate that he shall execute them, but if he adopts a signature and directs his secretary to affix it to vouchers or other official papers, which do not bind the municipal corporation, the same is legal.

COLUMBUS, OHIO, December 8, 1914.

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

GENTLEMEN:—I am in receipt of your communication of September 1st, wherein you ask the following question:

> "May the director of service of a city authorize his secretary to attach the signature of the director to contracts, vouchers, and other official papers, or must the official signature of said director be attached by him in order to make legal his allowance or approval of bills and contracts?"

In reply thereto I beg to say that section 4323, General Code, provides for the appointment of a director of public service in the following words:

> "In each city there shall be a department of public service which shall be administered by a director of public service. * * *"

Section 4324 provides that:

> "The director of public service * * * *shall have all powers and perform all duties conferred upon him by law.* * * *"

Section 4334 provides as to how contracts shall be made, namely:

*"All contracts made by the director of public service shall be executed by him in the name of the city. * * *"*

The director of public service is the appointed and delegated agent of the municipal corporation and as such he cannot redelegate those powers and duties which strictly pertain to his office and through him bind the city.

In the case of Knauss vs. Columbus, 13 O. D. (N. P.) 200, the second paragraph of the syllabus reads as follows:

"Where a particular public agent or official is charged with the performance of certain duties, these duties cannot be voluntarily assumed by any other person nor delegated to to any other person by him who is charged with the discharge of the duty."

This is the rule that applies to public officers in those cases in which the proper execution of the office requires on his part the exercise of judgment and discretion, the presumption being that he was chosen because of his competency and fitness to exercise judgment and discretion, and unless power to substitute another in his place has been given to him, he cannot delegate his duties to another. This would be strictly true in reference to the execution of contracts which bind the municipal corporation of which the director of public service is the agent.

I appreciate, however, that there is a relaxation of this rule in reference to ministerial or mechanical duties where it can make no difference to anyone, and is no risk to the city, who does the physical act of signing "vouchers or other official papers." Mechem's Public Offices and Officers, section 568 says:

"The rule * * * is that the performance of ministerial duties may, unless expressly prohibited, be properly delegated to another.

"Where, however, the law expressly requires the act to be performed by the officer in person it cannot, though ministerial, be delegated to another."

If the director of public service has adopted a signature and with his permission his secretary affixes the same to certain official papers, I can see no irregularity or illegality in that performance. In fact, I believe it would be well nigh impossible for a director of public service in a large city to give the actual time daily to the perfunctory signing of official papers and this ministerial duty could legally be done by his secretary. As to "other official papers" which you mention in your letter I assume that you mean those which would not bind the corporation as would contracts, and as the statutes do not touch upon them it is my opinion that they are in the discretionary class which the director of public service can delegate to his secretary for execution, and the same would be legal.

I am of the opinion, therefore, that as section 4334 expressly provides that the director of public service shall execute *all contracts,* he is without power to delegate this duty and the same must be performed by himself, and for the reasons stated above I am of the opinion that the "other official papers" which, I take it, do not bind the city, may legally be signed by the secretary of the director of public service.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1279.

TRANSCRIPT OF PROCEEDINGS FOR THE ISSUANCE OF BONDS FOR THE COUNTY COMMISSIONERS OF MONTGOMERY COUNTY FOR ROAD IMPROVEMENT PURPOSES.

COLUMBUS, OHIO, December 8, 1914.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the commission's request I have examined the transcript of the proceedings for the issuance of bonds by the county commissioners of Montgomery county, Ohio, in the following amounts:

"Improvement of Troy Pike No. 61, $21,600 (of which the commission, as I understand it, is to take $6,480).

"Improvement of Salem Pike No. 62, $24,000 (of which the commission is to take $4,000).

"Improvement of Covington Pike No. 63, $24,000 (of which the commission is to take $14,400)."

So far as the proceedings for issuance of the bonds are concerned I hereby certify that the same have been legal in all respects, and that the bonds constitute a good and legal obligation of the county of Montgomery, to be paid in accordance with the terms therein specified.

The industrial commission has authority to purchase a portion of a bond issue as well as an entire issue, and by amendment to the resolution of issuance in each of these cases it is made clear that the present offer of the bonds to the industrial commission is antecedent to the advertisement of the same for public sale; therefore there can be no objection to the purchase by the commission of a part only of each issue.

The transcripts, which I return herewith, should be corrected and supplemented in certain details. In the first place, those which I hand you consist, in part, of the original papers which belong in the files of Montgomery county and must be returned thereto. Certified copies of these papers should be substituted by the commissioners of Montgomery county so that the transcript on file with the bonds in the office of the treasurer of state may be kept complete.

In the second place, the certificate of the county auditor as to the financial condition of Montgomery county and Harrison township covers the entire issue, as does the opinion of the prosecuting attorney and this opinion. Copies of these three papers should be made so that the transcript of each separate issue will show their presence.

The bonds themselves have not been examined since the passage of the amendatory resolution of November 27, 1914 (see transcript). This resolution which makes certain material changes in the terms of the original resolution, providing for the issuance of bonds, authorizes the bonds to be altered on their face so as to conform to the amendment. The bonds should be examined to see that this has been done before they are finally accepted by the commission.

Subject to the foregoing qualifications, my advice is that the bonds in question may be accepted for investment by the commission.

Yours very truly,
CHARLES FOLLETT,
First Assistant Attorney General.

1280.

ORDINANCE FOR THE PURPOSE OF A BOND ISSUE IS INEFFECTIVE WHERE IT IS SUBMITTED FOR AN INITIATIVE PETITION AND FAILS TO RECEIVE A TWO-THIRDS VOTE IN ITS FAVOR.

Where an ordinance for the purpose of issuing bonds is submitted to the electors by initiative petition, and fails to receive a two-thirds vote in its favor, it is ineffective as an act of final legislation. If the ordinance proposes to provide for the issuance of bonds, it must be regarded as an attempt at final legislation and not as a mere resolution of necessity; such ordinance which fails to provide for the levy and collection of taxes to pay the interest and sinking fund charges on account of the indebtedness which it is proposed to create, fails to specify the length of time which the bonds shall run, the par value of the bonds, the interest they shall bear, etc., is on these accounts alone invalid.

COLUMBUS, OHIO, December 8, 1914.

HON. FRED W. WARNER, *City Solicitor, Marion, Ohio.*

DEAR SIR:—I have acknowledged receipt of a letter from Hon. Fred L. Carhart, assistant city solicitor, requesting my opinion as to the validity of an ordinance of the city of Marion to issue bonds in the sum of $500,000.00 "for the purpose of providing the city * * * and its inhabitants with water," proposed by initiative petition, submitted to the electors at the November, 1914, election, and receiving thereat a majority of affirmative votes, less than two-thirds of the entire number of electors voting thereon.

There are a number of reasons why this attempted legislation is ineffective. It will not be necessary, however, to dwell upon all of them. In the first place, there is considerable doubt as to the joint effect of the municipal initiative and referendum law and the so-called "Longworth act," section 3939 et seq., General Code. I have arrived at the conclusion, which you will find expressed in the enclosed opinion, to Hon. C. A. Leist, solicitor of the city of Circleville, Ohio, that an ordinance may be initiated for the purpose of issuing bonds under the Longworth act; but that such ordinance requires for its passage an affirmative vote of two-thirds of the electors voting on the proposition, in order to authorize the bonds to be issued.

The proposed ordinance of the city of Marion does not purport to be a mere resolution of necessity, such as council might have passed under the Longworth act, and could not be sustained as such; it must stand or fall as an act of final legislation, and as such it must fail, for the reasons stated.

There are other reasons tending to the same conclusion, as that the ordinance does not provide for the annual levy and collection of taxes in an amount sufficient to meet the interest and sinking fund charges of the bond issue, as required by article XII, section 11, of the amended constitution; nor does it even fulfill the formal requirements of an ordinance issuing bonds by stipulating the denominations in which the bonds shall issue, the time for which the bonds shall run, the installments in which they shall fall due, the rate of interest which they shall bear, and other essential matters pertaining to any bond issue.

For all these reasons, then, I am of the opinion that the ordinance is of no effect.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1281.

THE ASSISTANT ADJUTANT GENERAL AND THE ASSISTANT QUARTERMASTER GENERAL ARE EACH ENTITLED TO PAY FOR THE RANK OF COLONEL WHEN CALLED INTO ACTUAL SERVICE.

An assistant adjutant general and an assistant quartermaster general, each ordered to report to a brigadier general, to perform such duties as shall be assigned them by such brigadier general, in actual service, are each entitled to pay prescribed for the rank of colonel in actual service.

Should such officers have received their regular compensation as assistant adjutant general and assistant quartermaster general they may be paid the difference between such regular compensation and compensation as officers in actual service.

COLUMBUS, OHIO, December 8, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of November 18th you submitted for my opinion the following:

> "Attached you will find a voucher submitted to this department by the department of adjutant general, purporting to pay two employes of the adjutant general's department extra compensation for services rendered during the flood.
>
> "Also attached you will find payrolls showing that they received their regular compensation as state employes at the time of the service for which they ask pay in the present voucher.
>
> "Kindly advise me whether or not they are entitled to this extra compensation."

The voucher submitted to you is one submitted on behalf of the assistant adjutant general and assistant quartermaster general respectively and called for the difference between the salaries of such two officers as assistant quartermaster general and assistant adjutant general respectively, and the salaries which said officers would be entitled to by reason of their rank as "Colonel" and their years of service when in actual service.

The facts presented to me disclose that Col. E. M. Peoples was appointed as assistant adjutant general and Col. J. M. Bingham was appointed assistant quartermaster general and the term of service of Col. E. M. Peoples in the Ohio national guard is five years and the term of service of Col. Bingham in the Ohio national guard twenty years.

Col. Peoples was appointed under section 83 of the General Code, which provides as follows:

> "The assistant adjutant general shall serve in the office of the adjutant general and aid him by performing such duties as the adjutant general assigns him. In the absence or disability of the adjutant general, he shall perform all or such portion of the duties of the adjutant general as the latter may expressly delegate to him."

and Col. Bingham was appointed under section 84 of the General Code, which provides as follows:

"The adjutant general shall have an assistant quartermaster general of the grade of colonel, who shall be appointed and commissioned by the governor and serve in the office of the adjutant general and shall be entitled to all the rights, privileges and allowances of other officers of corresponding rank and grade of the Ohio national guard. The assistant quartermaster general shall perform all duties devolving upon an assistant quartermaster general, and aid the adjutant general in the performance of such duties as the adjutant general may assign him. Under the direction of the adjutant general, he shall have charge of all ordinance and quartermaster stores and of the military property of the state."

Section 2249, General Code, fixes the salary of the assistant adjutant general at $2,000.00, and the salary of the assistant quartermaster general at $2,000.00.

During the flood of 1913 and while Col. Peoples was acting as assistant adjutant general and Col. Bingham as assistant quartermaster general a certain order was issued by the adjutant general by command of the governor, being special order No. 61, dated March 25, 1913, of which the following, in part, is a copy:

"Par. 35. Colonel Evart M. Peoples, assistant adjutant general of Ohio, and Colonel John M. Bingham, assistant quartermaster general of Ohio, are directed to report to Brigadier General John C. Speaks, second brigade, O. N. G., in command of the troops, Ohio national guard, under the provisions of paragraph 10, S. O. No. 61, c. s.

"They will perform such duty as may be assigned to them by General Speaks in connection with this service. They will perform such duty as pertains to their regular offices as can be performed without interference with this detail.

"This service will continue until relieved from duty.

"The travel enjoined and expense incurred are necessary in the military service."

In pursuance of said order both Col. Peoples and Col. Bingham served under Brigadier General Speaks twenty-four total days from said March 25th to April 17th inclusive.

During said time said Col. Peoples and Col. Bingham received and receipted for the regular salary due to each of said officers respectively as assistant adjutant general and assistant quartermaster general. They claim, however, that since they were ordered into actual service and placed under the command of Brigadier General Speaks they should be entitled to the pay due their rank and years of service provided for such rank and service when in actual service, and, therefore, should be entitled to the difference between the amount which each has received and the amount which each should have received for compensation while in actual service.

Section 83, General Code, above quoted, provides that the assistant adjutant general shall serve *in the office* of the adjutant general and aid him by performing such duties as the adjutant general assigns him.

Now it is to be noted:

First: That in contemplation of section 83 of the General Code the assistant adjutant general is to serve in *the office* of the adjutant general, and he is by virtue of his position to aid the adjutant general by performing such duties as the adjutant general assigns him. In other words, that it is only contemplated that the assistant adjutant general shall perform the ordinary duties of the adjutant general which the adjutant general decides to place in his charge, and it is not contemplated by

said section that the assistant adjutant general shall go into actual service as assistant adjutant general. Therefore, when the special order ordering him to report to Brigadier General Speaks was issued and he was directed to perform such duties as said General Speaks should assign him, he went into actual service not as assistant adjutant general but with the rank of colonel in actual service. I do not think that the fact that he was required to perform such duties as pertains to his regular office "as can be performed without interference with this detail" would in any respect change the fact that when he was in the field he was in actual service as colonel and not as assistant adjutant general.

Second: In regard to the assistant quartermaster general, section 84 of the General Code prescribes that he "shall perform all duties devolving upon an assistant quartermaster general and aid the adjutant general in the performance of such duties as the adjutant general may assign him." As I understand the facts when Col. Bingham, the assistant quartermaster general, was ordered into the field in actual service he was not performing the duties of an assistant quartermaster general, nor in any way aiding the adjutant general in the performance of his duties, but was, as was Col. Peoples, performing those duties as a field officer in actual service, and the mere fact that he too was ordered to perform such duties as pertains to his office as assistant quartermaster general "as can be performed without interference with this detail" would not in any way change the fact that he too was acting as colonel under the command of Brigadier General Speaks.

I am, therefore, of the opinion that both Col. Peoples and Col. Bingham would have been entitled to have demanded compensation as colonel in actual service.

As before stated both Col. Peoples and Col. Bingham accepted the regular compensation attached to their offices during the period when they were in actual service, and the question arises as to whether or not in so doing they have elected to accept the regular compensation pertaining to the office as assistant adjutant general and assistant quartermaster general instead of the compensation due them for actual service, and thus estopped themselves from claiming anything in addition to their regular compensation. Since Col. Peoples and Col. Bingham are only claiming the difference between the two salaries and are not claiming both salaries I do not think it just that the doctrine of estoppel should be invoked in order to prevent their receiving what I consider in law to be justly due them, and I, therefore, think that it would be right and proper for you to pay the voucher calling solely for the difference in the compensation. As I understand the matter the national guards were called upon in aid of the civil authorities as prescribed in section 5292 of the General Code, and that the amount figured in the voucher as the compensation for said officers when in actual service is the same per diem "as allowed commissioned officers of like grade in the army of the United States."

I am herewith returning the voucher which you handed me.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1282.

DEFINITION OF THE TERM "LIBRARY STAFF," AS USED IN SUBDIVISION 6 (a) OF SECTION 8 OF THE CIVIL SERVICE ACT—PUBLIC LIBRARY IN CITY OF CINCINNATI IS A COUNTY INSTITUTION.

The term "library staff" as used in subdivision 6 (a) of section 8 of the civil service act, does not include all the employes of a library. It applies to those who are engaged in the handling of the books; it means more than a janitor or porter. The duties of each position must be considered to determine whether it comes within the term "library staff."

The public library in the city of Cincinnati is a county institution, and the employes thereof, who are in the classified service, are subject to the jurisdiction of the state civil service commission.

COLUMBUS, OHIO, December 8, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of September 24, 1914, Hon. Walter M. Schoenle, city solicitor of Cincinnati, Ohio, submits the following inquiry:

> "The question has arisen whether or not the employes of the public library located in this city are subject to the jurisdiction of the municipal civil service commission or the state civil service commission. It is claimed on one hand that the employes of the public library should be considered employes of the board of education of the school district of the city of Cincinnati, while on the other hand it is claimed that the public library is a county institution and its employes are therefore subject to the state civil service commission.
>
> "As the rights of the state are involved in this question, I take the liberty of asking you to pass upon the matter."

Under date of October 1, 1914, Hon. Washington T. Porter, a member of the board of trustees for the library, gives a comprehensive history of the laws under which the library in question has been organized and under which it is now operated.

Section 8 of the civil service act, section 486-8, General Code, places ten classes of positions in the unclassified service. In subdivision 6 (a) the following are placed in the unclassified service:

> "All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense."

The library in question is supported at public expense. This is shown by section 14995, General Code, hereinafter quoted.

Therefore, by virtue of section 8, subdivision 6 (a) of the civil service act the "library staff" of the public library in Cincinnati is in the unclassified service.

The term "library staff" is not defined by the civil service act. It must be given its ordinary meaning.

In section 8 of the civil service act, the legislature has used the words "employes" "clerks" and "officers," and it is to be presumed that the legislature had in mind these terms when it adopted the provision as to a "library staff." If the leg-

islature had used the word "employes" or the words "employes and officers," there could be no doubt as to the intention.

The term "library staff" does not necessarily mean all the employes of the library, and if the legislature had intended to exempt all the employes of a library, it could have easily so expressed it.

It is my conclusion that the term "library staff" does not include all the employes of a library. It includes those employes who have to do with the handling of the books. It means something more than a janitor or a porter.

It would be difficult to make a general rule applicable to all the positions. Each position would have to be considered separately.

As some of these employes are in the classified service it will be necessary to determine under whose jurisdiction they are.

The act under which the public library in question is operated is an old one, and was passed at a time when special acts as to classification of municipalities were considered valid. The act as now in existence contains a reference to this former classification.

It is not necessary, however, to this opinion to determine the validity of the act. It has been in operation a large number of years and property rights secured thereunder. The validity of the act will not be considered.

Section 15060, General Code (3999 Bates), provides for the manner of appointment of the trustees of this library.

This section reads in part:

> "Provided, that in cities of the first grade of the first class upon the expiration of the terms of office of the trustee of the public library therein, heretofore, appointed under this section, as amended April 30, 1891, there shall be appointed as successors to said board, a board of trustees of said library consisting of seven person, as follows: Two by the board of education of the school district within which such city is situated, two by the board having charge of the high schools of such city, two by the directors of the university in such city, one of each of said appointees shall hold his office for two years, and one for three years; and one by the judges of the court of common pleas of the county within which such city is situated, who shall hold his office for a period of three years; and thereafter said boards and said judges shall, upon the expiration of the terms of office of said appointees, and each three years thereafter, appoint successors to said trustees."

Section 14993, General Code (3999a Bates), provides:

> "Each and every resident of the county within which is situated any city of the first grade of the first class, having therein established a public library, shall be entitled to the free use of such library, reading rooms and any branch or department of the same, and all the privileges thereof, upon such terms and conditions not inconsistent herewith, as the board of trustees of such library may prescribe."

By virtue of this section every resident of the county of Hamilton is entitled to the free use of the library.

Section 14995, General Code (3999c Bates), provides for a tax levy for the library. Said section reads:

"For the purpose of increasing, maintaining and managing the public library in cities of the first grade of the first class, for which a board of trustees shall have been appointed, as provided in section 3999 (Bates R. S.), the said board of trustees may levy annually a tax of not exceeding five-tenths of a mill on each dollar valuation of the taxable property of the county wherein is situated such city, to be assessed, collected and paid in the same manner as are other taxes levied throughout the county. Said levy shall be certified by said board of trustees to the auditor of the county in which said city is situated, and shall be placed by said auditor on the tax duplicate and collected as other taxes. The money realized from said levy, and all moneys received or collected by said trustees for the library, shall be placed in the treasury of said county, subject to the order of said board of trustees of said library. Said fund shall be known as the library fund of said county, of which the county treasurer shall be the custodian, and no money shall be drawn therefrom, except upon the requisition of the board of trustees of said library, certified by the president and secretary of said board, directed to the county auditor, who shall draw his warrant upon the county treasurer therefor. Any part of said funds unexpended during any year shall remain to the credit of said library fund."

The funds for this library are raised by the county. The use of the library is co-extensive with the county. These determine the nature of the library and make it a county institution.

The fact that a majority of the trustees are appointed by the boards of the school districts does not change the nature of the institution.

Under the civil service act, the state civil service commission has charge of the "state service." This term is defined in subdivision 2 of section 1 of the civil service act, section 486-1, General Code, as follows:

"The 'state service' shall include all such offices in the service of the state or the counties thereof, except the cities and city school districts."

The employes in question are paid from funds raised by taxation throughout the county, and are therefore in the service of the county. The funds are not raised by the city or by the city school district.

Therefore, the employes of the library in the city of Cincinnati, who are in the classified service, are subject to the jurisdiction of the state civil service commission.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1283.

UNDER WHAT STATUTE THE SALARIES OF FORMER TOWNSHIP BOARDS OF EDUCATION ARE TO BE PAID FOR THE YEAR 1914.

Members of former township boards of education take their salaries for the year 1914 under the statute prior to amendment. After that they take under the amended statute.

COLUMBUS, OHIO, December 8, 1914.

HON. OLIN M. FARBER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 29th, wherein you request my opinion, as follows:

> "A member of a township board of education during the year 1914, attended a regular meeting of the board on the first Monday of January, February, March, April, May, June, July and August. Presuming that he will attend four more regular meetings of the board during the year 1914, what compensation will he be entitled to for such services performed during the year 1914?"

Section 4715, General Code, prior to its amendment in 104 Ohio Laws, was as follows:

> "Each member of the township board of education shall receive as compensation two dollars for each meeting actually attended by such member, but for not more than ten meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

This section now appears on page 135 of 104 Ohio Laws, as follows:

> "Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, but for not more than five meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

The former township school districts, under the new law, will constitute rural districts. The members of boards of education of the township districts remain in office, however, and their powers and duties are preserved to them by section 4735, General Code, until their terms expire and until their successors are elected and qualified. This section appears on page 138 of 104 Ohio Laws, as follows:

> "The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Your question presents an entanglement of legal difficulties. Whatever theory of solution is adopted in answer to the difficulty presented meets with an obstruction of serious legal consequence, and I am unable to arrive at any conclusion which

presents a clearly smooth and satisfactory legal answer. I, therefore, feel urged to present that solution which has the best appearance of fairness and logical practicability. To my mind, the best construction that the conflicting provisions can be given would be the holding that the officers in question be permitted to draw the salaries prescribed by statute prior to the amendment above referred to, for the entire year of 1914. I, therefore, advise that the officers be permitted to draw their salaries for the year 1914 under section 4715, General Code, under assumption that said statute remains in force and effect until the first Monday of January, 1915. The officers, therefore, will receive $2.00 per meeting for each meeting actually attended during the year 1914, but for not more than ten meetings in the year. After that time, the compensation prescribed by the amended statute above quoted may, in equity and fairness, be permitted to control.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1284.

NEWSPAPER PUBLICATIONS—IN MUNICIPALITIES WHERE NOTICES MUST BE PUBLISHED IN PAPERS OF OPPOSITE POLITICS, A NEWSPAPER IS ENTITLED TO PUBLICATION SO LONG AS IT DOES NOT DEMAND MORE THAN THE LEGAL RATE.

In matters requiring publication in two newspapers of opposite politics in municipality, if one of such newspapers being the only newspaper of opposite politics in such municipality, and fully meeting all other requirements, refuses to print such matters except at the maximum legal rate, such refusal is not within the meaning of section 4676, General Code, and such newspaper is entitled to the publication so long as it does not demand more than the legal rate.

COLUMBUS, OHIO, December 8, 1914.

HON. ELMER E. BODEN, *City Solicitor, Barberton, Ohio.*

DEAR SIR:—Your inquiry of October 22d with references to the legal advertising received. The statement of facts as given in your letter reads as follows:

> "There are two republican and one democratic newspaper published in Barberton, Ohio. At the beginning of the present year we entered into contract with one of the republican newspapers to do our legal advertising at 50 cents per square for the first insertion and 25 cents per square for each subsequent insertion. The democratic newspaper refuses to print the two paper matter except at the maximum rate of $1.00 per square for the first insertion and 50 cents per square for each subsequent insertion.
>
> "The Akron Times, a democratic paper, has a large circulation in the city of Barberton and is published in Akron, which is in the county. The Times sends a reporter here every day, and one section on one page is headed Barberton News.
>
> "Can we, according to law, publish our ordinances and resolutions in the Akron Times?"

In answer to the above, would say that in an opinion given to the bureau of inspection and supervision of public offices, under date of September 2, 1914, I held:

That if two or more newspapers of opposite politics and of general circulation in the municipality and at least one side of such newspapers is printed therein, then publication must be made in two of such newspapers of opposite politics; section 4229, General Code, requiring that if two or more newspapers of opposite politics are published and of general circulation in the municipality and at least one side of such newspaper is printed therein, then publication must be made in two of such newspapers of opposite politics; section 4229, General Code, requiring publication and general circulation, and section 6255, General Code, requiring printing of one side therein. (Copy of opinion inclosed herewith.)

If the democratic newspaper published at Barberton meets the requirements just quoted, and is the only newspaper of opposite politics from the two republican papers you mention, then publication should be made in said newspaper, unless its refusal to contract at less than the maximum legal rate can be considered a "refusal" within the meaning of section 4676 of the General Code, which reads as follows:

> "Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for." (R. S., Sec. 1537.)

I am of the opinion that the fact that the democratic newspaper will not contract at less than the maximum legal rate does not constitute a refusal as contemplated in said section. In other words, that so long as the democratic newspaper does not demand more than the legal rate, it is entitled to the publication.

Therefore, my opinion is that you would have no legal authority for publishing in the Akron Times.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1285.

BOND ISSUE UNDER LONGWORTH ACT FOR THE PURCHASE OF AUTOMOBILE HOSE TRUCK.

Bonds may be issued under the Longworth act for the purchase of an automobile hose truck.

COLUMBUS, OHIO, December 8, 1914.

HON. LEONARD S. WISE, *Village Solicitor, Chicago Junction, Ohio.*

DEAR SIR:—I have acknowledged receipt of your letter of November 21st, requesting my opinion upon the question as to whether or not a village may issue bonds under the "Longworth act," so-called, for the purpose of purchasing an automobile hose truck.

I assume that your question relates solely to the interpretation of the statute as bearing upon the power to issue bonds for the specific purpose mentioned and does not involve any question as to the limitations upon the borrowing power imposed by other sections of the same act.

While section 3939, General Code, which is the operative section of the "Longworth act," is in terms limited to a grant of power to issue bonds for the purpose of purchasing *fire engines* (sub-section 27 of section 3939), yet, when this specific provision is read in connection with sub-section 2 of the same section, authorizing the issuance of bonds for "extending, enlarging, improving * * * or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it," the provision seems in effect to be enlarged so that the power to borrow money for fire department equipment is not to be strictly limited to the purchasing of fire engines and the other particular kinds of apparatus mentioned in sub-section 27, but extends to all apparatus used by a fire department whether, strictly speaking, the same is a *fire engine* or not. Akron vs. Dobson, 81 O. S., 66.

It follows, therefore, that the village may issue bonds under the "Longworth act" for the purchase of the apparatus in question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1286.

RIGHT OF THE LIQUOR LICENSE COMMISSION TO INCREASE COMPENSATION OF MEMBERS OF THE COUNTY LIQUOR LICENSE BOARD.

When the state liquor licensing commission has provided monthly compensation for members of the county liquor licensing boards to continue until further action of the board, such state board has the right and authority to increase the aforesaid compensation at a subsequent date, and before the expiration of the term for which said members were appointed.

COLUMBUS, OHIO, December 8, 1914.

THE HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of October 29th, 1914, you inquire:

> "May the salary of a member of a county liquor licensing board be legally increased or diminished during his term of office?"

In this connection you refer to section 20 of article II of the constitution, reading 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."

Section 8 of the act to provide for the license to traffic in intoxicating liquors, 103 O. L., 216, provides that the salary of the county licensing commissioners shall be fixed in the case of each county board by the state liquor licensing board, subject to the approval of the governor, but in no case shall it exceed five thousand dollars per annum for each commissioner, payable monthly.

Whether the section of the constitution referred to by you is applicable to county liquor licensing boards, is not here material in view of the facts which I shall hereinafter present, but it may be argued with great force that the words "office" and "officers," as used in the constitution, have reference to constitutional and not statutory offices and officers.

"See State ex rel. Ferry vs. Board of Education, 21 C. C., 785.
"State vs. Kalb, 50 Wis., 178.
"County vs. Timms, 32 Neb., 272."

The facts to which I have referred as altering the situation have been presented by the state liquor licensing commission upon request therefor. They show that on September 2, 1913, "it was moved by Mr. Secrest, and seconded by Mr. Clendening, that the monthly salary of each commissioner should be fixed as follows: (Here follow the various amounts fixed) said salaries to be subject to the approval of the governor and to begin September 1st and *to continue until further action of this board.*"

This resolution was unanimously adopted upon roll call. From this it is very clear that there was no annual salary fixed for the county licensing commissioners, but, on the contrary, the amount specified in the resolution was to be paid monthly, and was to continue until the board saw fit to change the same. From this it is very apparent that the action of the state liquor licensing commission was in this respect only tentative, as at the time it was impossible to ascertain exactly what the commissioners were earning. Temporary compensation was provided for them until such time as the commission had sufficient facts upon which to determine what would be proper as a regular salary.

This method of providing for the payment of the commissioners could not possibly bring the situation within the purview of section 20 of article II, even if it were applicable here. There is a vast difference between the fixing of a permanent salary, and the providing of monthly compensation which may be altered at any time at the pleasure of the appointing board. That it was not the view of the state commission that the salary first fixed should be permanent, will be apparent from a resolution adopted by it on November 29th, 1913. It was moved by Mr. Clendening, and seconded by Mr. Secrest, that "the monthly compensation of each county licensing commissioner of the following counties be increased $20.00 per month, said increased salary to be subject to the approval of the governor, to begin with the month of December, and to continue until further action of the board: (Here follow the counties.)"

This resolution was unanimously carried.

From the foregoing state of facts, I have not the slightest doubt that the so-called salary fixed on September 2, 1913, was properly altered on November 29, 1913, and that the action of the liquor licensing commissioners in their original resolution was not only proper, but highly commendable in view of the fact that it was impossible at that time to determine the amount of work which would devolve upon the various county liquor licensing commissioners, and hence it would not be possible to provide compensation commensurate with their services until experience had shown the requirements placed upon them by their position.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1287.

POWER OF DIRECTOR OF PUBLIC SERVICE OF A CITY, UNDER THE PROVISIONS OF SECTIONS 4167, 4171 AND 4172, GENERAL CODE, TO SELL CEMETERY LOTS—DISPOSITION OF MONEY RECEIVED FOR SAID LOTS.

The director of public service of a city, under favor of sections 4167, 4171 *and* 4172, *General Code, has power to sell cemetery lots, receive the money therefor and expend the same for authorized purposes without an appropriation of the same being first made by the city council.*

COLUMBUS, OHIO, December 10, 1914.

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

GENTLEMEN:—I have your letter of November 9th, in which you inquire:

"Must proceeds arising from the sale of lots owned by a city for cemetery purposes, be appropriated by council prior to their expenditure by the director of service, or has said director the authority to expend such moneys as he deems to be necessary?"

Section 4167 of the General Code reads:

"The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds generally, or for any particular part or parts, lot or lots therein, as the donor directs, or as the director may from time to time determine if no direction is given. He shall sell lots, receive payment therefor, direct the improvements, and make the expenditures, under such rules and orders as he prescribes, and invest, manage, and control property received by donations and surplus funds in his hands from any source whatever."

Sections 4171 and 4172 of the General Code, read:

"Section 4171. On the first Monday of January, each year, or as soon thereafter as is practicable, the director shall report in writing to the council, the number of lots sold, to whom sold, and the amount received therefor, during the year preceding, and a detailed statement of the expenditures during the same period, showing the time and purpose of each payment, and to whom made.

"Section 4172. The report shall also contain a pertinent statement whether the funds, if any on hand, are invested, and the character of the securities therefor, and such other matters as the director deems expedient or the council requires."

From a consideration of these sections, it is apparent that the director of public service may not only sell lots and receive the purchase price thereof, but may make expenditures in connection therewith, his duty being to report to council

on the first Monday of January of each year the number of lots sold, to whom sold, the amount received therefor, together with a detailed statement of his expenditures during the period covered by his report.

Section 4172 provides that the director of public service shall also set forth in his report whether any of the funds on hands are invested, and if they are the manner of investment, showing clearly that while he reports to council as to his doings, he sells lots, collects proceeds, make expenditures and invests funds on his own initiative, and without previous action by council.

I am of the opinion that the director of public service may make expenditures of money arising from the sale of cemetery lots, without a previous appropriation therefor by council.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1288.

CONSTRUCTION OF THE TERM "GROSS PREMIUM RECEIPTS," AS USED IN SECTION 841, GENERAL CODE, PROVIDING FOR SO-CALLED FIRE MARSHAL TAX.

The term "gross premium receipts" as used in section 841, General Code, providing for the so-called fire marshal tax, includes all premiums received by an insurance company on business transacted in Ohio, and no deductions whatever can be made therefrom.

COLUMBUS, OHIO, December 10, 1914.

HON. PRICE RUSSELL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On May 22, 1914, I gave you an opinion upon the construction of section 841 of the General Code, to the effect that the tax commonly called the "fire marshal tax," provided for by said section, was to be computed upon the gross premium receipts of fire insurance companies on all business transacted by them in Ohio during the year next preceding the day specified for the payment of such tax.

This opinion has been questioned by some of the fire insurance companies, and Hon. J. W. Mooney, of Columbus, has filed with me a very able brief in support of the contention that "gross premium receipts," as used in section 841, General Code, means the amount of moneys received by the companies after deducting premiums returned upon canceled policies and upon policies void at inception; also upon premiums received by a reinsuring company.

Mr. Mooney calls attention to the rule of construction, which is admitted, that if the meaning of an act passed by the legislature, imposing a tax, is doubtful or ambiguous the doubt must be resolved in favor of the party taxed. He then contends that the words "gross amount of premium," as used in section 841, must be held to mean the premiums after deducting the amount returned for cancellation and the amount returned for policies which never took effect; in other words, that the statute only covers premiums which have been received and retained by the company for writing and issuing contracts of insurance.

Mr. Mooney's argument is very strong, and I think I would, on the strength of the authorities he cites, agree with his contention if there were no legislative history, which amounts to interpretation as I view it, connected with our statute;

that is, if this so-called "fire marshal statute" stood alone, had never been interpreted in any way, and the question were now raised for the first time, I think the weight of authority supports Mr. Mooney's contention.

The question submitted by you to me was this:

Section 841 of the General Code, which provides as follows:

> "For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the superintendent of insurance in the month of November each year, in addition to the taxes required by law to be paid by it, one-half of one per cent. on the gross premium receipts of such companies on all business transacted by it in Ohio during the year next preceding, as shown by its annual statement under oath to the insurance department. The superintendent of insurance shall pay the money so received into the state treasury to the credit of a special fund for the maintenance of the office of state fire marshal. If any portion of such special fund remains unexpended at the end of the year for which it was required to be paid, and the state fire marshal so certifies, it shall be transferred to the general revenue fund of the state."

was passed April 16, 1900, as part of the act establishing the state fire marshal department (94 O. L. 386), and for the purposes of the question under consideration may be said never to have been changed. The tax under this section, from the time of the passage of the act until April 29, 1902, was calculated on the gross premium receipts of such companies on all business transacted by them in Ohio; and, without any amendment to this act, since the date of April 29, 1902, and up to the date of your request of May 8, 1914, this fire marshal tax was calculated on the balance of the gross premium receipts after deducting return premiums and considerations received for reinsurance, as shown by the next preceding annual statement. Your exact question, was, why, if it was proper to calculate the tax on the gross premium receipts, without the above mentioned deductions, prior to 1902, as there was no change in the law at that time nor since, was it not logical to use the same basis of calculation for the one-half per cent. fire marshal tax since that date.

My answer in effect was that I knew of no reason for the change, that is, of no reason which was apparent from the statutes bearing upon this tax.

The reason for the change in calculating, it seems, is this: that prior to April 29, 1902, under sections 5432 and 5433, General Code (R. S. 2745), all foreign insurance companies were compelled to pay a tax of 2½% on the gross premium receipts of such companies as shown by their annual statements, and that this had been held to mean actual gross premiums without the reductions now claimed; on April 29, 1903, section 2745, Revised Statutes, was amended so as to provide for the payment of the 2½% on the gross amount of premiums received after deducting such returned premiums and considerations.

Though this definite change was made in the law providing for the 2½% tax, no such change was made in the fire marshal tax, and yet, for some reason, from the date of April 29, 1902, the fire marshal tax was calculated as though the gross premium receipts named in the section providing for such tax had been defined to be the amount remaining after the deductions specifically allowed by the amendment to the section providing for the 2½% tax. As the words "gross receipts" or "gross premium receipts" are used in both sections the matter resolves itself into the question as to the definition of the word "gross" as used in these sections. If the word "gross," as used in these sections imposing a tax upon the premiums received by insurance companies, has the meaning contended for on behalf of the insurance

companies, the query arises as to the necessity for the amendment to section 2745, R. S., expressly providing for the reduction.

The question also arises, as this term was used in both sections and in both at one time was given the same meaning by the companies and by the superintendent of insurance, does it follow that a modification of its meaning in one section by amendment to the statute carries the same amendment by inference to the other section? Is it not more logical to say that if these terms originally had the same meaning in two separate statutes, and that meaning had been determined by the legislature and the court, then, it was so fixed that only legislative action could change the meaning in either or both sections; and that the very fact that the meaning of the term in one section was changed while the other section was untouched would lead to the conclusion that no change was intended in the statute which was not amended?

The history of sections 5432 and 5433, General Code (Sec. 2745, R. S), upon this is as follows:

The first provision as to the taxation of insurance companies is found in section 16 of the act passed April 8, 1876, 73 Ohio Laws, 138. This section, as to insurance companies, provided:

> "* * * Every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the auditor of the county in which the office or agency of such company may be kept * * * the amount of the gross receipts of such company, which shall be entered upon the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located."

This section, in this form, was before the supreme court of Ohio, in the case of State ex rel. vs. Reinmund, decided June 7, 1887, 45 O. S. 214. In this case no contention was raised as to the construction of the term "gross receipts" of such agency, or that the word "gross" had any other meaning than its usual meaning, except that, on page 221, it appears from Judge Spear's statement that the tax in Ohio was based upon the gross receipts of the company without any deductions.

By the act passed April 11, 1888, 85 Ohio Laws, 183, section 2745, R. S., was amended so as to provide that every foreign insurance company should return to the auditor of each county in which such company "does" business, annually,

> "the amount of the gross premium receipts of such agency, for the previous calendar year, in such counties, which shall be entered upon the tax list of the proper county and be subject to the same rate of taxation for all purposes that other personal property is subject to, at the place where located, for the year in which such premiums are received. * * * And it shall be the duty of the county auditor * * * to certify to the superintendent of insurance the amount of receipts returned under this act by each company, with the rate charged against the same; and it shall be the duty of the superintendent of insurance * * * annually, to charge and collect from all such companies such a sum as, added to the sum payable to the county treasurers, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statement, under oath, to the insurance department."

By an act passed April 12, 1889, 86 Ohio Laws, 274, section 2745, Revised Statutes, was again amended, but the amendment had no bearing upon the question under consideration, as the language used was the same as in the prior act, namely:

"gross premium receipts of such agency" and "gross premium receipts of such companies"; and there was nothing said as to deductions.

This section was again amended April 19, 1893, 90 Ohio Laws, 201; the amendment providing that every foreign insurance company should return to the auditor of each county in which it did business, annually,

> "the amount of the gross premium and assessment receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values, and commissions paid to the citizens of this state during the same period for which receipts are recorded, shall be deducted from such gross receipts, and the net amount after such deductions shall be the basis of taxation for such companies under this section; which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located * * *. And it shall be the duty of the superintendent of insurance * * * annually, to charge and collect from such companies or associations such a sum as, added to the amount paid to the county treasurers, will produce an amount equal to 2½% on such receipts of such companies and associations, as shown by their annual statements, under oath, to the insurance departments; * * *"

It will be noted that this is the first provision for any deduction from the gross receipts for taxation purposes. It will further be noted that under this amendment the term "gross receipts" is only used in the portion of the statute which provides for taxes payable in the counties, and that the term "gross" is not used in that portion of the statute which provides for the tax to be imposed by the superintendent of insurance in addition to the county tax.

On the first day of January, 1893, prior to this amendment, the Penn Mutual Life Insurance Company filed with the superintendent of insurance of Ohio its statement showing the gross premiums collected by it in Ohio during the year 1892 without any deduction. After the passage of the above amendment, on April 19, 1893, the same company presented to the superintendent of insurance a supplement to its annual statement, setting out the deductions to which it claimed to be entitled under said amendment, viz.: "dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values and commissions paid to citizens of this state" for the year 1892, claiming that the superintendent of insurance could only compute the 2½% tax upon the balance of said gross premium receipts after making the said deductions. It also offered to pay the amount of taxes represented by such calculation. The superintendent of insurance refused to allow said supplementary statement to be filed, refused to allow said deductions and insisted on the payment of the 2½% on the gross premium receipts without deductions. The company brought an action in mandamus to compel the superintendent of insurance to receive and permit the filing of such supplementary statement and to accept the sum tendered (being the amount claimed to be due after making said deductions), in full of all demands against it. The case was entitled State ex rel. vs. Hahn, and is reported in 50 O. S. 714.

The court in said case decided that the insurance company was liable to pay as taxes an amount equal to 2½% of the gross premiums received during the year 1892. The court say, at page 717:

"Section 2745 provides, among other things, that certain dividends, cancellations, values and commissions 'shall be deducted from such gross receipts and the net amount after such deduction shall be the basis of taxation, for such companies, under this section'. This seems favorable to the claim of the relator, and, if it stood alone, would be conclusive.

"Further along in the same section it is provided that, 'it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from such companies or associations such a sum as, added to the amount paid to the county treasurers, will produce an amount equal to two and one-half per cent. on such receipts of such companies and associations, as shown by their annual statements under oath to the insurance department.' It will be noticed that, by this latter provision, the two and one-half per cent. is to be calculated on such receipts of the company as are shown by the annual statements under oath to the insurance department.

"The only annual statement to the insurance department of the relator is the statement filed within sixty days after January 1, 1893, which showed the amount of premiums, without deduction, that is the gross receipts. There is no sworn statement of the company in the office of the insurance department showing the net receipts of the various deductions claimed, and there is no law requiring or authorizing the filing of such supplemental statement, as was presented by the relator to the defendant, and he therefore did right in refusing to allow the filing of the same. It follows that, as to the taxes to be paid for the year 1892, the superintendent is right in calculating the tax on the gross receipts of the company as shown by its sworn statement filed within sixty days after January 1, 1893. Whether the same rule would apply for the years following 1892, it is not now necessary to decide."

Evidently, there was some doubt after this decision as to whether or not, for the year 1893 and subsequent years, the claim of the relator in the above case was well founded, for the reason, as I have heretofore pointed out, that the legislature omitted the word "gross" in providing for the tax to be assessed by the superintendent of insurance.

We find, therefore, that this act was again amended by an act passed the following year, viz.: on March 27, 1894, the act being found in 91 Ohio Laws, 91. This amendment follows practically the language of the act which I have last quoted and makes exactly the same provisions for deductions in the tax to be paid in the counties; but in the portion of the section which provides for the tax to be charged and collected by the superintendent of insurance the word "gross" is again inserted. This portion reads:

"And it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from all such companies such a sum as, added to the sum paid to the county treasurers, will produce an amount equal to 2½% on the gross premium receipts of such companies as shown by their annual statements. * * *"

In view of the contention raised in the case of State ex rel. vs. Hahn, above referred to, this amendment is conclusive as to the intention of the legislature, and from the time of the passage of said amendment, up to April 29, 1902, all said foreign companies doing business in Ohio paid on the basis of 2½% on their gross premium receipts without any deductions. On April 29, 1902, this section was again amended, so as to make explicit provisions for the deduction in the tax to be assessed by the superintendent of insurance. (95 Ohio Laws, 290.) This amendment provided that,

"Every foreign insurance company * * * 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 deductions 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. Every such company shall, annually, in the month of November, pay to the superintendent of insurance, an amount equal to two and one-half per cent. of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurances, as shown by its preceding annual statement."

This is substantially the form in which the statute appears at present.

After the passage of the amendment found in 91 Ohio Laws, 91, to which I have above referred, making definite that the two and one-half per cent. tax was to be calculated on the gross premium receipts, and while said amendment was in force, the department of the state fire marshal was created, by an act passed April 16, 1900, found in 94 Ohio Laws, 386. By section 7 of said act provision was made for what is known as the "fire marshal tax," and the language used in said section is substantially the same as appears in present section 841 of the General Code, as pointed out in my previous opinion.

This act provided that such companies should pay a tax of one-half of one per cent. "on the gross premium receipts of such companies on all business done in Ohio the year next preceding"; the act then in force as to the 2½% tax provided "2½% on the gross premium receipts of such companies"—the language in both sections being identical, as shown above. At the time this language was incorporated in the fire marshal tax act it had a meaning which had been made plain by the legislature and the supreme court of Ohio, that is, it meant gross premium receipts without the deductions afterwards allowed.

Subsequently, section 2745, Revised Statutes, providing for the 2½% tax, was so changed as to allow the deductions which are now claimed for the fire marshal tax, but the fire marshal tax was in no way changed. The meaning having been fixed, I am therefore compelled to hold that the action of the legislature was intentional. It had the subject of taxation of insurance companies before it, was familiar with the history of section 2745, knew that the basis provided for the computation of that tax, in regard to gross premium receipts, was the same as that provided by the fire marshal tax; and when it changed one section without changing the other, we are forced to the conclusion that no change was intended.

The conclusion that the legislature has itself placed a construction upon the term "gross premium receipts" is borne out by the last enactment upon this subject—103 Ohio Laws, 713, passed April 18, 1913—which is entitled "An act defining, for the purpose of taxation, the term 'gross premiums' as applied to mutual fire insurance companies * * *." The first section of the act shows that it applies wholly to franchise taxes assessed against such companies; and as the fire marshal tax is not a franchise tax, it is not included in this section.

It may be asserted that the legislature, by mere inadvertence, failed to provide for deductions from the gross premium receipts in computing the fire marshal tax, when it authorized such deductions in computing the 2½% tax, and also when it passed the general act last referred to authorizing such deductions when computing on franchise taxes; but I cannot assume this; on the contrary, I am bound by the presumption that the legislature was fully cognizant of all the laws on this subject, and that when it failed to authorize such deductions in computing the fire marshal tax it did so advisedly.

This opinion has been prepared entirely upon the basis of statutory construction; necessarily so, because if the statutes are plain and unambiguous themselves we are precluded from making deductions or inference as to the meaning of words or terms used in the statutes.

My attention has been called forcibly to the two cases reported in 97 N. W. Reporter, 1063, particular emphasis being placed upon the case of State ex rel. Palmer vs. Fleming, reported on page 1068 et seq., of said report; it being claimed that the question decided in that case is identical with the one now before us. With this contention I cannot agree.

The cases of *State ex rel.* vs. *Fleming* and *State ex rel. Palmer* vs. *Fleming* are reported together and both cases decided by the supreme court of Nebraska on the sixteenth of December, 1903.

Section 58 of the Session Laws of Nebraska, 1903, provided that foreign insurance companies should report the gross amount of premiums received by them for insurance written upon property in Nebraska during the preceding year, and that such gross receipts were to be taken as an item of property of that value. Nothing was said about deductions.

Section 61 of the same Session Laws applied to domestic fire insurance companies and required them to report the gross amount of premiums received for all business done within the state during the preceding calendar year, less the amount ceded to other companies as reinsurance and less premiums returned on canceled policies.

It was claimed in the first case reported that the law, in so far as it allowed domestic companies to make said deductions from their gross receipts and did not allow such deductions to be made by foreign companies, imposed an undue burden upon the property of the foreign corporations and was therefore unconstitutional. The court, upon this point (there were other points involved in this case) said:

> "Without at this time stopping to construe these two sections and determine their exact meaning, we are of opinion that the foreign companies, if discriminated against, may successfully contend that the discriminative provisions are invalid, and that the law must be enforced without them."

In the syllabus of the case it is stated:

> "A general revenue law will not be declared unconstitutional on account of discriminative provisions if such provisions may be rejected and the law enforced without them."

In the second case—that of State ex rel. Palmer vs. Fleming, the question which was touched upon, but not decided, in the first case was squarely faced by the court, and the court was called upon to decide whether in fact there was discrimination against foreign insurance companies and in favor of domestic insurance companies by the laws of Nebraska allowing deductions from the gross receipts of the latter and not allowing such deductions from the gross receipts of the former. If such discrimination existed the act would be unconstitutional, for, as stated by the court, on page 1069:

> "When dealing with the taxation of property the legislature cannot discriminate in favor of the resident against a non-resident. Each are to be treated alike and each is to pay a tax in proportion to the value of the property."

The insurance companies in this case evidently took the position that, the statute having failed to authorize deductions from the gross receipts of foreign companies, it meant just what it said; all receipts were to be returned and no deductions were authorized. This contention on behalf of the companies is, of course, the opposite of what is made here. The court proceeded to harmonize the statutes and thus avoided declaring the act unconstitutional, by holding that foreign insurance companies were entitled to make the same deductions as were authorized to be made by domestic companies. This was the gist of the case. The court was forced to do one of two things—either to declare the act unconstitutional, or to give a construction to it which, though not asked for by the foreign insurance companies, would be favorable to them and save the act. In other words, the court was *in extremis* and I cannot believe that this case is very strong authority for the interpretation of the word "gross." In any event, the case is by no means analogous to the case we now have before us. In section 841 there is no discrimination; it applies to all fire insurance companies domestic as well as foreign.

The case of the German Alliance Insurance Company et al. vs. James R. B. Van Cleave et al., reported in 191 Ill., 410, would be an authority directly in support of the contention of the insurance companies if section 841 stood alone and the term "gross premium receipts" had received no construction by the legislature, or the courts, or the insurance department, or the insurance companies of this state. In that case the court, while stating that there was no dispute as to the meaning of the word gross," that it was conceded to mean the whole or entire amount of premiums received for business done in the state during the year, and that the word "gross" is opposed to the word "net," that its ordinary meaning is the entire amount of the receipts of the business while the net receipts are those remaining after deductions for the expenses and charges of conducting the business—goes on to state that the view of the court was that, though the legislature used the words "gross receipts," its real intention was to levy a tax on the gross income. No authority whatever was cited by the court in support of its view.

This case, with whatever weight it carries, is an authority for the proposition that gross premium receipts mean net premium receipts.

The Van Cleave case was quoted with approval and followed in People ex rel. Continental Insurance Company vs. Miller, Court of Appeals of New York, 70 N. E. Rep., 10. The New York statute provided:

> "* * * The term 'gross premiums' as used in this article shall include, in addition to all other premiums, such premiums as are collected from policies subsequently canceled and from reinsurance."

The court held that under the term as defined by the statute the word "gross" was intended to include all premiums that remained in the treasury of the company and to exclude any deductions for the commissions of agents or the expense of doing business; that the gross amount collected from canceled policies means the gross amount collected and retained by the company. The court also held that the reinsurance premiums must be included in the term "gross premiums" and that no deduction could be made therefor.

The authority of this case and the Van Cleave case would, I think, justify me in giving the construction to our statute which is claimed by the insurance companies were it not for the fact that I feel myself precluded from so doing on account of the difference between our statutes and the other statutes, and on account of the different question which is necessarily presented by the construction of the term as used in providing for the so-called "fire marshal tax" in Ohio.

The authorities, however, are not uniform. The case of Fire Insurance Association of Philadelphia vs. Love, decided by the supreme court of Texas in 1908, 108 S. W. 158, is directly contrary to the above cases.

The contention that premiums received by reinsuring companies are not subject to the tax, I think, is disposed of by what I have already said. The statute make no allowance for deductions of this kind. The proposition that reinsuring companies should not be taxed upon such premiums, because the contracts are almost entirely made outside of this state and do not constitute business transacted in Ohio, cannot be considered in this opinion. If the business is not transacted in Ohio, then, the tax would not attach; but whether the business is transacted in Ohio is a question between the companies and the insurance department, and would depend, of course, upon the facts in each particular case.

For the above reasons I am compelled to adhere to my opinion issued May 27, 1914.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

Since the above was dictated I have received an additional brief, citing the opinions of several attorney generals on this question.

The statute of Wisconsin providing for a tax similar to ours for maintaining the department of the state fire marshal provided for a tax of one-fourth of one per cent. on the gross premium and assessment receipts of such companies on all business done in Wisconsin * * *. The attorney general, upon the authority of the Van Cleave case and the Miller case, held that such term did not include the amount paid by fire insurance companies as return premiums; he held, however, that the term "gross premiums" should include the amounts paid for reinsurance and in this holding he called attention to the fact that the laws of Wisconsin, by an amendment, provided that money paid for reinsurance should be deducted from gross receipts in determining the amount upon which license fees should be paid, while the act providing for the fire marshal tax did not make any such provision. This seemed to have determined the attorney general's ruling as to reinsurance and the reason is analogous to that which has determined my ruling in the question now before me.

The attorney generals of North Dakota, South Dakota and Montana have all held that under the terms "gross amount of premiums received," "gross receipts" and "gross premiums collected," as applied to life insurance premiums, the companies should be allowed to make deductions for the amount of dividends paid or allowed on the policies.

These opinions all bear upon the construction of the word "gross," as applied to the method of calculating taxes to be assessed against insurance companies, and they are all authority for giving such word the construction asked by the insurance companies. I cannot, however, for the reasons which I have several times stated, feel justified in giving our statute the broad construction which is claimed; to do so would be to ignore entirely the construction placed upon it by the legislature of the state and by the court. If the statute is unjust it should be changed; but as it stands this change should be made by the legislature.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1289.

APPLICATION OF THE STATE BUILDING CODE WITH RESPECT TO THE SUBJECT OF SANITATION, INCLUDING THE MANNER OF SANITARY PLUMBING APPLYING TO BUILDINGS BEING ERECTED BY THE CITY OF CINCINNATI AT GLENDALE, OHIO, FOR USE AS A BOYS' REFUGE HOME—CINCINNATI PLUMBING CODE HAS NO APPLICATION OUTSIDE OF CINCINNATI.

The provisions of the state building code, with respect to the subject of sanitation, including the matter of sanitary plumbing, apply to the buildings here in question, to wit, those now being erected by the city of Cincinnati at Glendale, Ohio, for the purpose of being used as a boys' refuge home, and so applying the provisions of the state code as to sanitary plumbing, operate to exclude the conflicting provisions of municipal ordinances and of the plans and specifications with respect to plumbing in said buildings. The provisions of the Cincinnati plumbing code, being governmental in their nature, have no operation outside of the corporate limits of the city of Cincinnati.

The duty of enforcing the state building code in this case, is in the state board of health, and inasmuch as the observance of the provisions of the state building code is procured by the sanction of penalties, no other remedy than the invocation of these penalties can be resorted to to enforce its provisions.

COLUMBUS, OHIO, December 10, 1914.

HON. E. F. MCCAMPBELL, *Secretary Ohio State Board of Health, Columbus, Ohio.*

DEAR SIR:—My opinion has been asked with respect to certain situations presented by the erection, by the city of Cincinnati, of a certain refuge home for boys at Glendale, Ohio, which is outside the corporate limits of the city of Cincinnati.

I am informed that the plans and specifications for the construction of the buildings of this refuge home require the plumbing therein to be installed in accordance with the Cincinnati plumbing ordinance, the provisions of which are in some particulars in direct conflict, in regard to construction, quality of materials and tests, with part four of the Ohio state building code on the subject of sanitation.

The precise question presented is whether the provisions of the state building code, with respect to sanitary plumbing, or those of the Cincinnati ordinance, or either, apply to the situation at hand. With respect to this question it is evident that in so far as the provisions of the ordinance of the city of Cincinnati, relating to plumbing, are in conflict with the provisions of the state building code, relating to the same subject, the provisions of the ordinance must yield to the provisions of the state code. This conclusion follows upon consideration of the familiar rule that, where the provisions of a state statute and those of a municipal ordinance are in conflict, the conflicting provisions of the ordinance are void and of no effect. This rule is recognized by the legislature in the enactment of the state building code, as appears by section 5 thereof, which has been carried into the General Code as section 12600-277, which provides as follows:

> "Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions in this act contained nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act. * * *"

Aside from the question just noticed, it is apparent that the provisions of the Cincinnati ordinance can have no application by force of their own terms and the sanctions therein imposed to buildings erected outside of the municipal limits. The provisions of the ordinance with respect to the subject of sanitary plumbing are governmental in their nature, rather than proprietary, and as to such regulations it is clear that they can have no operation outside of the city limits in the absence of express statutory authority giving such regulations extra territorial operation

City of Coldwater vs. Tucker, 36 Mich. 474.
Donable vs. Harrisonburg, 104 Va. 533.
Decker vs. LaCrosse, 99 Wis. 414.
Snyder vs. Menasha, 118 Wis. 298.

Of course, aside from the effective operation of laws governing the situation, it would have been entirely competent for the parties to the contract for the construction of the plumbing work in these buildings to accept the provisions of the Cincinnati ordinance as a standard regulating the civil obligations of the parties in the execution of the work under this contract. But it is likewise clear that it was not competent for the parties, in the plans and specifications or otherwise in the contract, to provide that the plumbing work should be installed according to regulations which are in conflict with statutory provisions on the subject.

From the foregoing it is apparent that the plans and specifications for the erection of the buildings of this home, calling for the application of the provisions of the Cincinnati ordinance as to sanitary plumbing, are of no effect and can afford no protection to those installing plumbing in these buildings according to said provisions, in so far as the same are in conflict with provisions of the state code on this subject, if the provisions of the state code apply to the buildings in question.

With respect to this question, I note that the preamble to the building code act, found in part two thereof, under the heading of "Special requirements," provides as follows (102 O. L., 588; Sec. 12600-1, G. C.):

"Under part two which follows, will be found under their respective titles, the various classes of buildings covered by this code together with the special requirements for their respective design, construction and equipment.

"The classification of the various buildings will be found under the following titles, viz.:

"Title 1. Theaters and assembly halls.
"Title 2. Churches.
"Title 3. School buildings.
"Title 4. Asylums, hospitals and homes.
"Title 5. Hotels, lodging houses, apartments and tenement houses.
"Title 6. Club and lodge buildings.
"Title 7. Workshops, factories and mercantile establishments.

"Buildings or parts of buildings used only for the specific purposes mentioned under their respective title and classification shall be designed, constructed and equipped as called for under all of the sections coming under such title and classification.

"Buildings used for two or more different kinds of occupancy and combining the classifications covered under two or more different titles shall be designed, constructed and equipped according to all of the various sections of the different titles affecting such building or parts of such building.

"The detailed requirements of the above mentioned special requirements, together with standard devices will be found in subsequent parts of this code."

From a consideration of the provisions of this section of the act, just quoted, as well as all the provisions of the act as a whole, it is apparent that the general scheme of the act was to make specific provisions and special requirements with reference to the construction of the particular kinds of buildings designated in the preamble or section of the act quoted above, and also to make certain general provisions as to certain other matters of construction and equipment applicable equally to all of the kinds of buildings designated in the act.

Among the general provisions relating to construction and equipment, applying to each and all of the kinds of buildings above designated, are those relating to the subject of sanitation, found in part four of the act. As to the special requirements in construction and equipment, covered by part two of the act, only title 1, covering the subject of theaters and assembly halls, and title 3, covering school buildings, were enacted into the law. It follows, therefore, that the building code as enacted makes special requirements with reference to the construction only of theaters, assembly halls and school buildings; but with respect to sanitation, which includes the matter of plumbing, it makes provisions applicable to each and all of the particular kinds of buildings before mentioned. Among the buildings particularly designated are those of asylums, hospitals and homes; by which latter term is meant not private residences but public institutions of the kind here in question. I therefore conclude that the building code, in so far as it pertains to and provides for the matter of sanitation and plumbing, is applicable to the buildings now in process of erection for the boys' refuge home at Glendale, Ohio.

That the building code in these particulars so applies is to my mind further evidenced by section 2 of the act (Sec. 12600-274, G. C.) which provides as follows:

> "It shall be unlawful for any owner or owners, officers, board, committee or other person to construct, erect, build, equip or cause to be constructed, erected, built or equipped any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary sanitorium, children's home, hospital, medical institute, asylum, memorial building, armory, assembly hall or other building used for the assemblage or betterment of people in any municipal corporation, county or township in this state, or to make any addition thereto or alteration thereof, except in case of repairs for maintenance without affecting the construction, sanitation, safety or other vital feature of said building or structure, without complying with the requirements and provisions relating thereto contained in this act."

Though juvenile refuge homes of the kind and character of the one in question are not specifically mentioned in this section, the buildings of this home are of a kind similar in their use and purpose to some of the institutions specifically named, and are to be used for the assemblage and betterment of the particular persons for whom it is intended; and refuge homes of this kind are, in my opinion, clearly within the purview of the penal section above quoted.

It having been here determined that the state building code, with respect to plumbing and other matters of sanitation, applies to the buildings of this particular institution, it follows, upon the considerations before noted, that all provisions of the ordinance of the city of Cincinnati or in the plans and specifications for the erection of said buildings in conflict with the provisions of the state building code, on the subject of plumbing and sanitation, are void and of no effect.

The only remaining question suggested by the situation at hand is that concerning the duty of enforcing the provisions of the state code. With respect to this question section 1 of the act (Sec. 12600-281. G. C.) provides in part as follows:

"It shall be the duty of the state board of health or building inspector or commissioner, or health departments of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

From a consideration of the provisions of this section, it is apparent that whatever questions may be raised respecting the duty of enforcing the provisions of the state building code in municipalities having building or health departments, it is clear that outside of such municipalities the duty of enforcing the provisions of the state building code is cast upon the state board of health. In this connection, as before stated, the proper observance of the provisions of the code is secured by the sanction of the criminal penalties therein provided for, and this consideration makes it plain that the invocation of these penalties is the only remedy for violation of the provisions of this act.

State ex rel. vs. Capital City Dairy Co., 62 O. S., 123, 126.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1290.

AWARDING OF CONTRACT BY STATE HIGHWAY COMMISSIONER IN A CASE WHERE THE COUNTY HAS NOT CONTRIBUTED ANY PART OF THE COST OF A ROAD IMPROVEMENT.

The state highway commissioner in a case where a county is not contributing any part of the cost of a road improvement, may award a contract for the construction of such an improvement to members of the board of county commissioners as individuals, providing bids are advertised for and they are the lowest bidders, and all provisions of the law relating to contracts of that nature are complied with.

COLUMBUS, OHIO, December 11, 1914.

THE HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 11th, which reads as follows:

"I find that the county commissioners of Brown county, Ohio, did not make use of the apportionment of the highway fund, to Brown county within the statutory time, as required under the provisions of section 1185, General Code. Whereupon we proceeded under the provisions of this same section to survey, prepare plans and make an estimate of the cost of the construction of a certain inter-county highway.

"We have offered for letting the contract for this construction, wherein the state is to pay the entire cost and expense of the improvement. No bids were received at this particular letting, and it is our intention to readvertise the work for letting at an early date. Two members of the board of

county commissioners have requested that they be given consideration as contractors, and the question confronting us is whether or not we would be entitled to award the contract to these two members of the board of county commissioners, acting as individuals, should they be the lowest responsible bidders."

Section 1185, of the General Code, as amended, 1913 (103 O. L., p. 449), provides for the application by county commissioners on or before January 1st of each year for state aid in the construction, maintenance and repair of inter-county highways, and that if the county commissioners have not made use of the apportionment of the state money allotted to the county on or before the first day of May succeeding the making of the application, the state highway commissioner

> "Shall enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof of said county, either by contract, force account, or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof from the said apportionment of the appropriation to said county so unused as aforesaid."

In a case where the state is paying the whole cost of an improvement, the county commissioners are not required to adopt a resolution that the highway be constructed under the provisions of the state highway law; they have nothing to do with the selection of the road or roads to be improved, nor is it necessary that they approve contracts for construction as is the case where the county is contributing a portion of the cost.

Consideration of the various statutes governing your department leads to the conclusion, and it is my opinion, that there is nothing to prevent you from awarding the contract to the two men who are on the board of county commissioners, providing they are the lowest bidders, and the requirements of law relating to advertisement for bids, awarding of contracts, and giving of bonds are complied with.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1291.

COUNTY CORONER NOT JUSTIFIED IN HOLDING INQUESTS OVER BODIES OF PERSONS WHO LOST THEIR LIVES IN THE FLOOD OF 1913.

A county coroner is not justified in holding inquests over the bodies of persons who lost their lives in the flood of March, 1913, nor to receive fees from the county treasury for holding such inquests, unless there was a good reason to believe that such persons came to their death by violence or unlawful means.

COLUMBUS, OHIO, December 11, 1914.

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

GENTLEMEN:—I have your letter of October 19th, wherein you request an opinion upon the question set forth in a letter addressed to you by Mr. T. W. Jones, one of your examiners, which letter was enclosed in your communication to me.

Mr. Jones states that the coroner of a certain county in this state held inquests over the dead bodies of persons who lost their lives in the flood of March 24, 1913, for which services he charged and received the statutory fees. Mr. Jones inquires whether, under these circumstances, the coroner was justified in holding the inquests and in drawing from the county treasury fees therefor.

The authority for a coroner to hold an inquest is found in section 2856, of the General Code, which provides:

> "When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law."

Section 2857, of the General Code, provides:

> "The coroner shall draw up and subscribe his finding of facts in writing. If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, so charged, and there present, he shall arrest such person or persons, and convey him or them immediately before a proper officer for examination according to law. If such persons, or any of them, are not present, the coroner forthwith shall inform one or more justices of the peace, and the prosecuting attorney, if within the county, of the facts so found, in order that the persons may be immediately dealt with according to law."

Before the codification of 1910 these sections were known as sections 1221 and 1222 of the Revised Statutes. They were construed in State ex rel. vs. Bellows, 62 Ohio St. 307, as

> "Within the meaning of section 1221, Revised Statutes, providing for inquests by the coroner, a dead body 'is found within the county' when it is ascertained to be in the county; and death is supposed to have been caused by violence whenever the coroner from observation or information has substantial reason for believing or surmising that death was caused by unlawful means." (Syl.)

After quoting from the foregoing sections the court on page 310, says:

> "It is thus indicated that the inquest is intended to aid in the detection of crimes and in the punishment of those who perpetrate them. Construed

with this purpose in view, and with reference to their natural meaning, the sense in which the words and phrases of the statutes are used should not be the subject of serious doubt. *A death 'caused by violence' is a death caused by unlawful means, such as usually call for the punishment of those who employ them.* A body 'is found' within the county when it is ascertained by any means that it is in the county. 'Death is supposed to have been caused by violence' whenever from such observation as he may be able to make, and from such information as may come to him, the coroner is for reasons of substance led to surmise or think that the death has been so caused.

"It is the duty of the coroner to hold an inquest and to perform the other duties enjoined upon him by these sections of the statute whenever a dead body is found within his county and he knows or may reasonably believe that death was caused by unlawful means. For such service he is entitled to the compensation which the defendants propose to pay."

The court then approves the opinion of the circuit court in the same case, as reported in 8 Circuit Decisions, 376. The syllabus in the circuit court report reads:

"Meaning of the words 'found' and 'violence' as used in section 1221, Revised Statutes:

"The word 'found' in this section is jurisdictional, and means being present in the county. *'Violence' means the unlawful use of physical force or other agency to cause death. It does not include mere accident or casualty.*

"The coroner is authorized and required to hold an inquest upon a dead body lying in his county, when he knows, or has reason to suppose, the death was caused by unlawful means."

On pages 378 and 379 of the opinion Shearer, C. J., says:

"Of course, it is not in every case of death from unknown causes that the coroner would be authorized to hold an inquest, but if he knows, or has reasonable ground to believe, the death was the result of violence, or unlawful means, the coroner not only may, but is required to hold an inquest. *Violence, in the sense used in the statute, means force unlawfully exercised, as distinguished from mere accident or casualty.*

"We are, therefore, of the opinion that where a person has come to his death by violence, as hereinbefore defined, whether in the presence of third persons or not, it is the duty of the coroner to hold an inquest, not only to ascertain the cause of the death, but whether a crime has been committed, who the perpetrator is, and to secure and preserve the evidence to the end that justice may not be defeated.

"The word 'supposed' in the statute does not necessarily imply doubt, uncertainty or ignorance of the cause of the death. It is broad enough to include both suspicion and knowledge. If the coroner either knows or suspects the death to have been by violence, he may act."

By virtue of section 2856, General Code, above quoted, the coroner is authorized to hold an inquest over the body of a person "whose death is supposed to have been caused by violence;" and the court, in State vs. Bellows, supra, says: "A death caused by violence is a death caused by unlawful means, such as usually call for punishment of those who employ them."

The coroner, therefore, can only hold an inquest when he knows or has reasonable grounds for believing that death has been caused by violence, by the use of unlawful means, as defined in the Bellows case, supra.

I am, therefore, of the opinion that said coroner had no legal right to hold inquests over the bodies of persons whose death was caused by the March, 1913, flood, unless there was good reason to believe that such persons came to their death by reason of violence that would call for the punishment of those who employed it. Death by accidental drowning in that flood certainly would not be death caused by violence, so as to justify the coroner in holding an inquest. In such cases the coroner was without right or authority in law to hold an inquest or to receive from the county treasury the fees so charged therefor.

Very truly yors,
TIMOTHY S. HOGAN,
Attorney General.

1292.

AUTHORITY OF THE AGRICULTURAL COMMISSION OF OHIO TO TAKE MEANS OF EXTERMINATING RABBITS FOR THE PURPOSE OF PREVENTING THE SPREAD OF CONTAGIOUS DISEASES AMONG LIVE STOCK.

Under the provisions of section 30 of the act of April 15th, 1913, creating an agricultural commission of Ohio, the commission is given express authority to use all proper means to prevent the spread or infection of contagious diseases among live stock, and under this delegated authority it has the authority to make all such rules and orders having any relation to the authorized end to be attained.

Where rabbits are now or may become an agency in any degree in the spread of the hoof and mouth disease, the board may lawfully take such measures as will secure relief from such danger.

COLUMBUS, OHIO, December 11, 1914.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—My opinion is asked with respect to a condition rising out of the fact that during the hunting season which is now about to close, the hunting and killing of rabbits has been prevented in large part by the precautionary order of your commission prohibiting hunting on account of the existence of the hoof and mouth disease in cattle and other live stock.

As I understand it, the quarantine heretofore established has been entirely lifted in a large number of the counties, and that in other counties now subject to absolute or qualified quarantine, a large amount of free territory as far as the question of hunting is concerned has been declared. The question presented is what, if anything, your commission may do in order to secure the destruction of rabbits in this free territory in order to prevent such rabbits from becoming an agency in the spread of this disease either now or in the immediate future.

In answer to this it seems obvious that your power to take measures for the destruction of rabbits which may become a menace on the reason above stated rests upon the same ground which authorized your board to prohibit promiscuous hunting. By section 30 of the act of April 15th, 1913, creating the agricultural commission of Ohio, this commission is empowered to use all proper means in the prevention of the spread of dangerously infectious and contagious diseases among domestic animals and providing for the extermination of such diseases. Your commission is an administrative body, and as such it has no power to make laws, nor

is it within the power of the legislature to delegate to this commission any power to make laws. By the section above noted, however, the commission is given express authority to use all proper means to prevent the spread of infectious and contagious diseases among live stock, and under this delegated authority it has the authority to make all such rules and orders having any relation to the authorized end to be attained, and if rabbits are now or may become an agency in any degree in the spread of the existing hoof and mouth disease, or in preventing or retarding its extermination, an order to your board contemplating and providing for the destruction of rabbits would be an order having proper relation to the end in view, and for this purpose it is my opinion your board may lawfully take such measures as will secure the result desired.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1293.

INDUSTRIAL COMMISSION OF OHIO—NO AUTHORITY TO HOLD AN APPLICATION FOR AN AWARD BARRED BY COMPROMISE WHERE THE CONTRACT OF RELEASE WAS FOR A LESS SUM THAN THAT TO WHICH THE EMPLOYE WAS ENTITLED UNDER SAID ACT.

The Industrial Commission of Ohio has no jurisdiction or authority to hold that an application for award has been barred by a compromise and release entered into subsequent to the filing of such application between the employer and his employe, who has been injured in the course of his employment, when such claim for award has been made by the injured employe under section 27 of the workmen's compensation act; such contract of release being for a less sum than that to which the employe was entitled under said act.

COLUMBUS, OHIO, December 12, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of December 1st, 1914, you write that a claim has been filed with your commission, under the provisions of section 27 of the workmen's compensation act, by an employe against his employer, for the determination of the amount of compensation to which he is entitled by reason of an injury sustained by him on June 23d, 1914.

It seems that *after filing the claim,* the applicant on December 18th, 1914, signed a release prepared and presented to him by the employer against whom he claimed compensation, releasing such employer from any or all claims for damages and the payment of medical services rendered in connection with and growing out of the accident. The amount of compensation to which applicant would be entitled under the law would exceed the amount which he received from the company. The question is whether the release signed by the applicant is a bar to the award to him of compensation to which he would be entitled under the provisions of section 27 of the workmen's compensation act. As the form of release is not presented, I am unable to answer the question as to whether it covers the release of claims made under the workmen's compensation act, and therefore, shall assume that it was so drafted as to constitute a waiver of such claim provided a contract of that sort would be valid.

This reduces the question to the determination of whether an employer has the right to contract with his employe to release such employer from the claim for award which is pending before the industrial commission.

An examination of the act and its history will show that one of its purposes was to render the payment of compensation certain to those who were injured in the course of their employment, and to obviate unconscionable advantage of employes being taken by their employers. This object would not be subserved if contracts such as the one here referred to were permissible, and the act should not be construed so as to authorize such violation of its spirit if there is to be found therein language justifying a contrary interpretation. In other words, statutes of this character should be liberally construed in favor of the employe, and the broad, humanitarian purpose which they are designed to accomplish.

Section 27, which is referred to in your inquiry, provides in substance that when an employer is not insured in the state fund his employe may, in lieu of action for damages, file an application for compensation with the board of awards (now the industrial commission), whereupon the board shall bear and determine the application in the same maner as other claims before the board. It shall ascertain and determine the amount due the injured employe, and in case of the failure of the employer to pay the award within ten days after receiving notice thereof, an action shall be instituted by the general on behalf of the injured employe to recover the amount found due the employe, the amount of compensation to be a liquidated claim for damages. The following language constitutes the concluding sentence of this section:

> "Any suit, action or proceeding brought against any employer, under the provisions of this section, may be compromised by the board, or such suit, action or proceeding may be prosecuted to final judgment as in the discretion of the board may best subserve the interests of the persons entitled to receive such compensation."

This language shows it to be the clear purpose of the act to preclude compromise between the employer and employe, without the approval of the board. While the quoted sentence may be said to be applicable after action has been instituted by the attorney general, nevertheless, it indicates the intent of the statute. Furthermore, when the claim is filed with the commission, it has sole jurisdiction over the same and any agreement for the purpose of barring it of the right to make an award should be subject to its approval. The practical effect of this section is to place the employer who is not insured on a parity with him who is insured in so far as the rights of the injured employe are concerned, in that the latter is allowed compensation on the same theory as if the employer had contributed to the state fund; the only distinction being that in the one case the compensation is paid from the state insurance fund, and in the other directly by the employer. Therefore, it would seem that any attempt to reduce the amount by compromise would be without consideration and therefore voidable unless it could be shown that the employer had a defense before the commission, which would only be in the event that the injury did not occur in the course of employment, that it was purposely self-inflicted, or that the employer or employe did not come within the purview of the workmen's compensation act. Of course it would be immaterial whether or not these defenses were meritorious if they were advanced in good faith, in so far as the question in consideration is concerned. This question, however, is one that I do not regard as essential to a determination of your inquiry.

Recurring again to the original discussion, I desire to call your attention to the fact that after the employe elects it is provided that the board shall hear and de-

termine the application and ascertain the amount of compensation which shall constitute a liquidated claim for damages. The only qualification is that the application shall be heard and determined in like manner as other claims before the board. When such claims are made the only duty of the board is to decide whether the premiums have been paid, and whether the employe has been injured in the course of his employment, and whether such injury has not been purposely self-inflicted. Applying this to section 27 it will be readily seen that the only question for the board is that above stated. There is no provision vesting it with jurisdiction to determine whether the claim has been barred. The board is to hear and determine the application and decide it *in the same manner* as other claims: section 27. No compromise, release or bar may be considered by it when such other claims are heard, but, on the contrary, as will be shown *infra,* the amount of award must be that called for by the law. The employer who is permitted to carry his own insurance must pay the amount required by the statute. He cannot relieve himself from responsibility by the payment of loss, nor can the industrial commission permit him so to do. Hence, if claims under section 27 must be allowed in like manner, it seems patent that the board of awards has neither power, authority, nor jurisdiction to decide questions arising under section 27 in a different manner from that adopted in the hearing of other applications under the act. The necessary corollary to this is that a question such as that submitted would not be within the province of your board or commission.

Subdivision 2 of section 14 construes the terms "employe," "workman" and "operative" as meaning

> "every person in the service of any person, firm or corporation, including any public service corporation employing five or more workmen regularly in the same business, or in or about the same establishment. * * *"

and section 21 provides that

> "every employe mentioned in subdivision 2 of section 14 hereof, who is injured and the dependents of such as are killed in the course of their employment * * * provided the same was not purposely self-inflicted * * * shall be entitled to receive either directly from his employer, as provided in section 22 hereof, or from the state insurance fund, such compensation * * * as is provided by sections thirty-two to forty inclusive of the act."

These sections indicate the manifest policy of the act to afford compensation under the act to all employes of all employers of the class named, the evident theory being that all such employers would comply with the law and insure in the state fund or carry their own insurance as allowed by the statute. Those who obeyed the law could not compromise, and if they carried their own insurance could not legally provide for the payment of less compensation than that paid out of the state fund to employes of those who contributed to the state fund. See sections 22 and 25. Can it be said to comport with sound public policy to permit one who disobeys the law by failing to insure, to do that which one who complies with the law is not permitted to do, thus penalizing obedience to law and rewarding violation of it? To state the question is to answer it in the negative.

Under section 54 contracts to indemnify employers from loss or damage on account of injuries to their employes shall be void unless they provide for payment to the injured employe of such compensation as is provided by the act. This reveals intent to secure to the employe the amount required to be paid by the statute.

All of the foregoing is in harmony with the first sentence of section 47 which contains the following language:

> "No agreement by an employe to waive his rights to compensation under this act shall be valid."

While this section may be said to have reference to agreements made prior to the injury, nevertheless, it seems to add force to the theory which I have taken of the law to the effect that it should not be read so as to justify the release of legitimate claims through an agreement entered into between the employer and the employe by virtue of which the latter receives less than he would have been entitled to under the statute. Any other construction would result, as I have before suggested, in the object of the statute being nullified, and its purpose ignored. Therefore, I am of the opinion that your commission is authorized to consider this case and make such order as you deem proper in the premises, on the theory that the release spoken of is no bar to the right of the injured employe to receive compensation in the manner provided by section 27.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1294.

DUTY OF THE BOARD OF EDUCATION IN REFERENCE TO PROVIDING RELIEF FOR BOYS UNDER FIFTEEN YEARS OF AGE AND GIRLS UNDER SIXTEEN YEARS OF AGE WHO ARE UNABLE TO SUPPORT THEMSELVES AND STAY IN SCHOOL.

It is the duty of the board of education to provide for relief out of its contingent fund for any boy under fifteen years of age and any girl under sixteen years of age, who is unable to attend school because absolutely required to work at home or elsewhere in order to support himself or herself or help to support or care for others who are unable to support or care for themselves, upon the report of the truant officer that he is satisfied of such necessity.

COLUMBUS, OHIO, December 12, 1914.

HON. GEO. J. CAREW, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—Under date of November 6, 1914, you submitted for an official opinion thereon the following inquiry:

> "A dispute has arisen in this city between the board of charities and the board of education as to the construction of section 7777 of the General Code, which provides for relief to children of school age in order to facilitate their attendance at school.
>
> "The board of charities claim that under a proper construction of this statute, the school board is required to provide, out of its contingent fund, necessary relief to children of school age required to work at home or elsewhere in order to support themselves or help to support others legally entitled to their services who are unable to support or care for themselves, no matter what the age of such child may be between the ages of eight and sixteen. The board of education contends that they are required to provide for only

such children, between the ages of eight and sixteen, as under the existing statutes are permitted to work, and that since as the law stands now, no boy under sixteen years of age and no girl under eighteen years of age is permitted to be employed by any person unless they can show schooling certificates, showing that they have passed the sixth grade, if a boy, and the seventh grade, if a girl, there are no children who are entitled to this relief."

Section 7777 of the General Code, referred to in your letter, provides for furnishing relief to enable children to attend school, as follows:

"When a truant officer is satisfied that a child, compelled to attend school by the provisions of this chapter, is unable to do so because absolutely required to work at home or elsewhere in order to support itself or help to support or care for others legally entitled to its services who are unable to support or care for themselves, such officer must report the case to the president of the board of education. Thereupon he shall furnish text books free of charge, and such other relief as may be necessary to enable the child to attend school for the time each year required by law. The expenses incident to furnishing books and relief must be paid from the contingent funds of the school district. Such child shall not be considered or declared a pauper by reason of the acceptance of the relief herein provided for. If the child, or its parents or guardian, refuses or neglects to take advantage of the provisions thus made for its instruction, it may be committed to a children's home or a juvenile reformatory, as provided for in the next three preceding sections."

The above quoted section comes under the section of the General Code entitled "Compulsory education."

Section 7765 provides for age and schooling certificates for girls and boys who are employed, as follows:

"No child under sixteen years of age shall be employed or be in the employment of any person, company or corporation during the school term and while the public schools are in session, unless such child presents to such person, company or corporation an age and schooling certificate herein provided for as a condition of employment, who shall keep the same on file for inspection by the truant officer or officers of the department of workshops and factories."

Section 7766 of the General Code provides in substance by whom such age and schooling certificates shall be approved and what such certificates shall contain.

The last two mentioned sections, to wit, 7765 and 7766, relate merely to the matter of permitting school children to work or be employed, and specifies the method whereby they may be so permitted to work or be employed.

Section 7777 supra, in effect provides that when a truant officer is satisfied that a child, compelled to attend school by the provisions of this chapter, is unable to do so because *absolutely required* to work at home or elsewhere in order to support itself or care for others legally entitled to its services who are unable to support or care for themselves, such officer must report the case to the president of the board of education, etc.

The term "absolutely required" as employed in said section, is used in the sense of necessity or want. That is to say, when a child is unable to attend school

because he is absolutely wanted or required, or it is absolutely necessary for him, to work at home or elsewhere in order to support himself or help to support or care for others who are unable to support or care for themselves—if this condition of necessity, want or need exists in the child's home, and his services therefore are required at home, then, within the meaning of the terms employed in section 7777, supra, such child is entitled to relief under said section. There is all the more reason for taking this view of the provisions contained in said section, when you consider that in every instance no boy under sixteen years of age and no girl under eighteen years of age, is permitted to be employed by any person unless they can acquire an age and schooling certificate showing that they have passed the sixth grade, if a boy, and the seventh grade if a girl. In other words, boys and girls are now barred from employment unless they can acquire an age and schooling certificate as provided for in sections 7765 and 7766, supra. Section 7777 supra, provides in substance that after the report has been made to the president of the board of education by the truant officer, thereupon such president shall furnish text books free of charge and such other relief as may be necessary to enable the child to attend school for the time each year required by law, such expenses incident thereto to be paid from the contingent fund of the school district. This duty is clearly imposed upon the president of the board, when the situation arises that a child is absolutely required, needed, or it is absolutely necessary for such child to work at home or elsewhere in order to support itself or help to support or care for others legally entitled to its services, etc.

Section 12981 of the General Code provides that whoever, being an officer, teacher, principal or other person, neglects to perform a duty imposed upon him in relation to enforcing the laws providing for compulsory education, shall be punished as follows:

> "Whoever, being an officer, principal, teacher, or other person, neglects to perform a duty imposed upon him by the laws relating to compulsory education or employment of minors, for which a specific penalty is not provided by law, shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense."

For the foregoing reasons, I am of the opinion that it is the duty of the board of education to provide relief out of its contingent fund for any boy under fifteen years of age and any girl under sixteen years of age, who is unable to attend school because absolutely required to work at home or elsewhere in order to support himself or herself or help to support or care for others legally entitled to his or her service who are unable to support or care for themselves, upon the report of the truant officer that he is satisfied of such necessity.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1295.

POWERS AND DUTIES OF DISTRICT ASSESSORS IN INCREASING OR REDUCING TAX VALUATIONS—BOARD OF COMPLAINTS—POWER AND DUTIES OF BOARD OF COMPLAINTS IN INCREASING OR DECREASING TAX VALUATION—POWER OF STATE TAX COMMISSION.

1. *A district assessor, acting under section* 5401, *General Code, and exercising the powers and duties formerly vested in the county auditor by said section, may not reduce valuations for previous years; but if in the course of the investigation of a return on the current duplicate, he is satisfied that a reduction ought to be made, he may make such reduction, with the consent of the auditor of state, unless the board of complaints has acted upon the same matter.*

2. *A taxpayer who fails to appeal to the board of complaints, may, nevertheless, be the beneficiary of a reduction in valuation made by the district assessor under section* 5401, *General Code, but is without other means of relief, judicial or otherwise.*

3. *Where the board of complaints has acted upon a complaint made to it by a taxpayer, and the taxpayer is not satisfied with its decision, but fails within thirty days of its decision to perfect an appeal to the commission, no relief can be afforded to him under section* 5401, *General Code, nor can the tax commission entertain an appeal from the decision of the board of complaints; in short, a taxpayer can have no relief whatever under such circumstances.*

4. *The substance of section* 5401, *General Code, is still in effect, and the district assessor may exercise the powers and duties formerly imposed by that section upon the county auditor, notwithstanding the seeming inconsistency of having the district assessor review and correct his own action.*

5. *The tax commission is not substituted for the auditor of state under section* 5401, *General Code.*

6. *Section* 5401 *does not apply to the correction of real property valuations.*

7. *The tax commission has no power to grant relief in individual cases other than through an appeal from the decision of a board of complaints.*

COLUMBUS, OHIO, December 14, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 26th, requesting my opinion upon the following questions: .

"1. Can a taxpayer whose property has been listed and carried on the duplicates in past years and the triplicate for the current year now receive any relief from the said valuation under section 5401, General Code?

"2. Can any relief be had by a taxpayer who failed to appeal to the district board of complaints?

"3. Is a person who failed to file an appeal within the thirty days from the *date of decision* of the board of complaints estopped from any further relief than that granted by that board?

"4. Do the provisions of the Warnes law operate a repeal by implication of section 5401, in that it would be a reviewing of a matter which had already been passed upon by the district assessor when he certifies the abstract of the county to the tax commission or transmits the duplicate to the county auditor?"

Your questions arise out of a seeming incongruity, apparent on the face of the statutes providing for the machinery of the assessment of personal property for taxation. Said statutes are as follows:

"Section 4 of the Warnes law, so-called, 103 Ohio Laws, 787. The district assessor shall, annually under the direction and supervision of the tax commission, list and value for taxation all real and personal property subject to taxation in the county constituting his assessment district, except as otherwise provided by law. * * * Wherever in the General Code, excepting in (certain sections) the words 'assessor' * * * are used, the same shall be deemed to mean the district assessor * * * and the offices held by such officers shall be deemed to be and are hereby abolished. The district assessor or his deputy shall, unless otherwise provided by law, perform or cause to be performed all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon such officers."

Section 7 of said act:

"On or before the first Monday of July, annually, the district assessor shall compile and make up * * * separate lists of the names of the several persons * * * in whose names real or personal property has been listed in each * * * district in his assessment district, placing separately * * * opposite each name * * * the aggregate value of the personal property as listed therein and revised by him * * *. Such lists shall be prepared in triplicate. On or before the first Monday in September in each year the district assessor shall correct such lists in accordance with the additions and deductions ordered by the tax commission of Ohio and by the board of complaints and shall certify and deliver two copies thereof to the county auditor. The copies delivered to the county auditor shall constitute the auditor's tax list and treasurer's duplicate of real and personal property for the current year. * * *"

Section 9 of said act:

"Before making out and compiling the tax lists and duplicate the assessor shall examine and revise the statements and returns of all property, both real and personal, to see that the valuations thereof are equal and uniform throughout the assessment district, and that all property and each and every class, kind or description thereof, is valued for taxation through his district at its full and true value in money. *If he finds any statement or return to be erroneous, either in the amount of property listed in the name of of any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, he shall correct such statement or return.*"

Section 14 of said act:

"It shall be the duty of the board of complaints to hear all complaints relating to the assessment of both real and personal property. It shall have power to lower or raise the assessments of all property submitted to it for review, or it may order a reassessment by the original assessing officer. At any hearing before the board, the assessing officer may appear to defend his assessments. Either party may appeal to the tax commission of Ohio

from the decision of the board. *If the board has reason to believe or is informed that any property subject to taxation in its assessment district has been omitted from the tax list, or has been improperly valued or assessed, it shall notify the district assessor to that effect and furnish him any facts and information within its knowledge bearing theron."*

Section 18 of said act:

"The district board of complaints shall have power to investigate all complaints against assessments on the tax list, with respect to the amount of property listed as well as with respect to the valuation at which the same is listed. The power of the board shall extend to all cases in which real estate or personal property has been assessed for taxation for the current year, *and to addition and corrections made during the next preceding year to the tax lists of previous years, but not to assessments, additions or corrections made by the tax commission of Ohio."*

Section 21 of said act:

"On or before the first day of July, annually, the district assessor shall give ten days' notice, * * * that the tax lists for the current year have been completed and are open for public inspection in his office, and that complaints against any valuation or assessment * * * will be heard by the district board of complaints. * * *"

Section 24 of said act:

"Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. Any taxpayer may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, county auditor, county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such a complaint."

Section 25 of said act:

"The county auditor shall lay before the district board of complaints all complaints filed with him. The board shall investigate all such complaints and may increase or decrease any valuation or correct any assessment complained of, and no other."

Section 27 of said act:

"The district board of complaints shall not increase any valuation complained of without giving reasonable notice to the person in whose name the property affected thereby is listed, and affording him an opportunity to be heard. * * *"

Section 29 of said act:

"The district board of complaints shall certify its action to the district assessor, who shall correct the tax lists and duplicates according to the de-

ductions and additions ordered by the board, in the manner provided for by law for making corrections thereof. If the tax list and duplicate have been delivered to the county auditor, the district assessor shall certify such corrections to him and he shall enter such corrections on his tax list and the treasurer's duplicate."

Section 31 of said act:

"An appeal from the decision of a district board of complaints may be taken to the tax commission of Ohio, within thirty days after the decision of such board, by the district assessor, or by any complainant, as provided in section twenty-four of this act. Such appeal shall be taken by written notice to that effect filed with the tax commission and with the county auditor, who shall thereupon certify to the commission a copy of the record of the board of complaints, pertaining to the original complaint, together with the minutes thereof, and all evidence, documentary or otherwise, offered in connection therewith. Upon receipt of notice of appeal, the county auditor shall notify all parties interested, and shall file proof of such notice with the tax commission of Ohio."

The foregoing sections lead to the following general statements:

The district assessor is the assessing officer (section 4). He is also the equalizing officer (section 9), and as such he is presumed to examine each statement or return of property to see that the amount and valuation thereof is correct before completing his work in that capacity. The completion of his work as an assessing and as an equalizing officer is to take place on the first of July, and does take place in contemplation of law when he has made up his tax list (section 7) and given public notice that the same is complete (section 21). The board of complaints is primarily the reviewing board, before which all complaints of taxpayers and public officers are to come. It is a tribunal in which the district assessor may appear, so to speak, as the adversary of any complainant. It is given ample power to grant relief against the action of the district assessor.

Nevertheless, on the face of the above statutes as they stand, without considering any other statutes, it appears that the power of the district assessor as an assessing officer is not wholly at an end when he has completed his work by making up his tax lists and duplicates and giving notice thereof; and that the power to make changes in valuations does not from that date forth in an assessing year reside exclusively in the board of complaints; for it is provided by section 14 that the board of complaints may order a reassessment by the original assessing officer and that the same board shall notify the assessor of the omission of any property from the tax lists, or of the improper valuation or assessment of any property, when knowledge of such fact comes to its notice. The meaning of this last provision is not exactly clear, in the light of the fact that the board of complaints has power to act upon its own initiative in the increase or reduction of any valuation on the tax list or the listed amount of taxable property thereon (section 28). If there is an explanation it is found, I think, in the supposition, which the legislative history will bear out, that the original draft of the measure from which the above sections are quoted did not provide for action by the board of complaints on its own initiative; so that, if the board of complaints should acquire knowledge of an erroneous assessment otherwise than through a direct complaint, it was the intention of the original bill that that knowledge should be imparted to the district assessor, who was to make the necessary assessment. As the law is actually passed, however, there is conflict at this point.

Of similar import is section 65 of the act above referred to, which provides as follows:

"When the district board of complaints discovers or has its attention called to the fact that in the current year or in any year since the year 1910 any taxable land, building, structure, improvement, minerals, mineral rights or personal property in the county, has escaped taxation or has been listed for taxation at less than its true value in money, it shall forthwith notify the district assessor of such fact. The district assessor shall make such inquiries and corrections as he is authorized and required to make by law in other cases in which real or personal property has escaped taxation, or has been improperly listed or valued for taxation."

At the risk of anticipating, I may state here that I think that this section, and especially the last sentence thereof, constitutes sufficient foundation for the conclusion that section 5401 of the General Code, as affected by other provisions of the Warnes law, was not repealed by implication, as inquired about in your fourth question.

I need not refer to section 64 of the Warnes law, which gives to the district assessor authority to correct clerical errors in the valuation of personal property after the tax list and duplicate has been made up, for the reason that I have assumed that your inquiries do not relate to errors of this sort.

So far, then, certain inconsistencies do appear in the Warnes law, but the supposed inconsistency to which your inquiries more particularly relate is disclosed by the following provisions of that law, and of the General Code as affected thereby:

Section 5 of the Warnes law, 103 O. L., 788:

"* * * whenever the county auditor is by any existing provision of law charged with any duty or vested with any power * * * in listing and valuing any property which has been omitted from the tax list, or in correcting any returns or statements of property for taxation, either with respect to its valuation or amount, such duty shall devolve upon and be performed by the district assessor, and such power shall vest in him and be exercised by him; provided, that if the county auditor has reason to believe or is informed that any property subject to taxation in his county has been omitted from the tax list, or has been improperly valued or assessed, he shall notify the district assessor to that effect, and furnish him any facts and information within his knowledge bearing thereon."

Section 5401 of the General Code provides:

"The county auditor, if he shall have reason to believe, or is informed that a person has in the year nineteen hundred and eleven or in any year thereafter, given to the assessor a false statement of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed, in said year nineteen hundred and eleven or in any year thereafter at any time before the final settlement with the county treasurer to correct the return of the assessor, and charge such persons on the duplicate with the proper amount of taxes. To enable him so to do, he may issue compulsory process, and require the attendance of any persons whom he thinks have knowledge of the articles, or value of the personal property, money or credits, investment in bonds, stocks, joint stock companies, or otherwise,

and examine such persons, on oath, in relation to such statement or return. The auditor, in all such cases, shall notify every such person before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or the return of the assessor was correct. The auditor, in all such cases shall file in his office a statement of the facts or evidence upon which he made such correction; *but, he shall not reduce the amount returned by the assessor, without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor.*"

It seems to me to be very clear that the general assembly intended that the group of powers vested in the county auditor by section 5401 of the General Code should be preserved intact and devolved upon the district assessor in his stead; in fact, I cannot imagine how the intention could have been made clearer than it has been made by the explicit provisions of section 5 of the Warnes law. But as if to make the matter sure, section 65 of the same law speaks of the powers of "inquiry and correction vested in the district assessor by law"; and aside from the provisions of sections 5398 to 5401, inclusive, and related sections, I know of no provisions of law which vest in the district assessor such powers as are referred to in said section 65.

I think, therefore, that I am ready to answer your fourth question at this point in this opinion by saying that however incongruous the idea of having the district assessor exercising the powers of the auditor, inquiring into and correcting his own acts as an assessing and equalizing officer, may be, such was the obvious intention of the legislature. So far from there having been an implied repeal of section 5401, there is an express adoption of it by reference—that is, the reference is express in all respects save the mere mention of the section number. In other words, the legislature has seen fit to repose in one officer the seemingly inconsistent functions of original assessment and equalization on the one hand and revision and correction on the other hand. But, as we shall see, this meaning inconsistency is not a novel one in our tax legislation.

Another inconsistency which seems to exist lies in the fact that the board of complaints has ample power to grant relief to a taxpayer, both against overvaluation of his own property and against undervaluation of another's property, as well as with respect to the listing of erroneous amounts, yet the district assessor, under section 5401, seems to have similar power; so that an instance is presented of similar power being vested in two tribunals which might, conceivably, act at the same time upon the same subject-matter.

Without discussing the question as to whether the inconsistency is as great as it seems at first blush, I may state now that this feature of our taxation law is not a new one by any means.

I refer the commission to the laws as they existed before the Warnes law was passed. So far as they related to the assessment of personal property they provided that the original listing should be made through the assessors elected in the different townships and municipal wards in the county. These made their returns to the county auditor, whose duty it was to receive them and then to "lay them before the annual county board of equalization" (Sec. 5590, General Code, now repealed). This annual county board of equalization consisted, for the county outside of any city therein, of the county commissioners and county auditor; while in cities it was known as the board of review and consisted of three members appointed by the state board of appraisers and assessors, and the auditor was its secretary, subject in all proper respects to the orders of the board. (Sec. 5623, General Code, now repealed.)

Now, under the old scheme of things, when the returns of the assessors were laid before the annual county board of equalization or the board of review, as the

case might be, it was the duty of the board to equalize such returns, hearing complaints (Sec. 5582, General Code, now repealed) and to go over the lists returned by each assessor (Section 5586, General Code, now repealed), with the power to add to or deduct from the valuation of personal property, moneys and credits of any person returned by the assessor or county auditor, or which may have been omitted by them. (Sec. 5591, General Code, now repealed.)

At the same time, of course, section 5401, as above quoted, with its original force and effect, was extant.

Under these provisions the county auditor, as a member of the county board of equalization, might directly participate in the finding and determination with respect to the amount that should be returned by an individual as his personal property, or he might have acted as county auditor, under section 5401, with the same effect. There is, therefore, practically the same inconsistency in the old statutes as is found in the new. Two remedies, at least, exist on the part of the public against the taxpayer for the correction of the same wrong, and so far as the inference deducible from the last clause of section 5401 is concerned it would appear that under the old law the taxpayer might in a proper case have his assessment reduced by the auditor, even though he had failed to go before the board of equalization.

Nor did this situation seemingly creep into the law in an accidental way. Our present taxation statutes date from the act of April 5, 1859; and it may be remarked that most of the sections of the General Code, as they stood prior to the adoption of the Warnes law, and as many of them still stand, have not been amended in substance or form since the date last mentioned. The act in question will be found in 56 Ohio Laws, 175. I call attention to section 34 of that act. It will be found, I think, to be almost verbatim the same as present section 5401, General Code, with the exception that the limitation to the year 1911 is not, of course, found therein.

In this connection see section 46 of that act, which provided for the annual county board of equalization. At that time there were no boards of review.

It is fair, then, to say that from the inception of our present system of taxation practically the same inconsistencies have existed in the machinery of making corrections that are found in the present law. In fact, the only difference between the present statutes and the old statutes is that the district assessor is substituted for the equalizing function of the old annual county board of equalization, and the board of complaints is substituted for the reviewing function of that board. The old county board of complaints, of which the auditor was a member, was supposed to perform exactly the same functions which the district assessor is required to perform by section 9 of the Warnes law, which is the section which really gives rise to your question, it being the provision requiring him, before he makes up his tax list, to examine the statements and returns and to see that the valuations are equal and uniform throughout the district and to correct any statement or return if it appears to be erroneous either in the amount of property listed or in the valuation of any item or items thereof. If it were not for the imposition of this duty on the district assessor, the inconsistency between the functions exercised by the district assessor antecedent to the making up of the tax lists and the functions which he is authorized to exercise under section 5401, as adopted by reference, would not be so great.

It appears, therefore, that this seeming inconsistency, which, as I shall hereinafter point out, is not so great as it appears to be, has been in one degree or another a feature of our taxing machinery since its inception. Therefore, I cannot hold that on account of its existence there has been any implied repeal of section 5401 or any part thereof through the adoption of the Warnes law.

My answer to your fourth question is therefore in the negative.

Your first three questions may be considered together. They involve an *interpretation* of all the provisions of law which have been quoted, and particularly of the last clause of section 5401, which, by necessary implication though not directly, authorizes the district assessor, exercising the powers formerly possessed by the county auditor, to reduce the amount returned by the assessor with the written assent of the auditor of state. In my opinion, the implication which appears here cannot be avoided, and if the district assessor, proceeding in the manner and form which the section stipulates, has acquired, so to speak, jurisdiction of given returns or statements, and the necessity or propriety of a reduction, rather than an increase is made clear to him, he may make such reduction if the written assent of the auditor of state is forthcoming.

In this connection I must point out that section 5401 is not a remedy available to the taxpayer as such; it provides for an exparte proceeding on the part of the district assessor, the successor of the county auditor in this respect. That official does not act on complaint but on his own initiative. In order to move him to action it must appear that the assessor (in this case the district assessor himself or one of his deputies) "has omitted or made an erroneous return." Though that fact may be made to appear to him by informal complaint, yet, the proceeding is not of the character of one before the board of complaints and it does not partake of the nature of a remedy in the sense that the taxpayer is required to exhaust it before receiving relief in the courts. But once the district assessor has determined to proceed with his inquiry, upon information that an erroneous return has been made, he must notify the taxpayer and give him a hearing. He must make up a statement of facts, and if this statement of facts shows the necessity or propriety of a reduction, rather than an increase, he must transmit the same to the auditor of state and secure his consent before such reduction can be made.

Now, this power can be exercised at any time before the final settlement in August of the year following the year in which the assessment is made. So far as express provision in the law is concerned, the failure of the taxpayer to complain to the board of complaints is no bar to the exercise by the district assessor of the powers reposed in him by this section. In fact, it could not be a bar; otherwise, there never could arise an occasion for the exercise of the power to reduce the assessment.

Whether or not the making of the complaint to the board of complaints and the failure of that board to afford relief to the taxpayer would be a bar to relief by the district assessor, under section 5401, is a question which it is not necessary to answer in considering the queries submitted in your letter, and no opinion is expressed thereon.

With these considerations in mind, then, your questions may be answered directly. Coming to your first question I beg to advise that the action of the district assessor, under section 5401, relates exclusively to the correction of the duplicate of the current year and does not apply to corrections for previous years. (Patton vs. Bank, 7 N. P. 401.) Corrections for previous years are to be made under section 5398 and section 5399 of the General Code, neither of which authorizes any reduction. The only remedy for reduction on personal property assessments for previous years is that found in section 18 of the Warnes law, supra, which gives the district board of complaints power to relieve upon complaints against additions and corrections made during the next preceding year to the tax lists of previous years; and it will be observed that this power does not extend to assessments on duplicates for previous years except such as have been made by way of corrections and additions.

Therefore, answering your first question, I am of the opinion that a taxpayer, whose property has been listed and carried on the duplicate in the past years and on the triplicate for the current year, may receive relief from the valuation for

the current year only under section 5401, General Code, provided he has not complained to the board of complaints respecting said valuation; if such a complaint has been made to the board of complaints I would be of the opinion that the same is a bar to proceedings by the district assessor under section 5401. But, as already stated, no final opinion is expressed here upon this point.

Answering your second question, I beg to advise that in my opinion the taxpayer who fails to appeal to the district board of complaints may be relieved by the district assessor under sections 5401 of the General Code. This section has been held to be mandatory upon the county auditor (when it applied to him), in the sense that when informed as to omissions it was his duty to proceed to correct them. State ex rel. vs. Crites, 48 O. S., 142. But it is my opinion that the section cannot be held to be mandatory with respect to the making of reductions, and that in this respect it does not constitute a remedy from the standpoint of the taxpayer. Therefore, if a taxpayer should fail to make complaint to the board of complaints with respect to a valuation on the current tax list, he is not entitled as of right to any action on the part of the district assessor under section 5401. If the district assessor chooses to reopen the matter of the taxpayer's return, for the purpose of correcting it, he may do so, but he need not take such action unless upon complaint that property has been omitted from that return, in which event mandamus will lie to compel him to make the necessary corrections. So, if a taxpayer fails to apply to the board of complaints for a reduction, all other remedies intended for his benefit are foreclosed to him, and upon the principles laid down in Mills vs. Board of Equalization, 1 C. S. C. R. 566, and other cases of similar import, the taxpayer's right to question the assessment by injunction proceedings or by resisting the collection of the tax is foreclosed.

In answering your third question I shall assume that some action has been taken upon a taxpayer's complaint by a board of complaints, but that the taxpayer is dissatisfied with the action of the board and desires further relief. Certainly, such relief cannot be obtained through the district assessor acting under section 5401, General Code, for the reason that his function under that section extends only to the correction of the returns, and when the returns have been supplanted by the determination of the board of complaints any proceedings on the part of the district assessor, under section 5401, would be in reality a correction of the work of the board of complaints. So that, while I have declined to pass, as a general proposition, upon the question as to whether a mere appeal to the board precludes action under section 5401, I do not hesitate to express an opinion that, where the board has actually acted on complaint made to it, the right of the district assessor to act under section 5401 in the matter of the assessment thus made by the board of complaints is destroyed.

Your third question involves consideration of section 31 of the Warnes law, as above quoted. This section stipulates that the appeal from the district board of complaints to the tax commission shall be made within thirty days after the decision of the board. In my opinion a taxpayer who has allowed thirty days after the decision of the board of complaints to elapse has no appeal to the tax commission therefrom. Not having any remedy by way of moving a district assessor to action under section 5401, and his right to an injunction being defeated by reason of his failure to exhaust the remedy that was open to him, or his laches in prosecuting that remedy, he may have no relief whatever.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

Since the above opinion was dictated it has been stated to me that by your first three questions you intended to inquire concerning points that have not been passed upon therein, viz.:

> "1. Is the power which section 5401, in terms, vests in the auditor of state now vested in the tax commission of Ohio?
> "2. Does section 5401 apply to real property valuation?
> "3. In the cases suggested by your second and third questions may a taxpayer, who has neglected to pursue the specific remedies afforded by the Warnes law, receive any relief from the tax commission?"

The first of these three questions involves consideration of section 1465-33 of the General Code, which provides in part as follows:

> "All powers, duties and privileges imposed and conferred upon any state board, which board was abolished or its powers in whole or in part conferred upon the tax commission of Ohio, by an act of the general assembly, passed May 10, 1910, or any power or duty theretofore conferred upon any state or county officer or board, which power and duty by such act was conferred upon such commission, is hereby imposed and conferred upon the commission created by such act. * * *"

I think it is obvious that this section is a mere adoption by reference of the provisions of the prior act therein mentioned, and has no independent force and effect of its own save to carry into the act of which it was a part the provisions of the earlier act; therefore, we must turn to the act of May 10, 1910, for an answer to the question. That act is found in 101 Ohio Laws, 399. Seeking in that act for a provision which would have the effect of transferring, so to speak, from the auditor of state to the tax commission, the power to approve reductions made by the county auditor under section 5401, General Code, the following are encountered, and their effect in this respect may be considered:

> "Sec. 12. (Designated as section 5456, General Code, but since repealed as such.) The commission shall adopt reasonable and proper rules and regulations to govern its proceedings and to regulate the mode and manner of all valuations of real or personal property, apportionments, investigations, inspections and hearings not otherwise specifically provided for."

The commission's power to adopt reasonable and proper rules and regulations is limited, I think, to the government of the mode and manner of proceedings authorized by law and does not extend so far as to authorize the commission, by rule, to assume to itself jurisdiction over a given subject-matter which the statutes specifically confer upon some other officer.

> "Sec. 115. (Designated as section 5542-17, but since repealed as such.) All powers, duties and privileges imposed and conferred upon any state board, which board is by this act abolished or its powers and duties in whole or in part conferred upon this commission, or any power or duty which has heretofore been conferred upon any state or county officer or board, which power and duty is hereby conferred upon the commission, is hereby imposed and conferred upon the commission created by this act; * * *"

The auditor of state not being a "state board," it is apparent that the second half, so to speak, of the above quoted provision is the only part thereof which could be applicable to the situation presented by your question. If the power or duty of the auditor of state, under section 5401, is a power or duty which the act of May 10, 1910, confers upon the commission, then, the effect of this section is to deprive the auditor of state of jurisdiction in the premises and to confer the same upon the commission. It is obvious, however, that section 115 of the act of 1910 does not of itself determine the question, because the act of which it is a part must be searched for other provisions which have the effect of conferring upon the commission the power or duty which section 5401 formerly at least imposed or conferred upon the auditor of state.

In this connection it may be said generally that many of the powers and duties formerly imposed by law upon the auditor of state are expressly vested and imposed by the act in the tax commission; thus, the auditor of state was formerly required or authorized to instruct the county auditors relative to their duties under the taxation laws; while section 81 of the act of 1910 expressly devolved that function upon the tax commission; it vested in the commission power to remit taxes and penalties illegally assessed and to correct errors on the tax duplicate, which function was formerly vested in the auditor of state, who was required in certain instances to call to his assistance the governor and the attorney general. Upon these express provisions the operation of section 115 of the act of 1910 is clear and its effect, as already stated, is to deprive the officers formerly exercising such functions of the power to exercise them and to impose the same exclusively upon the commission.

In addition to these powers, however, the commission was vested with certain functions which were at the time new in our taxation laws. Section 81 of the act directed the commission to "see that all laws concerning the valuation and assessment of all classes of property and the collection of taxes thereon are faithfully obeyed." I do not think that this function of the commission, taken in connection with section 115 of the act, has any effect upon the auditor's power under section 5401, because it is apparent from the context in section 81 that the function itself is to be discharged by the commission by the issuance of "such orders and instructions * * * as will carry into effect the provisions of law relating to taxation." The power to issue orders and instructions to a subordinate officer, for the purpose of seeing that the laws are properly administered, is readily distinguished from the power to approve an act of such an officer with reference to a matter of judgment and discretion.

The same section directs the commission to "require county auditors to place upon the tax duplicate any property which may be found to have, for any reason, escaped assessment and taxation."

This power of the commission would have some effect upon section 5401, because it would authorize the commission to move the auditor to action under section 5401 at the very least; indeed, it might have the extreme effect of giving to the commission the power to make investigations and corrections such as that possessed by the auditor under the section named, and, when read in connection with section 115 of the act, to deprive the county auditor of that power. I do not, however, believe that this extreme result can be sustained; that is, I think that the commission's power in this connection was intended to be merely supplementary to that of the county auditor and not to be a substitute for it. My reasons for this conclusion will not be stated in full, but the consequence of the opposite conclusion may suggest some of them. That consequence would be that the tax commission would have the sole power under the act of 1910 to make inquiries and corrections such as were formerly made by the county auditor, and that the county

auditor would have no power to do so. As already stated, I do not believe that the act of 1910 had such far-reaching effect. Certainly, it was not so interpreted in practice.

Further in this connection, however, it is to be observed that the power of the commission to order county auditors to place omitted property on the duplicate is not a power that was formerly possessed by the auditor of state, but is a new power. Therefore, I do not think that any effect can be claimed for this provision, read in connection with section 115 of the act of 1910, such as to divest the auditor of state of the power expressly imposed in him by section 5401.

Another power which the commission had under the act is created by the same section, viz., section 81, and is that of raising or lowering the assessed value of any real or personal property, to the end that the assessment laws of the state will be equitably administered. This action could be taken only upon notice and after hearing; it was a power quite separate and distinct from any which had formerly been exercised by any state officer; therefore, it could not be regarded as a power "which has heretofore been conferred upon any state or county officer or board" within the meaning of section 115.

Now, it might be contended with much force that the spirit of the act of 1910 was such as to force the conclusion that the legislature intended that all the functions of the state government relative to the assessment of property for taxation should be vested in the tax commission; so that section 115 should be given a liberal construction for the purpose of accomplishing this result; and that when the section is given such a construction the result of its application would be that the power of the auditor of state under section 5401 is transferred to the commission.

Unfortunately, such a vital substantive thing as a power cannot be taken from one officer and vested in another by such a remote inference as this. It would have been very easy for the legislature, in passing the act of 1910 and that of 1911, to amend section 5401 so as to accomplish this result. So far from doing so, however, the legislature, on the very same day on which it passed the act of May 10, 1910, amended section 5401 in other respects and left in it the same language which had theretofore been incorporated therein relative to the approval of the auditor of state. (101 O. L. 434.) Were there a direct conflict between the provisions of amended section 5401 and any provision of the tax commission act, passed on the same day, I would be of the opinion that the latter would prevail, especially in view of the fact that section 5401 was not amended in the *particular respect* of which I am speaking; but, as already pointed out, I can find no such direct conflict; so that, in the absence thereof, the re-enactment of section 5401 contemporaneously with the passage of the tax commission act of 1910 takes on a considerable degree of significance.

For all these reasons, then, I am of the opinion that it is the auditor of state and not the tax commission whose approval is required under section 5401.

Answering the second question above mentioned, I may say that section 5401 clearly relates only to personal property. *State ex rel.* vs. *Akins,* 63 *O. S.* 183. I think that the section as a whole clearly discloses the correctness of this conclusion and I do not believe that it is necessary for me to elaborate my reasons therefor.

The third question above mentioned requires further consideration of the Warnes law, so-called. Formerly, as already pointed out, the tax commission had the original power to raise or lower the assessed value of any real or personal property, first giving notice to interested parties, etc. This power, which first arose under section 81 of the act of 1910, was carried into the act of 1911, as section 147, and became section 5617-2, General Code. This section, however, was repealed expressly by the Warnes law. (See 103 Ohio Laws, 803, section 68.) So that the

commission no longer has independent power to act upon property valuations. Whatever action it takes must be under some specific provision of the statutes now in force.

One set of provisions is, of course, that for appeal from the decision of the board of complaints to the tax commission. As observed in the main opinion, the right of such an appeal is forfeited by the taxpayer upon failure on his part to perfect the same within thirty days after the decision of the board of complaints. It would seem reasonable to hold that where the right had been thus forfeited the same result could not be attained in some other way; otherwise, there would be no reason whatever for inserting the thirty-day limitation in section 31 of the act.

In like manner, section 5617-4, General Code, has been repealed. This is the section providing for the remission of taxes illegally assessed. The evident intention of the Warnes law is that the sole remedy of the taxpayer for the correction of errors shall be by application to the board of complaints and appeal from its decision to the tax commission. I think this intention is very clearly effected by the whole law, and it is not inconsistent therewith to hold that the county auditor may incidentally reduce a valuation of personal property by proceeding under section 5401; for, as I have pointed out, section 5401 is not in its essence a taxpayer's remedy at all, but rather a remedy of the public as against the taxpayer.

Without discussing the subject more elaborately, I may say I am clearly of the opinion that under the circumstances mentioned in your second and third questions the tax commission can afford no relief whatever to the taxpayer.

I have not dealt, however, in answering this question with the subject of reassessment power, to make which is expressly preserved by sections 62 and 63 of the Warnes law. The effect of an order for reassessment, however, is to subject all property of a given class within a taxing district to such reassessment. I assume that your questions relate to individual complaints, where the necessity for reassessment does not exist. Therefore, I do not consider the seemingly difficult question as to whether a reassessment may be ordered at any time, or only prior to the commission's approval of the abstract of property; though I should be inclined to the view that after the commission has approved the abstract it is too late to order a reassessment.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1296.

SCHOOLS LOCATED AT COUNTY CHILDREN'S HOME—CONTROL OF SUCH SCHOOLS PLACED WITH BOARD OF TRUSTEES OF SUCH HOMES—MEANING OF THE TERM "ORPHANS' ASYLUM" AS USED IN SECTION 7676, GENERAL CODE.

Sections 3085 *and* 3088, *General Code, vest the control of schools located at county children's homes in the board of trustees of such homes and they maintain control of the same until such time as schools are established by the respective boards of education of the districts wherein such county or orphans' homes are located, upon the request of the board of trustees of such homes to such board of education to so establish such schools. There is no statutory provision whereby the schools of county homes can be brought uniformly under the supervision of the boards of education of the respective districts, except that it be done in accordance with the provisions of sections* 7676 *and* 7677, *General Code, supra.*

Schools in county homes may be established and maintained independently of the boards of education of the respective districts wherein such homes are located, until such time as such schools may be brought under the control of the boards of education of such respective districts by the boards of education establishing schools at such homes in accordance with sections 7676 *and* 7677, *General Code, here before mentioned.*

The phrase "or orphans' asylum established by law," as employed in section 7676, *General Code, does not include an institution incorporated for the purpose of caring for dependent children, and which is not maintained in any manner by funds derived from governmental sources. The phrase "established by law" means those children's homes or orphans' asylums which are established and maintained by the state or some political subdivision thereof, and cannot be said to apply to institutions incorporated for the purpose of caring for dependent children, which are privately managed institutions and which do not derive support from the state.*

COLUMBUS, OHIO, December 14, 1914.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Under date of November 6, 1914, you request my opinion as follows:

> "By section 7676 of the General Code, as amended in April, 1913, O. L. Vol. No. 103, pp. 896, 897, 'the board of education in any district in which a children's home or orphan asylum is established by law, when requested by the board of trustees of such children's home, when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford the children therein, etc., the advantages and privileges of a common school education * * *.'
>
> "Section 7677 of O. L. Vol 103, supra, states that all schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located * * *.
>
> "What, in your opinion, is the meaning of the phrase as above worded, 'all schools so established in any such home or asylum, etc.', that is, does the control and management of the board of education of the school district in which a children's home is located extend to the school in such children's home under *all conditions,* or does it extend only to such children's homes as maintain schools which have been established by the board of

education at the request of the trustees of the home? In other words, was it the intent of the law to place the schools in all county homes under the supervision of the boards of education of their respective districts, or was it the intention to make such supervision possible only in those cases where the boards of education of the districts had established such schools at the request of the board of trustees?

"If the latter is the interpretation, can you find any other way whereby the schools of county homes can be uniformly brought under the supervision of the boards of education of their respective districts?

"Is there, in your opinion, under present statutes, authority whereby schools in county homes may be established and maintained by the trustees independently of the boards of education of the school districts in which such homes are located? That is, does section 3088, G. C., as amended in April, 1913, and found in O. L. Vol. 103, p. 890, give the trustees power to maintain a school in the home independently of the board of education of the district, as to establishment of the school and as to supervision and management after it is so established?

"Or, in other words, we seek to inquire whether the recently enacted school code does not place the inmates of the county children's homes of Ohio under the same scheme of county supervision as for other children who are educated at public expense? If this is not the case upon what sections of the law do you base the exemption from the application of the general school laws?

"In some sections of the General Code relating to children's homes occurs the expression 'or orphans' asylum established by law.' Does such expression include an institution incorporated for the purpose of caring for dependent children and which is not maintained in any manner by funds derived from governmental sources?"

Section 7676, General Code, as amended, Vol. 103 Ohio Laws, 896, provides as follows:

"The board of education in any district in which a children's home or orphans' asylum is established by law, when requested by the board of trustees of such children's home or orphans' asylum when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. Such schools must be continued in operation for such period as is provided by law for public schools. If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners."

Section 7677, General Code, as amended, 103 Ohio Laws, 896, provides as follows:

"All schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located, and courses of study, length of school term, and all other school matters shall be uniform in the respective school districts. Teachers employed in such homes

or institutions must have a teacher's elementary school certificate as provided by section seven thousand eight hundred and twenty-nine of the General Code."

It is to be noted that only schools established in the manner provided by section 7676, in any such home or asylum designated in said section, shall be under the control and management of the boards of education of the respective school districts in which such homes and institutions are located, as specified by section 7677. The provisions of the sections just quoted seem to indicate, therefore, that schools which are not so established in accordance with said sections are left outside of the control of the boards of education of the respective districts wherein such homes and schools so established are located, unless there is some other statutory authority which authorizes or warrants the board to take charge of schools which are not so established.

At first it might be thought that section 7690, General Code, might have some application to the situation about which you inquire. Said section provides as follows:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

It is to be noted that the section just quoted applies only to public schools. In this case the schools established at county homes or orphan asylums, by the trustees of such homes or asylums, are not strictly public schools, because they are solely and only for the purpose of educating the children or pupils living in such homes or asylums and are not open to the public generally, and do not even come under the control of the boards of education of the respective districts wherein such homes or asylums are located unless such boards assume the control and management of the same in accordance with sections 7676 and 7677, above quoted.

Section 3085, General Code, as amended, 103 Ohio Laws, 889, seems to indicate that schools located at county children's homes shall remain under the control of the trustees unless they come within the control of the board of education by virtue of sections 7676 and 7677, above quoted. Said section 3085 provides as follows:

"Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommendation of the superintendent, the trustees may appoint a matron, assistant matron, teacher or teachers whose duties shall be the care of the inmates of the home, and to direct their employment giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron, teacher, or teachers, shall perform such other duties, and receive for their services such compensation as the trustees may

by by-laws from time to time direct. They may be removed by the superintendent or at the pleasure of the trustees, or a majority of them. A licensed physician may be employed who shall at least quarterly make a physical and mental examination of all the inmates of such home, and a record of such examination shall be kept. When necessary, experts may be employed to give the proper treatment, or a child may be sent to a suitable institution for treatment at the expense of the county."

Section 3088, General Code, as amended, 103 Ohio Laws, 889, provides the particular method whereby funds shall be provided for the support of the school in such county homes, as follows:

"During the two weeks ending on the fourth Saturday in July, the clerk of the board of trustees shall take and return to the county auditor the names and ages of all youth of school age in such home. The state common school fund, not otherwise appropriated by law, shall be apportioned in proportion to the enumeration of youth, to such home and other districts, subdistricts and joint subdistricts within the county. The amount of money due such home under such apportionment shall be set apart by the auditor of the county, and shall become a part of the children's home fund and used to maintain a common school in such home, and shall be paid out on certificate of the trustees, stating in the certificate, the amount and the purposes thereof. Thereupon the county auditor shall issue his warrant on the treasurer for the amount so certified. This section shall not apply to children's homes in counties where such children attend the public schools. When in their judgment advisable, the trustees may employ a teacher to teach the school in any such home, as provided by law, but such teacher must have a 'teacher's elementary school certificate' as provided for by section seven thousand eight hundred and twenty-nine of the General Code."

By way of summary, it appears from the foregoing that sections 3085 and 3088, just quoted, vest the control of schools located at county children's homes in the board of trustees of such homes, and they maintain control of the same until such time as said schools come under the control of the respective boards of education of the districts wherein the same are located, by the board of trustees of such homes requesting the respective boards of education to so assume control of the schools therein. This answers your first question.

As to your second question, I am unable to find any statutory provision whereby the schools of county homes can be uniformly brought under the supervision of the boards of education of the respective districts except that it be done in accordance with the provisions of sections 7676 and 7677, General Code.

Answering your third question, it is my judgment that schools in county homes may be established and maintained independently of the boards of education of respective districts wherein such homes are located, until such time as such schools may be brought under the control of the boards of education of such respective districts in the manner heretofore pointed out. This follows as a conclusion from the reasoning set forth in the answer to your first question.

The recently enacted school code does not place the inmates of county children's homes attending schools maintained by the trustees under county supervision. This is in answer to your fourth question. I have already indicated the sections of the General Code which exempt the inmates or the children of county children's homes from the operation of the general school laws.

In answer to your fifth and last question, the phrase "or orphans' asylum established by law," as employed in section 7676, does not include an institution incorporated for the purpose of caring for dependent children, and which is not maintained in any manner by funds derived from governmental sources. The phrase "established by law" means those children's homes or orphan asylums which are established and maintained by the state or some political subdivision thereof, and cannot be said to apply to institutions incorporated for the purpose of caring for dependent children, which are privately managed institutions and which do not derive support from the state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1297.

POWER OF THE INDUSTRIAL COMMISSION IN REFERENCE TO EMPLOYERS CARRYING THEIR OWN INSURANCE UNDER SECTION 22 OF THE WORKMEN'S COMPENSATION ACT—MEDICAL ATTENDANCE, HOSPITAL AND NURSING SERVICE.

The industrial commission has authority to permit employers carrying their own insurance under section 22 of the workmen's compensation act to require employes of such company to receive medical attendance and hospital and nursing services from the physicians, surgeons and hospitals maintained by such company. If the employe calls upon physicians other than those employed by such company, the employer is not liable for the expenditure so incurred by such employe. This is a general rule and is subject to modification under exceptional circumstances, such as those which might arise when the company surgeons or physicians were unable by reason of absence or from some other cause to furnish the necessary medical attendance to the employe in case of emergency. This is especially true when the employe has first resorted to one of the company physicians and has later gone to another physician not in the employ of the company, for no valid reason.

COLUMBUS, OHIO, December 14, 1914.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of November 25, 1914, you write as follows:

"This commission has before it at the present time a claim involving the following set of circumstances:

"A certain company has been authorized by the commission to pay compensation and medical expenses direct in accordance with the provisions of section 22 of the workmen's compensation act.

"Said company maintains at its plant several regularly equipped emergency hospitals and employs under salary a number of surgeons to care for injuries sustained by its employes.

"On July 2, 1914, an employe of said company was injured and on July 7th said employe received treatment for his injury at the hands of one of the company's regular surgeons. This surgeon also rendered treatment for said injury from July 8th to July 27th, on which day he was discharged as cured.

"On July 5th, which was the first Sunday after the date of said employe's injury, he went to a doctor who is not connected with the surgical

staff of said company, who dressed his injury. Said doctor has presented to said company a bill for $3.00, covering the services rendered by him, as above mentioned, which bill the company refuses to pay, on the ground that their employes are compelled to accept the services of their regular surgeons in the treatment of injuries sustained in the course of their employment, and that in the event of the refusal of any employe to accept the services of a regular surgeon of the company, the company is not required to pay the fee of any outside physician from whom the employe may receive treatment.

"The commission is therefore desirous of obtaining your opinion as to whether an employer operating under the provisions of section 22 of the compensation act is required, under the provisions of said act, to pay for medical fees incurred by employes injured in the course of their employment, when such services are rendered by physicians other than the regularly appointed physicians of the employer."

Section 22 of the workman's compensation act, 103 Ohio Laws, 72, provides that,

"such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, or such employers as maintain benefit funds or departments or jointly with other employers maintain mutual associations of such said financial ability or credit, to which their employes are not required or permitted directly or indirectly to contribute, providing for the payment of such compensation and the furnishing of such medical, surgical, nursing and hospital services and attention and funeral expenses, may upon the finding of such facts by the state liability board of awards elect to pay individually or from such benefit fund department or association such compensation, and furnish such medical, surgical, nursing and hospital service and attention and funeral expenses, directly to such injured or the dependents of such killed employes; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or to secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases * * *."

The board of awards is further authorized to modify its findings in order to secure strict compliance with the provisions of the act in reference to the payment of compensation and the furnishing of medical, nursing and hospital services and medicines and funeral expenses.

An explicit provision may be found in section 42 of the act authorizing the board to disburse such amount for medical, nursing and hospital services and medicines as it may deem proper, not, however, to exceed two hundred dollars; and the board is given the power to adopt rules and regulations with regard to furnishing medical, nursing and hospital services and medicine.

From this last it will be seen that the board itself is given wide discretion as to the manner in which disbursements of this character may be made; but there

is no such explicit provision contained in section 22 authorizing employers directly to compensate their injured employes. It seems that the language with reference to the furnishing of medical, surgical, nursing and hospital attention and services and medicine would permit the employer to provide such services and attention, and in so doing he would have the right to select his own physician or surgeon, and provide for nurses and a hospital of his own selection, subject to the approval of the board of awards—or at the present time the industrial commission, which has superseded said board of awards. It is nowhere directly stated in the section that the employer must pay the injured employe the expenses to which he has been put in providing himself with medical, surgical, nursing and hospital services; although he is required to furnish funeral *expenses*.

In those parts of the section above quoted it will be found, however, that the employer may be required to give bond to secure "the payment of the compensation and the expenses herein provided for." From this one might infer that the word "expenses" had reference not only to funeral expenses but to sums expended for medical, surgical, nursing and hospital services. The fact that express mention is made of payment of compensation and expenses would seem to imply that this was to cover all of the expenditures to which the employer was to be put under the act. It would not seem reasonable to require bond simply for the payment of compensation and funeral expenses and to omit the furnishing of medical, surgical and hospital services. It is as important to the employe that he receive one as the other. Therefore, it may be assumed that the act may be so construed as to require reimbursement of the employe for such sums as he has expended in the treatment of his injuries. On the other hand, as we have before suggested, it may with great force be argued that when the employer has provided a corps of nurses, physicians and a hospital for the care and treatment of his injured employes, he is complying with the spirit of the act and his employe should be compelled to receive treatment from those whom the employer has provided for this purpose; provided, of course, the industrial commission has sanctioned the action of the employer in this regard. Under these circumstances it would seem manifestly unfair for the employe to put the employer to the additional expense of paying compensation for medical attention in addition to that which he had furnished the employe and which was adequate.

With these considerations in mind I incline to the belief that this is an administrative matter, which should be taken care of by your commission at the time it authorizes the employer directly to pay compensation and medical expenses in lieu of insuring in the state fund. If it finds that the hospitals, surgeons and nurses maintained and employed by the employer are efficient, and that injured employes will receive proper medical care and attention therefrom and therein, it may permit such employer to require his employe to be treated by its surgeons, and cared for by its nurses in its hospitals. When this is done I do not think that the employer can be made liable to other physicians who may be employed by the injured workman, except under exceptional circumstances, under which it might be impossible to secure the attendance of the regular surgeon of the employer.

Directly answering your question, it is my opinion that if the employer is permitted by your commission to furnish medical attention by his regular physicians to his injured employes, and, further, if your commission authorizes such service to be exclusive, then such employer cannot be compelled to pay for medical services rendered by physicians other than the regularly appointed physicians of the employer. I think I have fully outlined the circumstances under which this condition of affairs may arise.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1298.

LAND REGISTRATION ACT—ENTRIES CLERK OF COURTS SHOULD MAKE—EXPENSE OF REGISTRATION—COUNTY RECORDER—COSTS ARISING OUT OF REGISTRATION.

1. *The clerk of courts should in ordinary cases enter upon his journal the entire decree of registration in actions brought under the land registration act of Ohio, but where there is no special reason for so doing the court might, under authority of section* 11605, *General Code, authorize the waiver of the making of the final record. Requirements of this law may be met by the clerk's entering the orders and decrees on the minutes of the journal and carefully collecting and binding all papers and transmitting them to the recorder's office. A certified copy of the entry must be furnished the recorder by the clerk.*

2. *Applicants for registration should deposit a sufficient amount of money to pay the cost of mailing registered letters and the posting of notice.*

3. *All papers dealing with registration of title should be filed with the recorder.*

4. *Costs arising out of the registration cause of action should be taxed and paid in the manner provided in that act; while costs covering cause of action to sell realty should be paid under the statutes governing them. Registration is separate and distinct from partition or the selling of lands to pay debts and legacies. The statutes referring to the latter have not been superseded by such registration act.*

COLUMBUS, OHIO, December 14, 1914.

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

GENTLEMEN:—Under date of November 18th you submit the following questions, asked of you by the clerk of courts of Delaware, Ohio:

> "1. Is the clerk of courts expected to journalize all of this complex decree of registration and also furnish recorders with certified copies of the same? In ordinary cases a single copy of these plats and descriptions would cost more than the three dollars.
>
> "2. What record is the clerk compelled to make in the above suit?
>
> "3. Is a defendant who files a pleading in answer to the first cause 'to sell lands to pay debts, etc.,' but does not in any way answer the second cause 'registration,' required to pay the three dollars mentioned in section 112 of the registration law?
>
> "4. Who pays the cost of notifying defendants as required in section 15?
>
> "5. What should be the final disposition of papers in above cause?
>
> "6. Is the clerk required to journalize all the orders of the court in the registration cause?
>
> "7. How should costs be taxed in above suit?"

1. While in ordinary cases the court is to enter upon his journal the entire decree of registration, nevertheless, I think that it is competent to waive the making of final record in cases where there is no special reason for so doing, and this should be done under order of the court, by authority of section 11605, of the General Code. The real requirements of the law will be met by the clerk's entering the orders and decree of the court on the minutes of the journal and carefully collect-

ing and binding all the papers together and transmitting them to the recorder's office where they will be permanently filed. If this course is adopted the decree settling title and also the decree of registration will be of record in the minutes of the court; and the certified copy of the decree of registration, which under the law becomes the first certificate of title, will be of record in the recorder's office. The clerk must furnish the recorder with a certified copy of the entry. This is manifest from the provisions of section 23, of the land registration act, 103 O. L. 914 et seq.

2. Your second question has been answered in the reply to your first question.

3. This question is too indefinite for answer. A statement should be made as to how the defendant has been made a party and what interest he has in the matter. You will remember that under section 64, in a suit embodying two causes of action, one for registration, all the parties are to be brought before the court in the manner provided for original registration. If the defendant is brought into court for this purpose it would seem that he comes within the purview of section 112 of the registration law and should pay the fee.

4. While the statute is very vague as to the payment of the cost of notifying defendants, as required by section 15, I think it would be proper for the court to provide that the applicant for registration should deposit a sufficient amount to pay the cost of mailing registered letters and the posting of the notice. The service of summons is taken care of by the next to the concluding paragraph of section 112.

5. As has been before suggested, all papers dealing with the registration of title should be filed with the recorder. The following language from section 23 of the act in question is decisive of this:

> "The clerk shall at once in every cause make a final record thereof and immediately thereafter deliver to the recorder all papers in the case, taking his receipt therefor, which papers the recorder shall file, index and carefully preserve and note on the original certificate in his office such filing and the number or other designation under which they may be found."

6. Your sixth question has been covered in my answer to your first question. Orders of the court should be entered on the minutes.

7. The registration costs should be taxed and paid in the manner provided in the registration act; and costs provided by the statutes governing the second cause of action should be taxed and paid in the manner heretofore obtaining. The registration is separate and distinct from partition or the selling of lands to pay debts and legacies. The statutes with reference to the latter have not been superseded by the former.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1299.

EXEMPTION OF PROPERTY OF FOREIGN CORPORATIONS IN OHIO UNDER SECTION 192, GENERAL CODE.

The stock of a foreign corporation, some of the property of which is taxed in a foreign country, can, under no circumstances, be exempt from taxation in Ohio, under section 192, General Code.

COLUMBUS, OHIO, December 15, 1914.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of November 7th requesting my opinion on the following question:

> "Suppose a corporation pays as a fee for the privilege of exercising its franchises in Ohio the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock, and unquestionably has two-thirds of its property taxed in Ohio but has a comparatively insignificant part of the remainder taxed in a foreign country, would the stock of such company be taxable in the hands of the owners thereof residing in this state?"

In connection with this request I have been favored with an exhaustive brief prepared by Hon. E. L. Savage, representing a certain corporation which falls within the class suggested by your question. I take this opportunity to state that this brief has been of great assistance to me in reaching the conclusion at which I have arrived. The question hinges upon the proper interpretation of section 192, General Code, which provides as follows:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed *in another state or states,* provided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."

The exact question is as to whether or not the phrase "in another state or states" as used in this section means and embraces states of the United States only or applies to foreign countries. At first blush it would seem natural to me that the phrase is limited in its scope to other states of the United States. It is true that a foreign country or province is in a sense a "state" but it is not *"another state"* like Ohio. There was evidently in the mind of the legislature a comparison between Ohio and other states, meaning, of course, other states of the United States.

But Mr. Savage, by an exhaustive discussion of the related statutes, has convinced me that the meaning of this phrase is ambiguous. He points out that a corporation organized under the laws of a foreign country is a foreign corporation

within the meaning, for example, of sections 178 and 183, General Code, and may be admitted to do business in Ohio the same as a foreign corporation organized under the laws of another state of the Union. With this I agree; and I agree too that it would be most reasonable to extend the comity provisions of section 12 equally, and to hold that "another state" as used therein, means any other sovereign territory having the power to create corporations. But under the peculiar language of section 192, I cannot arrive at the conclusion that the phrase in question is more than ambiguous, i. e., clearly has the meaning for which Mr. Savage contends. Therefore I have followed with him the course of the legislative history of this provision as being the clearest and most likely index to the legislative intent therein embodied.

It appears that prior to the codification of 1910 this section, which was enacted in its then existing form in 97 O. L. 498, used the following language:

> "and the remainder is taxed in some other state or states of the *United States.*"

In process of codification the words "of the United States" were, therefore, dropped. Mr. Savage argues that this verbal change is indicative of an intention to change the meaning of the statute, particularly in view of the fact that such changed meaning would possibly comport more nearly with a consistent legislative policy. He argues further that the words "of the United States" in the original law must have been inserted by mistake and that such mistake was clearly apparent when the policy of the entire law was considered, and constituted a proper subject for a correction in process of codification.

I cannot agree with this theory of the matter. The fundamental principle applicable, is that verbal changes made in process of codification are presumed not to change the meaning of the law; so that where the codified statute is ambiguous, reference to the prior statute for the purpose of resolving such ambiguity is proper, and if upon such reference the original statute is found to be clear in meaning, the meaning thus ascertained will be given to the codified statute. Allen vs. Russell, 39 O. S. 336; State vs. Shockley, 45 O. S. 304; State vs. Stout, 49 O. S. 270; Martin vs. Miller, 70 O. S. 219, and Stevenson vs. State, 70 O. S. 11.

In other words we are not warranted in presuming that the legislation of 1902, which was the deliberate act of the legislature in considering this one subject-matter, contained language inserted by mistake, whereas the General Code of 1910, which was merely a general revision of all the statutes, embodied a deliberate intent to change the meaning of the law. The converse is rather the case, as the authorities hold.

Of course this line of reasoning would not be applicable if it could be said that the words "another state or states" clearly and beyond doubt comprise foreign countries as well as states of the United States. But as before stated, I am unable to bring myself to this conclusion. If these words in the present statute have any clear and unmistakable meaning, that meaning is limited to states of the United States; and when doubt is created, so to speak, by consideration of the hardships and perhaps ridiculous consequences that grow out of such a reading of the statute, it is nevertheless but a doubt, and as such is resolved by consideration of the legislative history as above set forth.

For all the foregoing reasons, then, I am of the opinion that if a part of the property of a foreign corporation is taxed in a foreign country, the stockholders of such corporation can under no circumstances claim exemption from taxation on account of their shares therein.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

1300.

RIGHT OF THE MAYOR OF A CITY OR VILLAGE TO ARREST A PERSON FOUND VIOLATING AN ORDINANCE OF A CITY OR VILLAGE, FOR THE PURPOSE OF HOLDING SUCH PERSON UNTIL A WARRANT MAY BE OBTAINED.

Under sections 4549 *and* 13492, *General Code, the mayor of a city or village may arrest a person found violating an ordinance of a city or village for the purpose only of holding such person until a warrant may be obtained. Such warrant must be founded upon an affidavit, as prescribed by sections* 13496, *et seq., General Code.*

The mayor is disqualified from sitting in trial of the cause and at the same time acting as witness therein, and when a mayor is therefore the only witness of the offense perpetrated, inasmuch as the mayor cannot hear the cause, justice would be denied unless another tribunal is authorized to preside over the same. Such a circumstance, therefore, operates as a disability of the mayor, and under section 4549, *General Code, he may, therefore, in such case, appoint a justice of the peace to hear the cause. With such justice of the peace the mayor may file an affidavit upon which warrant may be issued, and in the course of the trial the mayor would be permitted to testify.*

COLUMBUS, OHIO, December 15, 1914.

THE HON. J. T. DEFORD, *City Solicitor, Minerva, Ohio.*

DEAR SIR:—Under date of October 2d, you request my opinion upon the following questions:

> "1. Has the mayor the authority, under section 13492, 4255, or any other section of the General Code, to personally arrest a person whom he sees violating an ordinance of the village? If he has, what should he then do with his prisoner, and what should be the entries on his docket? If he has not, how is process to issue for the arrest of the offender?
>
> "2. Has the mayor of a village the authority to issue a warrant for a person whom he has seen violating a law or ordinance, without the filing of an affidavit, and direct an officer to serve the warrant? Is the officer justified in serving such warrant? Is it necessary that an affidavit be subsequently filed, and if it is, who can properly sign it?
>
> "3. If an affidavit is required before warrants can issue in every case, how is the mayor to comply with the provisions of section 4258, G. C., when no one will make affidavit?"

Answering your first question, section 4549, General Code, provides in part as follows:

> "The mayor shall have, within the corporate limits, all the powers conferred upon the sheriffs to suppress disorder and keep the peace. * * *"

Section 13492, General Code, provides as follows:

> "A sheriff, deputy sherif, constable, marshal, deputy marshal, watchman or police officer shall arrest and detain a person found violating a law of this state, *or an ordinance of a city or village, until a warrant can be obtained.*"

These are the only provisions of the statute which I am able to find which in any way confer on a mayor the power to make an arrest, and they can be construed to grant such power only as is given to a sheriff in like instances. Under the latter section a sheriff may arrest a person whom he sees violating an ordinance without a warrant only for the purpose of holding him until a warrant may be obtained. It is, therefore, necessary in such cases that a warrant be obtained before the party arrested may be subjected to trial. Such warrant, of course, must be founded upon an affidavit, as is prescribed for the issuance of all warrants under sections 13496 et seq., of the General Code.

Answering your question directly, therefore, the mayor may arrest an offender found violating an ordinance of the village only for the purpose of holding such an offender until a warrant may be obtained, which warrant must be founded upon an affidavit.

I start with the assumption, which seems to be necessarily justified, that the case you refer to is one where the mayor is himself the only eye witness to the offense and, therefore, the only available witness upon a trial of the offender. For if it were otherwise, it is clear that the situation would present no difficulty since an affidavit might well be filed by the other eye witness, warrant issued thereon and the case proceeded with in the usual form. I see the possibility of a question arising as to the prejudice of a mayor by reason of having viewed the offense and forming thereupon a conclusion of his own. I am convinced, however, that this mere fact in itself would be by no means sufficient to afford a basis for the claim of prejudice on the part of the mayor. There being no provision, however, in the statute for an affidavit of prejudice against a mayor this point need not be discussed in this connection. Carey vs. State, 70 O. S. 124.

In the actual case presented by you, however, of the mayor being the only available witness section 4549, General Code, is of interest. This statute permits a justice of the peace to exercise the jurisdiction of a mayor during his absence or disability. The words "other disability" or terms similar thereto have been defined to include prejudice or bias on the part of an official.

> "Payton's Appeal, 12 Kansas, 398: 'Or otherwise disqualified to act.'
> "Turner vs. Commonwealth, 2 Metcalf (Ky.) at page 628: 'When from any cause.'
> "Williamson vs. Robison, 6 Cushing, 333: 'Other disability.'"

To justify the disqualification of a judge, however, on the ground of prejudice or bias, every bias, partiality or prejudice which he may entertain with reference to the case is not necessarily comprehended. The prejudice contemplated must be of a character calculated to seriously impair his impartiality and sway his judgment. 23 Cyc., page 582.

A mayor in making an arrest is presumed to do so in the performance of his duty, and by such an act it is not contemplated that he thereby disqualifies himself from performing his further duty of impartially judging of any defensive facts or points of law that may be presented in the trial of the cause. I am by no means satisfied, therefore, that the mere fact of making the arrest in a case would of itself disqualify the mayor from passing upon the facts therein involved, providing the case could properly be made out with the aid of other competent testimony.

It is settled beyond dispute, however, that a judge may not act as a witness and at the same time preside over a cause.

> "Rogers vs. State, 60 Arkansas 76, at page 85.
> "Strickley & Co. vs. Morgan, 103 Ga., 158.

"Morris vs. Morris, 11 Barber (N. Y.), 510.
"Maitland vs. Zanger, 14 Washington, 92.
"McMillen vs. Andrews, 10 O. S., 112."

In the case in mind, therefore, the mayor cannot preside and at the same time conduct a trial wherein he was the only material witness. Justice, therefore, must be denied unless some official other than the mayor is permitted to preside over the trial, and I am, therefore, of the opinion that such a contingency disables the mayor from sitting in the cause within the meaning of section 4549, General Code.

In the case of May vs. James, 2 Daily (N. Y.) 437, authority is found for the granting of an injunction against the trial of a case wherein the judge is a witness of unquestionable interest.

I am of the opinion, therefore, that such a case presents foundation for the filing of an affidavit and issuance of a warrant by a justice of the peace appointed by the mayor under section 4549, General Code. Such justice might then hear the case wherein the mayor would be able both to verify the preliminary affidavit and to testify in the case. This conclusion answers your first question.

With respect to your second question, I find no authority for the arrest of a person by means of warrant without a preliminary affidavit.

Your third question is also answered by the conclusion herein drawn.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1301.

OHIO UNIVERSITY LANDS HELD UNDER LEASE PRIOR TO 1843 SUBJECT TO REVALUATION—RENTS FOR SUCH LANDS.

1. *Ohio university lands held under leases executed prior to* 1843 *are subject to revaluation notwithstanding the act of the general assembly of Ohio, passed in that year, and declaring the true intent and purpose of the original acts pertaining to Ohio university to be otherwise.*

2. *The original act, providing for the leasing of such lands, provided that at the expiration of the principal term of the leases the lands should be revalued and the rent should be fixed upon the basis of the average price of a bushel of wheat in a certain market, for a given number of years. This price was to be determined through the agency of referees, one of whom was to be appointed by the university, another by the lessees and the third by the two thus chosen; but in the event of the failure of the parties to designate one or more referees, the legislature at its next session should appoint such number of referees as the case might require.*

(a) *On account of the change in the constitution, the legislature may not appoint referees, but without impairing the obligation of the subsisting contracts it may, in a proper case, pass a law providing for the appointment of such referees.*

(b) *The provisions of the act, which are to be read into the leases executed under it, may now be complied with, notwithstanding the fact that they have been ignored for many years, the laches of the state and the university not being effective to deprive the trust of their benefit.*

(c) *The revaluation which is to be made at the end of the principal term of the lease would remain effective only until the expiration of the period of twenty years from the time when that term expired.*

(d) *The action of the legislature need not be "at the next session thereof," this provision being directory, merely.*

(e) *While the provision for a revaluation at the end of the term and the proceedings therefor are separate and distinct from the provision for fixing the basis of rent, and the proceedings therefor, it should not be assumed by the legislature that the parties have failed to appoint referees until the trustees of Ohio university have taken steps toward a revaluation, and perhaps until they have appointed one referee in accordance with the terms of the original act.*

(3) *It being suggested that possibly the board of trustees of Ohio university is not at present a legally constituted body by reason of supposed defects in the manner in which the members thereof have been appointed, but such a fact, if true, would not affect the existence of the corporation known as "the president and trustees of Ohio university," and appropriations made by the general assembly for the use of the institution could not be withheld on that account.*

COLUMBUS, OHIO, December 15, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Sometime ago you submitted for my consideration certain questions pertaining to the university lands of the Ohio Company of Associates Purchase, and also to school, college and ministerial lands generally. The questions are stated in your letter quite elaborately with a full statement of facts, evincing a very careful and painstaking examination of the legislation involved, and for the purposes of this opinion I shall have to restate them as follows:

"*First.* Can the legislature now provide for the reappraisement of the lands held under leases executed by the president and trustees of Ohio university prior to 1843?

"*Second.* Section 12 of the act of February 18, 1804, providing for the leasing of Ohio university lands required that at the expiration of the original period of the lease (90 years or 99 years, dependent upon the date of the lease) three referees shall be appointed by the university and the lessees who shall determine the average price of wheat at the town of Marietta, for the five preceding years to be the basis of rentals for the succeeding twenty years.

"The section further provided that in the event of the failure of the parties to choose referees the general assembly 'at its next session, shall appoint such number of referees not exceeding three, as the case may require.'

"The period referred to under some of the leases, expired about 1886 and under the others about 1895.

"No such procedure as is contemplated by the section referred to has been followed.

"Can the legislature at the present time, on the assumption that the parties have neglected to choose referees, either appoint or provide for appointing them so that such revaluation as is required may be now made? This question assumes, of course, an affirmative answer to the first question.

"*Third.* Under the original act of incorporation of Ohio university, the trustees were to be appointed by the general assembly. An act of February 20, 1808, limited the members of the board to not less than eleven nor more than nineteen. An act of February 15, 1809, required nine members of the board as a quorum.

"After the adoption of the constitution of 1851, the legislature which had been theretofore appointing the trustees in accordance with the act of incorporation, ceased to exercise this power, and the governor of the state began to appoint the trustees. You say, however, that so far as you are able to ascertain there was no legislative authority whatever for the appointment of the trustees by the governor, but call my attention to sections 2 and 3 of article VII of the constitution of 1851 as possible sources of the power thus exercised.

"You call my attention now to the act of March 1, 1878 (75 O. L. 25), characterizing that as the first act passed by the legislature under the constitution of 1851, relating in any way to the board of trustees of Ohio university. This act has become section 9930, General Code. This law provides for the appointment of 'the required number of trustees' to serve for different periods of time; whereas the act of incorporation of Ohio university created no term of office for the trustees, their tenure being for life.

"You inform me in this connection that the governor has never appointed trustees for Ohio university for any term of years, but that all appointments made by him have been for life. You state further that in the year 1865 the number of trustees appointed by the legislature for Ohio university was reduced, by death, to ten, one fewer than the number required by the act of incorporation. Upon these facts you inquire:

"1st. Whether the present board of trustees of Ohio university is not legally constituted?

"2d. If the board is legally constituted, does the body politic and corporate constituting the president and trustees of the Ohio university, exist

in contemplation of law, and may the auditor of state permit payment to the present acting board, of moneys appropriated by the general assembly for the use of that institution?

"*Fourth.* School, ministerial and college lands throughout the state are now held under lease for terms of ninety-nine years renewable forever, upon annual rental payable, as to college lands, to the college for whose use they were granted, and as to school and ministerial lands, to the state.

"There is no provision of law permitting lessees to mine coal or oil or to use any of the appurtenants to the land except the soil, except in certain ancient so-called waterworks leases wherein the right to run mill races and otherwise use the water power appurtenant to the land is specially granted.

"The statute in all cases, except those just specially excepted, provides for the form of lease ordinarily meant by the use of the term 'deed of lease' or 'lease.'

"Nevertheless certain lessees are mining the coal, oil and gas upon the lands leased to them.

"Is this waste, and can injunction be had at the suit of the state, and recovery made for damages?"

In this opinion I will undertake to answer the first three of the above questions, only.

Your first question involves consideration of the following historical matter:

The Ohio university is located in the tract of land known as the "Ohio Company's Purchase." A corporation known as the "Ohio Company of Associates" bought from the confederation in 1787 all that tract of land known by the name above mentioned through a contract of purchase, which in part provided as follows:

"and also reserving out of the said tract so to be granted, two complete townships to be given perpetually for the purposes of an university, to be laid off by the said parties of the second part, their heirs or assigns, as near the center as may be, so the same shall be of good land, to be applied to the intended object in such manner as the legislature of the state wherein such townships shall fall, or may be situated, shall or may think proper to direct."

Pursuant to the obligation imposed upon the company by this clause of its contract with the treasury of the confederation, the company designated two certain townships to be applied to the intended purpose or object. Soon after the state of Ohio was admitted to the union its legislature enacted a law establishing an university in the town of Athens, passed February 18, 1804, 2 O. L. 193. In addition to incorporating "the president and trustees of the Ohio university" and establishing an educational institution under the name and style of "Ohio university," and providing generally for the performance of the constituent acts of the corporation and its organization the act contained the following provision:

"Section 11. That the two townships, numbered eight and nine, in the fourteenth range of townships, within the grant of land made by congress to the Ohio Company of Associates, be and they are hereby vested in the corporation by this act created, in trust, for the sole use, benefit and support of the said university, forever."

Section 12 of the act directed the trustees to designate one or more of their number to lay off the lands in the townships and estimate the value of the same "as

in their original and unimproved state"; and after having thus laid off and estimated the lands, that the trustees should proceed to make out leases of said tracts,

> "to such of the present occupants as shall apply for the same, within three months after such notice is given, and to all persons that shall apply hereafter, for the term of ninety years, renewable forever, on a yearly rent of six percentum on the amount of the valuation so made * * *; the land so leased shall be subject to a revaluation, at the expiration of thirty-five years, and to another revaluation at the expiration of sixty years, from the commencement of the term of each lease; which revaluation shall be conducted and made on the principles of the first, and the lessee shall pay a yearly rent of six percentum on the amount of the revaluation so to be made, and forever thereafter on a yearly rent equal to and not exceeding six percentum on the amount of a valuation to be made as aforesaid, at the expiration of the term of ninety years aforesaid (which valuation the trustees and their successors are hereby authorized and directed to make): Provided, however, that such last mentioned rent shall be subject to the following regulations, to wit: at the expiration of the aforesaid period of ninety years, three referees shall be appointed, the first by the corporation of the university; the second, by the lessees, under the provisions of this section, of this act, and the third, by the two referees thus chosen (or in case either or both of the parties shall neglect to choose such referee or referees, or said referees shall neglect to choose an umpire), the general assembly, at its next session, shall appoint such number of referees, not exceeding three, as the case may require; which referees shall meet within a reasonable time, to be agreed on between them, at the town of Athens, and then and there determine on and declare the medium price per bushel of the article of wheat; which determination shall be grounded on a calculation of the average price of said article at the town of Marietta, for the five preceding years; which declaration shall be made in writing; and entered of record on the books of the corporation; and at the commencement of each and every succeeding period of twenty years thereafter, the amount of rent for such period shall be fixed on and determined by referees, to be chosen upon the principles hereinbefore directed, from a comparison of the aforesaid recorded price of wheat, with its average price at Marietta, for the five years, which shall have been then last past; in which leases shall be reserved a right of distress and of re-entry for non-payment of rent, at any time after it shall have been due two months; Provided always, that the said corporation shall have power to demand a further yearly rent on the said lands and tenements, not exceeding the amount of the tax imposed on property of like description by the state, which rents shall be paid at such time and place to such person and collected in such manner as the corporation shall direct."

Section 14 of the act provided that the annual rents "shall be appropriated to the endowments of the said university."

Section 17 of the act provided that,

> "the lands in the two townships, appropriated and vested as aforesaid, with the buildings which are or may be erected thereon, shall forever be exempted from all state taxes."

On February 21, 1805 (3 O. L. 79), the general assembly passed an act which, among other things, changed the term of the leases thereafter to be entered into to

ninety-nine years, renewable forever, and limited the authority to lease thereafter to lands of greater appraised value than $1.75 per acre.

This amendatory act gave rise to the claim that it had effected an implied repeal of the provisions of the earlier act relative to revaluation; the theory being that it was intended as a complete substitute for all the provisions of the act of 1804 with reference to leasing. A revaluation was actually made at the expiration of first period of the thirty-five years of the first leases which were executed, to wit, in 1841, and the claim which I have described gave rise to the litigation which culminated in the case of McVey vs. Ohio University, 11 Ohio, 134. In that case it was held, in the language of Hitchcock, J., first, that, "whether any provision was made *in the lease* for a revaluation is a matter of no consequence." That is, the terms of the law must be read into each lease executed under it whether expressed therein or not. In the second place, Judge Hitchcock, speaking of the difference between the two laws, that of 1804 and that of 1805, mentions the difference which actually appear, and then says:

> "The two laws are contrary, the one to the other, in the mode of appraisal, in the duration of the lease, and in the quantity of land to be leased. To this extent the former was repealed. We have sought in vain for any other matter in which they conflict. It may have been the intention to have repealed all that part of the former law which related to the valuation and leasing of the land. But such intention cannot be gathered by any known rule of construction, and, of course, we are not authorized to declare that such effect is produced."

The court sustained the demurrer to the complaint filed by the individuals resisting revaluation, and so held that despite the amendment of 1805 the leaseholders which had been theretofore executed were subject to a revaluation.

Thereupon the general assembly on March 10, 1843, 41 O. L. 144, passed an act entitled "An act to declare the true intent and meaning of the first section of the act entitled 'An act to amend an act entitled "An act to establish a university in the town of Athens," passed February 21, A. D. 1805.'" In this act the general assembly attempted to declare that it was the true intent and meaning of the act of 1805 that the leases granted under that act, and the one to which it was amendatory, should not be subject to a revaluation.

You advise me that since the passage of this act no revaluation has been made of any of the Ohio university lands. You question, of course, the constitutionality of the act of 1843 in so far as it attempts to declare the intent and purpose of the act of 1805 as affecting leases executed prior to 1843.

This question involves a nice application of the doctrine of the separation of the powers of government in accordance with the genius of our constitutions. As against the exclusive power of the judiciary to declare what the law is and to apply it to specific cases, there exists the power of the legislature to declare what the law shall be for application to all cases within its purview. Thus, the legislature may pass not only statutes declaratory of the common law but also statutes declaratory of the meaning of prior statutes.

> "A declaratory statute is one which is passed in order to put an end to doubt as to what is common law *or the meaning of another statute,* and which declares what it is and ever has been."
>
> Bouvier's Law Dictionary. "Statute."

As pointed out by Judge Cooley in his work on Constitutional Limitations at page 111,

"As a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed may be found to declare the law to be different from what it has already been adjudged to be by the courts."

(See People vs. Supervisors, 16 N. Y., 424.)

But it is clear that there must, in the nature of things, be a definite line between the proper exercise of the power to pass declaratory legislation and the exercise of power under that guise amounting in effect to usurpation of judicial functions. Thus, that is clearly a judicial act, and hence beyond the power of the legislature, which attempts to decide controversies which have arisen.

Schooner Aurura Borealis vs. Dobbie, 17 Ohio, 125.

The line must be drawn with exactness for the purpose of answering your inquiry, between the two instances which have been mentioned. For brevity's sake, I may say that the test seems to be furnished by the application of specific constitutional provisions in force in 1843.

The constitution of 1802 contains no express provision against the passage of retroactive laws corresponding to section 28 of article II of the constitution of 1851; but section 16 of article VIII of the constitution of 1802 provided that,

"No expost facto law, nor any law impairing the validity of contracts, shall ever be made."

I think it will readily appear that a law is retrospective in its effect upon vested rights of a contractual nature when it impairs the validity or obligation of a contract entered into prior to its passage. So that inasmuch as the question which you present involves the application of a law to contracts previously entered into, the fact that at the time the law was passed there was no express inhibition against the enactment of retroactive laws is not material. The rule as applied to cases in which the constitution of the state contains no express prohibition against the enactment of retroactive laws is stated generally in 8 Cyc: 1018, as follows:

"In the absence of such express provision a law is not void because retroactive in action, where it is unconstitutional as an expost facto law, as a law impairing the obligation of a contract, or by reason of its violating some constitutional provision not directed against retrospective laws as such."

Lewis vs. McElvain, 16 Ohio, 348, 355.

But the express prohibition contained, both in the federal constitution and in the constitution of 1802, against laws impairing the obligation or validity of contracts, makes provision against retrospective or retroactive laws of this character unnecessary; so that when by later constitutional provision such a prohibition was made the organic law with respect to legislation of this character, *impairing* the obligation of pre-existing contracts, was not in reality changed.

As suggested, then, I think that the power of the legislature to pass declaratory statutes interpreting prior statutes, asserted as it is only under the general grant of legislative power to the general assembly, and not by specific grant of power in the constitution, is limited by the specific prohibition against impairing the validity of contracts. So that the true distinction under the constitution of 1802 between proper legislation declaratory of the meaning and intent of previous legislation,

and legislation that usurps the judicial function as an attempt to adjudicate upon rights that have vested, is, for the purpose of your question, to be drawn between declaratory acts which do not impair the obligation of contracts and those which do. In a word, the principle is that a declaratory act, though in a sense retrospective, since it undertakes to declare what the law was before it was enacted cannot operate retrospectively in the exact sense so as to affect rights which had vested prior to its passage; the right to the performance of an obligation of a contract being protected against legislative impairment by positive constitutional provision is in every sense a vested right, when the contract has been entered into and the obligation has been incurred. Therefore, a statute declaratory of the meaning of a former statute, though it might possibly be sustained as affecting contracts thereafter entered into, and so *fixing* the obligations thereof, cannot be sustained as applicable to contracts theretofore entered into and so *impairing* the obligations thereof.

Thus it is seen that though the constitution of 1802 did not impose upon the legislature restraints as effective as those imposed upon it by the constitution of 1851, the limitation with respect to legislation affecting contract rights is equally effective under both constitutions (as indeed it would have to be in view of the federal constitution). This conclusion leaves but two points to be determined, viz.:

1. Did the act of 1843, if construed so as to apply to leases theretofore entered into, affect contractual rights in any way? and,

2. If so was the effect of the act upon the rights so affected that of impairing the obligations thereof?

The first point is seemingly settled by the McVey case cited, which holds, as it has been pointed out, that the terms of the act of 1804 entered into and became a part of every lease executed thereunder prior to 1843. Whatever those terms were, the rights accruing to individuals on the one hand, and to Ohio university on the other hand, became vested, in the contractual sense, when leases were executed. While, therefore, the legislature might, as it did in 1843, declare what the act of 1805 meant, yet in so far as the act of 1805 and its predecessor, the act of 1804, had entered substantially into contracts executed prior to 1843, the legislature was without power, at least to the extent of impairing any obligation of such contracts, to declare what the terms thereof were; that function must necessarily reside exclusively in the courts.

The second question above suggested is answered, it seems to me, by consideration of the case of Matheny vs. Golden, 5 O. S. 361, wherein it was held that an act of the legislature passed April 13, 1852, the effect of which was to subject to state taxation lands held under a lease and belonging to Ohio university, was to that extent unconstitutional as violating the obligation of a contract, to wit, the terms of section 117 of the act of 1804 relative to the exemption of such property from state taxation, which in turn entered into and became a part of every lease which had been executed prior to 1852 at least (McVey case, supra).

Speaking of the contractual nature of the provisions of the act of 1804 in this respect, and the manner in which the obligations arise under it, Brinkerhoff, J., says at page 372 et seq. (Matheny vs. Golden, supra):

> "The state opens the negotiation, and speaking through her legislative act, makes her proposition to the complainant and his associates to this effect: If you lease these lands at a fixed rent, payable to the Ohio university, for ninety-nine years, your lands thus leased shall be perpetually exempt from all state taxes. This is the proposition of the state. The complainant and his associates lease the lands accordingly; they bind themselves

to pay, have paid, and must continue to pay, a fixed rent accordingly; a rent fixed, as a matter of course, at a considerably higher rate than they would have been willing to pay had it not been for the proposed exemption. Relying on the faith of the state for the fulfillment by her of a contract based on her own proposition, they take leases; and thus accept the proposition of the state pure and simple without modification; and thus the minds of the parties have met. They have respectively agreed to do particular things, and not to do other particular things.

* * * * * * * * * * *

"Is the recent legislation such as to impair the obligation of this contract? The question, unfortunately, can have but one answer. It has attempted to tax lands which it had solemnly contracted never to tax. Perhaps we ought to presume—and we should certainly be very glad to be able to presume—that this recent legislation complained of was the result of oversight. But—and we feel neither pride nor pleasure in saying it—the languge of that legislation seems to be too explicit, and too direct in its application to these lands, to admit of so charitable a presumption."

So that it is very clear that the clause in the act of 1804, relative to the terms on which the lease should be made and held, when leases were executed in accordance therewith, gave rise to contractual obligations not subject to legislative impairment. But it may be insisted that the protection of the constitution of 1802, and of the federal constitution as well, against the impairment of contracts, was intended to be accorded to the individual, and that the *state* may pass a law impairing a contractual obligation *running to it*, and it may be urged that the lease was between the state as custodian of the legal title of the lands, and the lessees, so that the right of the state to a revaluation and the obligation on the part of the lessees to pay rentals according to such revaluation, were matters within the power of the legislature to abrogate because by so doing the rights of individuals would not be deleteriously affected; but on the contrary they would be benefited.

Such an argument may, with some show of reason, be based upon the language of Brinkerhoff, J., in Matheny vs. Golden, supra, wherein he speaks of the contract between the state and the lessee. Yet, when the actual facts are considered, the error thereof becomes apparent. For the state, though it once had the fee did not retain it, but by section 11 of the act of 1804 vested the same in the president and trustees of the Ohio university in trust for the sole use and benefit of the university. The leases, then, were to be made by the trustees themselves and not by the state, and the trustees were not the mere agents of the state but the body politic and corporate.

The obligation of the leases, therefore, accrued substantially in favor of the trustees for the benefit of the university and not in favor of the state in any proprietary capacity. Whatever right, title or interest the state retained in and to the lands situated in the two townships was only such interest as had been vested in it by the contract between the congress of the confederation and the Ohio Company of Associates and it must be apparent that such interest was that of a mere trustee and constituted a moral obligation to see that the lands were properly applied to the support of the university rather than anything in the nature of a beneficial right.

Therefore, it follows that the rights and obligations which have been considered, accrued, in all probability, in favor of the president and trustees of the Ohio university and beneficially in favor of the institution itself. In my opinion such obligations are protected from impairment by the state and federal constitutions as well as the strictly private and individual obligations accruing under the same act to the leases themselves. Dartmouth College vs. Woodward, 4 Wheaton.

For all the foregoing reasons, then, I am of the opinion that the act of 1843 had no effect whatever upon the fixed rights and obligations of the parties to the leases entered into prior to that year; and upon the authority of the McVey case, supra, which constitutes an adjudication of the question as to what those rights and obligations were, I am further of the opinion that all leases of Ohio university lands, executed prior to the year 1843 are, and at all times have been, subject to revaluation in accordance with the terms of the act of 1804.

Your second question involves consideration of section 12 of the act of 1804 which is lengthy and which has been quoted herein. It is apparent, I think, from the provisions of this section that although the term of the original lease is stated as being ninety years, renewable forever (which term of 90 years was subsequently changed to 99 years) the leasehold interests are, in point of fact, permanent so that no formal renewal of any lease was necessary in order that the conditions attaching to the leasehold interests after the expiration of the original term should be operative. Your question contains no statement with respect to the making of any renewals and I assume that none have been made.

In your statement of facts you have very interestingly explained the object and purpose of the use of the price of a bushel of wheat in a given market as a criterion of value and have shown the historical development of such an idea. These facts, while throwing light upon the meaning and intention of the legislature, are not of importance in the solution of the legal question which you present and therefore they will not be stated here. So I simply assume that it is possible at the present time for the standard of rent applicable at the end of the original period to be determined and applied. It having been already decided that the provision as to revaluation remains as an obligation to the contract of each lease executed prior to 1843, your question requires me to inquire only whether there is any present legal obstacle to the performance of these obligations.

The first question which arises is suggested by the provision of section 12 to the effect that,

> "in case either or both of the parties shall neglect to choose such * * * referees * * * the general assembly at its next session shall appoint such number of referees * * * as the case may require."

There are really two questions here, first, as to whether or not it is essential that the intervention of the state shall be made "at the next session of the general assembly?" In my opinion this is not the case. The language is directory rather than mandatory. The test for ascertaining whether or not such provisions are directory or mandatory is furnished by inquiring whether the manifest intention of the whole act is that the thing commended to be done shall at all events be done, but is particularly commanded to be done at a given time, or whether the intention is that if the thing is not done at the given time it shall not be done at all. In this case the legislation is intended to cover perpetual leaseholds and to furnish a basis for a valuation which is to last for a period of twenty years. It seems to me that the intention clearly is that the revaluation and determination shall in all events be made, and shall be the basis of payment of rent during the next twenty years rather than that if the determination is not made through the intervention of the general assembly at the particular time mentioned it shall not be made at all. The act provides that at the expiration of the period of the lease "the lessee shall pay yearly rent * * * forever therefor * * * equal to and not exceeding six percentum of the amount of a *valuation to be made* as aforesaid. Provided, however, that such last mentioned rent shall be subject to the following regulations, to wit:"

I am, therefore, of the opinion that assuming the state to be called upon to act at the present time by reason of these provisions such action may now be taken through the "next session" of the general assembly following the failure of the parties to agree upon referees after the expiration of the period of the lease has gone by.

In this connection, however, I would be of the opinion that the revaluation if now made would be effective only during the remainder of the twenty-year period for which it should have been made at the expiration of the original term of the lease. That is to say, assuming a lease to have been executed in 1805 for a period of ninety-nine years, renewable forever, the right to a peculiar kind of revaluation would have accrued in 1904, and the revaluation which should have then been made would have lasted, so to speak, until 1925; so that if such revaluation were now made it would cover the period between the present and the year 1925 at which time another revaluation should be made on the same basis.

Another question is suggested by consideration of the fact that under the constitution of 1851 the general assembly can exercise no executive function, so that it would presumably no longer be competent for the legislature to "appoint" referees. This, and perhaps other questions arising in connection with the general question submitted by you, are, it seems to me, answered by a consideration of two principles, which happen, in this instance, to be related, although they have no necessary relation to each other, in the science of jurisprudence. In the first place, it is generally, if not universally held that the inhibition against the passage of laws impairing the obligation of contracts will not prevent the enactment of legislation affecting matters in connection with such obligations which are of a purely remedial nature. See 8 Cyc. 995.

Inasmuch as the essence of the right corresponding to the obligation in this instance, is that the general assembly of the state shall furnish the means of effecting a revaluation on the required basis, it seems to me that the manner in which the state shall act is of a remedial nature, and so long as the state's action is effective to enforce the right and to discharge the obligation, its legislation looking to that end will be upheld though it may alter the strict terms of the original contract founded upon the law of 1804.

The other principle which I have in mind is that axiom of equity jurisprudence that where the performance of a trust in the precise manner intended by the original donor is rendered impossible, the object of the donor shall be effectuated by means most nearly appropriate thereto and which are within the bounds of possibility. In this case, as has been stated, the state appears in the attitude of a trustee and as a trustee has stipulated that it shall act through certain designated agencies. By force of a change in its constitution these agencies can no longer be employed. Therefore, upon the principle just stated, if the end sought to be accomplished is brought about by agencies which are appropriate to the same object, legislation for that purpose should be upheld.

Accordingly, I am of the opinion that the duty of the state under section 12 of the act of 1804 may be effectively discharged by the passage of a law authorizing the appointment by the governor, or by some other executive officer, of the necessary appraisers.

Perhaps there is another question involved in your second inquiry, as to whether or not it may be assumed that a case is presented for the interposition of the state. Your statement is that no revaluation has been made at any time since 1843, all parties in interest evidently having failed to act upon the assumption that the legislation of that year precluded further action. I do not think that any claim of laches, waiver or estoppel can be made as against the assertion at this time of the rights clearly vested in the state and the corporation as trustee for the benefit of the Ohio

university. There can in the nature of things be no such thing as estoppel in such a case for the reason that no intervening rights of third persons could be built up under these leases as every assignee of such a lease would take subject to the provisions of the original lease and the statutes entering into the same. There is no such thing as waiver because a trustee has no power to waive any provision for the benefit of his trust, at least in such a way as to deprive the trust of a substantial right or benefit. There is, it is submitted, no such thing in this case as laches. This principle of equity, founded upon the maxim that equity aids the vigilant, not those who slumber on their rights, does not apply at all, for example, to suit brought against trustees to enforce an express trust. Pomeroy on Equity Jurisprudence, Vol. 1, sections 418, 419.

That is to say, a trustee, by neglecting to assert a right which exists, for the benefit of the trust estate, cannot deprive the trust of the benefit of the exercise of that right. This is particularly true in the case of charitable trusts wherein the cestuique trust being impersonal is not in a position actually to assert a right. Indeed the principle applies to the assertion of all public rights as such where no specific statute of limitation is involved, and where the right of the public is not strictly proprietary.

In this case it is obvious that the right to revaluation inheres substantially in the trust itself which is created for the benefit of the institution known as Ohio university. The trust is a public charitable trust and mere failure on the part of the trustees, such as the president and trustees of Ohio university or the general assembly of the state itself, to assert rights for the benefit of the trust will not prevent the subsequent assertion of those rights.

One fact remains to be mentioned in this connection. The provisions relative to the use of the "medium price per bushel of wheat" found in the act of 1804, relate to the fixing of the rental in terms of that commodity. Before the legislature of Ohio is called upon to act at all there must be provision for a revaluation. This is to be made by the trustees of the Ohio university in the manner provided in the original act and subject to the conditions therein. Therefore, the initial step in the matter of valuation must be taken by the trustees of Ohio university. However, it does not appear that the appointment of the referees for the purpose of determining the basis of the rent is dependent upon the making of a revaluation. The two may proceed at the same time, for the section directs the successors of the trustees of Ohio university to make a revaluation at the expiration of the term, and at the same time directs that at the expiration of the term the three referees shall be appointed thus clearly showing that the trustees of the university are authorized by the original act to initiate the process of fixing the basis of the rent independently of their proceeding to secure a revaluation; although when the rent is fixed and the determination of the referees "entered of record on the books of the corporation" it cannot be used for any purpose until the valuation is made. Therefore, while I adhere to the view as already expressed that the general assembly may, if it chooses, treat the present situation as an instance of neglect of the university and of the lessees to choose referees, yet I would recommend, in order to avoid all question, that the trustees of the university first proceed to have a revaluation made and then offer to appoint a referee, thus placing upon the lessees the obligation of choosing another, failure to discharge which will then clearly establish the right of the legislature to provide for the selection of such referees.

Subject to the foregoing qualification, then, I answer your second question by saying that the legislature may, at the present time, provide for the appointment of referees for the fixing of the rental, but that it would be better not to assume that the parties have neglected to choose referees until the trustees of Ohio university have taken some steps toward securing a revaluation.

In answering your third question I do not deem it necessary to go deeply into the legislative history in question. It is true that your third question inquires specifically whether the present board of trustees is legally constituted, and in order to answer this question with technical accuracy some such inquiry would have to be made. It is possible that the result of such an inquiry will show that by reason of the change in the constitution, and an evident misunderstanding with respect to the proper steps to be taken to adjust matters to that change, the present board of trustees of the Ohio university is not legally constituted. But your second, and I suppose your principal question in this connection is as to whether or not the fact that the present board of trustees is not legally constituted is sufficient upon which to base a conclusion that Ohio university is non-existent as a corporation, so that moneys appropriated for its support and maintenance by the general assembly may not lawfully be paid to it.

This question must be answered in the negative, even upon the assumption upon which it is founded. The corporation known as the "president and trustees of Ohio university" is an eleemosynary body corporate. It was created by the state in pursuance of a duty cast upon it in the nature of a trust. The institution as such, meaning thereby the trust itself, which may be designated as the "university" continues to exist notwithstanding the fact that those individuals who are administering its affairs as trustees may not have been legally appointed as such. The only proper way to question the legality of the incumbency of these trustees is by action in quo warranto. To withhold appropriations made by the state for the uses and purposes of the Ohio university from their intended object on the ground that the trustees of the university were not legally appointed, would constitute a species of collateral attack on the legality of such appointment which could not be sustained. To put it in another way, the trustees are in every sense defacto officers and members of the corporation. The corporation as such must continue to exist whether it has any dejure officers and members or not, and those who assume under color of authority to act as its trustees will be protected, and the validity of their acts sustained, as against any attack other than the direct one which might be made by an action in quo warranto.

Since your fourth question was asked there has been some legislation on the general subject and I do not know whether an answer thereto is still desired by you. If such is the case I will be pleased, upon notice to that effect, to make it the subject of a separate opinion.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1302.

FOREIGN CORPORATIONS—CIRCUMSTANCES UNDER WHICH CREDITS ARISING FROM BUSINESS DONE BY FOREIGN CORPORATIONS MAY BE TAXED IN OHIO—GOODS HELD IN STOCK BY SUCH CORPORATIONS.

1. *Where a foreign corporation has its manufacturing establishments and principal managerial offices in other states, but maintains in Ohio a selling agency which manages the business of selling products of the corporation, keeping a stock of its goods on hand, directing the activities of traveling salesmen and other solicitors, and extending credit to customers, the credits arising from such business are taxable to the company in Ohio. The fact that the local agents deposit the money collected by them in bank in Ohio to the credit of the company and keep one account from which some expenses of the Ohio business are paid upon checks drawn by agents themselves, considered but not deemed material to the conclusion stated.*

2. *Under the above facts, and the goods received by the Ohio agency and held in stock by it not being charged to it by the home company, so that there is no relation of debtor and creditor existing on account of the delivery of such goods to the Ohio agency, the debts which the corporation may deduct from the claims and debts payable to the Ohio agency for the purpose of arriving at the amount of the taxable credits, are such debts as are attributable solely to the Ohio agency and its business, and those only; that is, the debts which may be deducted are those which are incurred by the Ohio agents themselves, or by the home office, for and on behalf of the Ohio agency, and with direct reference to the business of the agency. The company may not deduct all debts owing to it from Ohio debtors, as such, nor a proportional share of the entire indebtedness of the company, determined by the amount of sales of Ohio agents as computed with the total sales of the company everywhere.*

COLUMBUS, OHIO, December 15, 1914.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On July 31st of this year you transmitted to me a letter addressed to the commission by the board of assessors for the district of Franklin county, enclosing correspondence which, with additional information furnished to me directly by counsel for the corporation concerned, present the following facts and questions arising thereon:

"The H. J. Heinz Company, is a corporation organized under the laws of another state with its principal office in the state of Pennsylvania. The company is engaged in the business of manufacturing articles of food and condiments. It has factories in several states. The company has a selling branch or office in the city of Columbus through which business is transacted in the following manner:

"The Columbus office takes orders for the goods manufactured by the company either directly or through traveling salesmen who report to Columbus. At Columbus there is maintained a stock of goods sent, by order of the main office in Pennsylvania, from the different factories variously located to the Columbus warehouse. The orders taken through the Columbus office are ordinarily filled from this stock.

"Large orders, however, are occasionally filled by requisition on the home office directly from the factory designated by that office. When an

order is placed, then the ordinary course of business is that the same is filled directly from the Columbus office which maintains its stock by making requisitions on the home office, which in turn makes requisitions on the various factories. The Columbus office sells goods on credit. The books of account involved in these transactions are kept in Columbus, and collections are made by the Columbus office. The Columbus office pays its own current expenses, such as rent, fuel, light and certain wages, but the salaries of the principal officers of the Columbus branch are paid by the home office.

"The Columbus office is not charged with the goods which it receives from the factory according to any standard of price or value and no relation of debtor and creditor exists between the Columbus branch and the home office.

"The proceeds of the collections are deposited by the Columbus office in a Columbus bank. Two accounts are kept. The statement of counsel for the company is that one of these accounts consists of moneys sent on by the home office for the use of the Columbus office in the payment of its expenses and may be checked on by the Columbus office, while the other into which all the collections are paid can be checked on only from the home office.

"(There appears to be some slight inconsistency between the statement last made, and the statement that the Columbus office pays certain expenses other than salaries. In the view I take of the legal questions involved, however, this inconsistency, if real, is immaterial.)

"Upon the foregoing facts the following questions are submitted:

"1. Are the credits arising out of the business transacted from the Columbus branch of the company taxable to the company at Columbus?

"2. If an affirmative answer is returned to the first question, may the company, for the purpose of arriving at its taxable credits, deduct from the gross amount of all accounts payable to it at the Columbus office, a proportional share, so to speak, of the debts of the company incurred in the purchase of raw material and for other purposes in connection with the process of manufacturing, such debts being those of the corporation in general and not directly, at least, attributable to the Columbus branch, or, is the right of the company to deduct debts limited to such debts as are incurred by Columbus office directly?"

These questions are in effect covered by my opinion to the commission, under date of September 26, 1912. In that opinion I held that a foreign corporation having an agency in this state, with a stock of goods located at such agency, is not entitled, under the tax laws, to deduct from the sum of its legal claims and demands arising from the sale of such goods, the legal bona fide debts owing such corporation, regardless of whether such debts are related to the goods sold and business done in the state of Ohio or not; and in particular that it could not deduct the debts arising from the purchase of such goods or the materials entering into them unless the debts created by the corporation could be directly referred to the specific goods sold through the Ohio office. In that opinion the taxable situs of the credits in Ohio was assumed, largely on the basis of the previous opinion given to the commission in the matter of the Ritter Lumber Company, and the sole question considered was the deduction of the debts.

The opinion of September 26, 1912, was, however, given in answer to a general question, and the previous opinion relative to the Ritter Lumber Company was

based upon a particular statement of facts wholly different from those now before me. For these reasons I have deemed it wise to go into the question of situs as well as the question of deduction *de novo*.

For the purpose of this opinion, however, the discussion which is contained in the two previous opinions referred to, in so far as it is applicable here, may be omitted. That is to say, it is not necessary for me in this opinion to trace the history of the development of the law of the situs of intangible property as applied to a corporation doing business in a state other than that of its origin, nor need I go again over the circumstances under which credits owned by a non-resident of a state may acquire a business situs in the state and thus become localized for the purpose of taxation at a place other than the residence of the owner. It will be sufficient, I think, for present purposes, without citing all the authorities which were considered in the other opinions, to state that the law recognizes the possibility of the establishment of such a business situs for intangible property such as moneys and credits, and that generally speaking, two kinds of circumstances were relied upon by the courts in the case considered in the former opinions as establishing such a separate business situs, viz., first, where the non-resident has sent money into another state and placed it in the care of an agent for the investment with power to collect and reinvest, such as where money is loaned on real estate mortgages, and the local agent has power to reinvest; and, second, where the credits arise out of a business conducted in the state by the agents of the non-resident owners of them.

It is pointed out in the former opinion that in the first case above mentioned it is essential to the creation of a separate situs of the credits that the agent in whose possession the evidence of indebtedness may be, and who may have authority to collect them, shall also possess the authority to reinvest. The former opinions, however, do not cite cases in which the test applicable in the second class of cases above set forth is defined with any accuracy. There is the case of Hubbard vs. Brush, 61 O. S., 252, in which the test is suggested merely. But the facts of the case are so entirely different from the one which is now before me that for reasons pointed out in the opinion of September 26, 1912, it is not of great service in this connection is transacted therein. Such cases are not lacking. I find the following authoris transacted in Ohio all its credits are taxable here.

It has seemed desirable, therefore, to search further for authorities on the question as to the situs of credits referable to the business of a foreign corporation transacted in a state when only a part of the managerial business of the corporation is transacted thereon. Such cases are not lacking. I find the following authorities upon the proposition:

In Armour Packing Company vs. Savannah, 115 Georgia, 140, the facts were as follows:

The packing company was a corporation organized under the laws of the state of New Jersey, but having its principal place of business at Kansas City, Kans. It owned real estate in the city of Savannah in which it did business in its own name through an agent. The business consisted in the selling of food products. The agent at Savannah sold the products to his customers in and around Savannah, delivered the goods, collected the money and deposited it in the Savannah banks to the credit of the Armour Packing Company. Such money was allowed to accumulate for a few days and then was remitted to New York where there was another branch office of the packing company. Money was also on deposit belonging to the packing company in a Savannah bank which was used for the purpose of paying the expenses of the Savannah office of the company. Some sales were on credit and the amounts due appeared on the books.

I am unable to distinguish the facts just stated from the facts in the case submitted by you. The court held that under a statute authorizing the city of Savan-

nah to lay taxes upon "the inhabitants of said city and those who hold taxable property therein, those who transact or offer to transact business therein," and designating as subjects of taxation, "capital invested in said city, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling * * * * and all other property or sources of profit not expressly prohibited or exempted by said law or competent authority of the United States; and under an ordinance taxing "every person or corporation owning or holding any trust or consignment * * notes or other evidences of debt, money, solvent debts, stock in trade and every other kind of personal property whatsoever," the book accounts of the Savannah agency of the packing company were taxable in Savannah.

It is true that the charter of the city of Savannah was very broad with reference to the delegation of the taxing power, but it does not appear to me that the ordinance of the city was any broader than section 5404, of the General Code of Ohio, which taxes all corporations wherever incorporated upon their "credits within this state."

The reliance of the corporation in that case was upon the general principle that the situs of credits for the purpose of taxation is at the domicile of the owner; while the decision of the court was planted upon the proposition that credits might acquire a different business situs, as held in the Ohio case of Hubbard vs. Brush, *Supra*. Therefore, I conclude that the case cited is in point and if its authority is to govern it leads to the conclusion that the situs of the credits inquired about in your letter is in Columbus, Ohio.

It is interesting to note in connection with this case that the Georgia court refused to follow the case of Vicksburg vs. Armour Packing Co., 24 So. 224 (Miss.), in which upon similar facts the supreme court of Mississippi, had held that the credits of the same corporation attributable to its business at Vicksburg, Miss., did not have a taxable situs in the state of Mississippi. So far as I know the Vicksburg case is the only one which is in conflict with what seems to me to be the otherwise unbroken line of authorities on the point.

The Georgia case just discussed is followed in Armour Packing Co. vs. Augusta, 118 Ga.. 552. The facts in this case were not quite identical with those of the Savannah case. The following differences appear:

In the first place the collections of the Augusta agency of the Armour Packing Co. were remitted daily to the home office of the company instead of being deposited in a bank to the credit of the company for temporary purposes. There did not appear to be any separate bank account in Augusta which could be checked upon for the current expenses of the Augusta agency as was the case in the Savannah case. In the second place no peculiar municipal charter provision was relied upon in whole or in part as a ground of decision in the Augusta case; but the case was decided upon general principles which are stated in the following excerpt from the opinion of Cobb, J.:

> "The ground upon which we rest our decision in this case is that when a non-resident goes into another state for the purpose of doing business, and employs an agent there to transact his business, receive money due him, contract debts for him, purchase property to be used in the business, and exercise a joint management of such business, he cannot escape the burden of taxation, which his property of every description situated in this state ought to bear, by invoking the fiction that intangible property has its situs where the owner resides * * *. To all intents and purposes these notes and accounts are a part of the business being conducted in Augusta. They were received in the course of that business and represent part of the capital em-

ployed in the business. They are, in short, as much taxable as is the tangible personal property actually employed in the conduct of the business in that city."

It will be seen that this case goes further than the facts submitted by you require in holding that credits acquire a separate business situs under given circumstances; for in the case which you present the Heinz company keeps money on deposit in Columbus, some of such money being subject only to the check of the Columbus office. Nevertheless, I think that the principle announced by the Georgia court is the correct one, and that the facts which are disclosed by the correspondence laid before me relative to the keeping of bank accounts in Columbus by the Heinz company are immaterial. The Armour Packing Company refused to rest content with the two decisions above cited and in a subsequent case of Armour Packing Co. vs. Clark, sheriff, 124 Ga., 369, sought to have a reconsideration of the entire case, and particularly of the Augusta case. The court refused to reverse its decision in either case, and in the course of the opinion, per Candler, J., the following comment is made with reference to the points of difference between the Augusta case and the Savannah case which I have referred to:

"We do not lose sight of the fact that * * * the authority of the plaintiff's agent in the city of Augusta is much more restricted than that of the agent in the case from which we have quoted; but we fail to see that this alters the principle involved in any degree. The plaintiff ships its meats from Kansas City, but its business was conducted in Augusta. Its agent had only a limited authority; but there is no escape from the important fact that regardless of any considerations as to the point from which it obtained its stock of goods, or the extent to which its agent was authorized to act for it, the plaintiff was engaged in conducting a business in the city of Augusta, and in the conduct of that business the fact of his nonresidence gave him no more favored position than that occupied by resident dealers of like character."

Although the two previous cases had been decided by less than a full bench, the decisions in 124 Georgia was concurred in unanimously.

Other jurisdictions offer cases almost as nearly in point as those above cited.

In the opinion to the commission respecting the taxability of the credits of the Ritter Lumber Company, I commented on the fact that the state of Louisiana, both in the language of its statutes and in the decisions of its courts thereunder, has perhaps gone further than any state in the Union in assigning a separate business situs to the intangible property of non-residents. Possibly for this reason cases from this jurisdiction lack the authority for present purposes which they otherwise would have. However, the case of Monongahela River Consolidated Coal & Coke Co. vs. Board of Assessors, 2 L. R. A. n. s. 637 presents facts so similar to the case about which you inquire that I cannot forbear mentioning it. These facts are as follows:

The plaintiff was a corporation of Pennsylvania, having its main office in that state. It was engaged in mining Pittsburgh coal and in shipping it for sale to various parts of the country. It had a sales agent in the city of New Orleans conducting its business there under the name of the agent. In the course of that business the agent accepted due bills payable on demand for coal sold by the agent to parties in and around New Orleans. These due bills were held by the agent and collected by him. When collected, the cash arising therefrom was deposited in bank and forwarded through the bank to the home office. The court in holding these

credits taxable in Louisiana, without relying on any specific statutory provision used the following language, per Breaux, C. J.:

> "The coal of plaintiff is sent here to be sold; it is retained to be sold; it is sold and evidence satisfactory to the agent is taken as the representative of the price; and when payment of this promise to pay is made, the amount thereof is deposited in bank, to be forwarded as above mentioned. The business while here, is under the direction and control of the agent domiciled here * *."

My purpose in citing this case, while acknowledging that Louisiana authorities may not be regarded as strictly in point, is, on account of the suggestion, in the above quoted language, of the test for determining the existence of a separate business situs in cases of this sort, viz., that the business out of which the credit arises is under the management of the resident agent or representative. That is to say, in cases of this kind, as distinguished from others to which I have already alluded, the test is not made by the authority of the agent to deal with the money collected on the claim, but rather to deal concerning the business which gives rise to the claim.

In Piano & Organ Co. vs. Dallas, 61 S. W., 943 (Texas, 1901), the facts were as follows:

The office of the company was located in St. Louis, Mo. It obtained a license to do business in the state of Texas and had established an office or headquarters in the city of Dallas in charge of a manager under whom were a bookkeeper, stenographer and other employes necessary for the dispatch and management of the business of the office. The company employed a number of solicitors and salesmen to canvass the territory adjacent to the city of Dallas, who reported to the manager in charge at Dallas. The company maintained in Dallas a repository or storeroom in which a stock of goods was kept for sale, and from which stock many, though not all, of the orders solicited by the traveling salesmen were filled, the remainder being forwarded by the manager in charge at Dallas to the main office of the company at St. Louis from which the same were filled either from a warehouse in St. Louis or from a factory in Indiana. The company in the usual course of its business, and acting, of course, through its Dallas manager, took notes, usually secured by chattel mortgages upon the musical instrument sold, said notes being made payable to the bank nearest and most convenient to the makers thereof as a matter of accommodation to both parties. The notes were transmitted to and kept by the managing office in Dallas and collected through that office. The Dallas office furnished to the main office in St. Louis schedule of said notes, and as a matter of practice the main office at St. Louis gave directions to the branch office at Dallas as to the management and collection of said notes. The cash arising from such collection, aside from that necessary to pay the current expenses of the business in Dallas, was remitted to the city of St. Louis. The agent at Dallas had no authority to reinvest the proceeds of the notes nor to purchase any stock in trade. The question was as to the taxability in Dallas of the notes referred to in the above statement. The charter of the city authorized it to levy municipal taxes upon "all persons or corporations owning or holding personal property or real estate in the city * * * on the first day of January of each year," and also to levy such tax on the property of corporations, as was provided by state law.

The laws of the state of Texas with respect to the assessment of personal property were strikingly similar to those of Ohio. Without quoting in full it may be said that there was a general provision to the effect that all personal property in the state and all moneys, credits and investments of citizens of the state should be taxed; and that there was also a provision that agents should list moneys "invested,

loaned or otherwise controlled * * as agent or attorney, on account of any person, company, corporation whatsoever, etc." So that, as I shall hereinafter point out, the same conditions might have been made with respect to the situs of credits under the statutes of Texas as might be made under the statutes of Ohio with respect to the same subject.

The supreme court of Texas in a very elaborate opinion cited numerous authorities beginning with the old case of Catlin vs. Hull, 21 Vt., 132, commented upon in the opinion in the matter of the Ritter Lumber Company, herein referred to, and held that the credits were taxable in Dallas. The following excerpt from the opinion will show the trend of the court's mind:

> "There is * * an exception to the above rule (that the domicile of the owner controls the taxable situs of intangible property like promissory notes) almost universally recognized * * *, and that is that when a person residing in one state has an agent in another who conducts the business of his principal and has notes in his hands for collection or renewal *with a view to keeping up a permanent business,* the situs of the notes will be the place of taxation * *."

In Marshall-Wells Hardware Co. vs. Multnomah county, 115 Pacific, 150 (Oregon, 1911), the facts were as follows:

The corporation was organized under the laws of New Jersey; its principal office was in that state, and its principal place of business in Minnesota; a branch business was conducted by the company in Portland, Ore., in charge of a manager. There a large stock of goods was carried and a large amount of accounts had accrued from sales made in various western states and in Canada by traveling salesmen and by mail orders. Orders were ordinarily filled from the Portland stock, but occasionally from the Duluth house. All accounts of sales made by the Portland house were kept only by it. The Portland manager employed, paid and discharged the traveling salesmen and sent them out. Collections were placed in a bank in Portland in a single fund, but when the fund amounted to more than a certain sum the surplus was remitted to the home office, the remainder being retained for the payment of the current expenses of the Portland branch. The question was as to the taxability in Oregon of the book accounts. They were held taxable in an opinion in which some of the cases already discussed in this opinion were cited and followed.

It will be observed that I have selected, as authorities, for the conclusion of law at which I have arrived on the first question of the two into which the general question resolves itself, cases presenting facts almost identical with those stated by you. As I have observed, I find one dissent from this otherwise unbroken line of decisions, viz., the case of Armour Packing Co. vs. Vicksburg, *supra.* I think it safe to say that as a general proposition a credit is localized in a state for taxation, though owned by a non-resident, when it arises out of a distinct business conducted for the non-resident in that state by an agent. I think it also may be concluded that an agent to sell and to manage all the selling operations of his principal, conducts a business separate from that of his principal within the purview of the rule. That is to say in many of these cases, if not in all of them, the selling end of the business was, so to speak, only a part of the entire business of the non-resident corporation; and that end or part of the business was the only part entrusted to the agent. Nevertheless, the operation of that part of the business was considered by all the courts whose decisions I have cited, as so far separate from the main business of the company as to assign to the credits arising therefrom a distinct business situs of their own. So that in the face of these authorities, it cannot be con-

tended generally that because a corporation is primarily a manufacturing company or a producing company of any kind, so that the sale of its products is merely a part of its business, the business conducted by a selling agent cannot be separated from the general business of the company and considered as a distinct affair.

Before going further, the statutes of Ohio must be considered; for it is clear that though Ohio may have the *power* to tax credits localized within her boundaries upon the principles above outlined, the credits will not be taxed unless the statutes provide for their assessment.

Avoiding the repetition of what was elaborately presented in the opinion in the Ritter Lumber Company matter, I may state that so far as foreign corporations are concerned, it is now too late to raise such a question with respect to the taxation of intangible property in Ohio. Hubbard vs. Brush, *supra,* adopts the general principle that credits arising out of business transacted in Ohio are taxable here.

Insurance Co. vs. Bowland, 196 U. S. 611, and other cases of a similar nature, like Western Assurance Co. vs. Halliday, 126 Fed. 257, are authority for the proposition that the corporation tax laws, section 5404, et seq., General Code, are not limited as to foreign corporations by the general terms of section 5328, General Code, to the effect that "moneys, credits, etc., of the persons residing in this state shall be subject to taxation. * *."

So that under the decisions in Ohio, as they stand the state has asserted its right to tax the credits of a foreign corporation, to the extent that under general rules they may be localized within its boundaries, and the test of localization in the case of a business conducted as distinguished from a mere investment is that the credits shall arise out of a continuous business conducted for the corporation on its behalf by the agents within the state. The only thing that is lacking in the Ohio decisions is authority upon the question as to whether or not it is necessary in order to assign a business situs to the credits of a foreign corporation that all of the business of the corporation shall be conducted in Ohio, and this omission is supplied by the cases from other jurisdictions which I have cited.

The Ohio cases just mentioned serve also to justify the distinction which I have drawn in this opinion between credits belonging to a non-resident and in the hands of a resident agent but representing a mere investment of the non-resident rather than a continuous business conducted in his behalf by the agent, and so as to distinguish such cases as Meyers vs. Seaberger, 45 O. S., 232; Grant vs. Jones, 39 O. S., 506; Lee vs. Dawson, 8 C. C., 365, and Walker vs. Jack, 88 Fed., 576.

Commercial credits stand on a footing quite different from mere investment credits.

For all the foregoing reasons, then, I am of the opinion, upon the first part of the question under discussion, that the credits arising from the business conducted at the Columbus branch of the H. J. Heinz Company are taxable in Franklin county, Ohio.

Greater difficulty is encountered in answering the second part of the question, and it is this feature of the case which you present that has caused me to give to the question consideration more deliberate than I am usually able to give to similar questions.

The laws of Ohio do not tax claims and demands as credits but merely the excess or difference between the sum of all claims and demands due or to become due in favor of the taxpayer, and the sum of all legal bona fide debts by him owing. It will not be necessary to quote entire section 5327, which defines the term "credits," the foregoing statement of its effect being sufficient for present purposes. Now, if the credits arising from the business conducted by a selling branch of a manufacturing corporation are to be localized where that business is conducted, and if in arriving at the amount of such credits, no account is to be taken of the debts of the

company incurred in the purchase of materials, machinery or otherwise in the process of production, as distinguished from that of sale, it will at once appear that a foreign corporation maintaining a selling agency in a state is at a disadvantage as compared with a similar corporation whose entire business in the managerial aspect thereof is conducted in a single state. For instance in Hubbard vs. Brush, *supra,* and in the Ritter Lumber Company case, the holding was that inasmuch as all the business of the corporation was conducted from an Ohio office, all of its credits were taxable in Ohio and all of its debts could be deducted from the sum total of its claims and demands for the purpose of arriving at the sum total of such credits; but if in either of the cases the facts had been like those which you now present a different question would have been suggested.

The question now under discussion has never arisen in Ohio. There are numerous decisions along similar lines by the court of appeals of New York, as pointed out in the opinion of September 26, 1912, but the laws of that state are so different from those of Ohio that I am unable to apply these decisions in the solution of the present question. The only decision which is at all analogous is that in Barnes vs. Flummerfelt, 21 Washington, 498.

The statutes of Washington with respect to the taxation of credits were substantially similar to those of Ohio. The application of such statutes to the following facts was involved in the case cited:

B. and N. were partners, doing business under a firm name. B. resided in the state of Washington and there conducted the business of broker and money lender in the firm name. N. resided in the Hawaiian islands and there carried on the business of wellboring and dealing in sugar in the firm name. The firm had claims and demands owing to it in Washington to the value of $22,000 in a given year, and owed debts on account of the business conducted in Washington in the sum of $1,200 in that year; at the same time on account of the business conducted in the Hawaiian islands the firm was indebted in the sum of $17,000.

Of course the firm claimed the right to deduct all its debts from its credits which were localized in Washington for the purpose of arriving at its taxable credits. The supreme court of Washington denied the right to make the deduction on the ground that the two businesses were separate and distinct and that the only debts which should be deducted from the business credits taxable in Washington were those debts arising out of the business there conducted.

I think that although there is a wide distinction between the case just cited and the case presented by you, the principle involved in the former may be applied to the latter. As I have pointed out in dealing with the subject of situs, credits can be localized in a state, if belonging to a foreign corporation, only upon the theory that the business conducted by the company, or on its behalf, in the state, can be separated from the main business of the company and considered as a distinct undertaking. Once the separation is made it runs through the entire subject, so to speak, and serves as well to put out of the equation the debts assignable to the main office or manufactory as the credits pertaining to the main office as such. In other words, going back to the case of Hubbard vs. Lynch, "the business it transacts in this state" must be considered as a separate and distinct undertaking as well for the purpose of ascertaining the amount of the legal bona fide debts owing on account of the business as for the purpose of ascertaining the sum of the claims and demands due to or to become due to the company on account of that business. Hardship results from this rule; but as pointed out by the Washington court, quoting from a Pennsylvania case,

> "There is nothing poetical about tax laws. Wherever they find property they claim a tribute for its protection, without any special respect to the owner or his occupation, and without reflecting much on questions of generosity and comity."

Or, as stated by Judge Cooley in his authoritative work on taxation,

> "It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardship, resulting from general rules, than is the individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."
>
> (Cooley on Taxation, Vol. 1, page 390.)

Admitting, then, the seeming injustice of the application of the rule to the case at hand, but being unable to find statutory or other ground for assigning to the business of the Columbus branch of the H. J. Heinz Company any part of the indebtedness of the home office of the company for the purpose of deducting such part from the total sum of the claims and demands due to the Columbus office and arising out of the business conducted by it, I am of the opinion that the only debts of the company which may be deducted from such claims and demands, for the purpose of arriving at its credits taxable in Franklin county, Ohio, are the debts which have been incurred in the course of the business conducted at Columbus, considered as a separate undertaking; that is such debts as have been incurred by the Columbus office in or by the corporation itself for and on behalf of the Columbus office in such a way as that the relation between a particular indebtedness and the business of the Columbus office can be definitely shown and ascertained. Inasmuch as the company does not claim the existence of any indebtedness of this class, but asserts merely the right to deduct either all debts of the company owing to persons residents in Ohio or a proportionate part of the debts of the company assigned to the Columbus office on the basis suggested by the sales of the Columbus office, as compared with the sales of all the other branch offices of the company, I am of the opinion that both of these claims of right, should be denied, and that the company should be limited to the deduction of such indebtedness as has been created by or in behalf of the Columbus agency and that only.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1303.

INDETERMINATE SENTENCE—POWER OF THE GOVERNOR UNDER INDETERMINATE SENTENCE LAW.

When the governor commutes the term of a prisoner serving an indeterminate sentence in the penitentiary, his action is a reduction of the maximum term provided by law and does not change the nature of the prisoner's sentence so as to entitle him under section 2163, General Code, to a further diminution of sentence.

COLUMBUS, OHIO, December 15, 1914.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 8, 1914, as follows:

> "Section 2163, General Code of Ohio, provides a table governing diminution of time for good behavior from the term of persons sentenced to this institution for a *definite term,* other than life, the provisions of which naturally do not apply to persons sentenced for an indeterminate period.
>
> "The governor has commuted a number of sentences from an indeterminate period to a specific or definite term.
>
> "In view of such commutation, have I a legal right to allow such prisoners the same diminution of time for good behavior as is provided in section 2163 for a definite term equivalent to the definite term to which they have been commuted?
>
> "Your prompt reply will be greatly appreciated, as the short time on some of these sentences will expire very soon."

The first question presented by your request is: Has the governor of Ohio the power to commute sentences to the Ohio penitentiary, when such sentences have been imposed under the new indeterminate sentence law?

The new indeterminate sentence law, 103 O. L., page 29, reads as follows:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

Section 11 of article III of the constitution of Ohio, provides:

> "He shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses, except treason and cases of

impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon or reprieve, with his reason therefor."

While the supreme court of Ohio has not as yet passed upon the new indeterminate sentence law of Ohio, the supreme courts of other states have held that similar indeterminate sentence laws are constitutional, and in so holding they have concluded that the power of the governor to grant pardons and commutations of sentences vested in him by the constitution, was not impaired by the passage of such indeterminate sentence law. And so the holding must be with respect to the Ohio law or our law will fall as being in violation of section 11 of article III of the constitution, as above quoted. So assuming that our law is constitutional, as I believe it to be, you may proceed upon the theory that the power to pardon and commute penitentiary sentences, still rests unimpaired with the governor.

Your next inquiry is as to the nature of a commutation of sentence. In the case of State vs. Peters, 43 O. S., 629, the supreme court at page 651, adopting the definition from Bouvier's law dictionary, defines a commutation of sentence as "the change of a punishment to which a person has been condemned, into a less severe one." This definition seems to have been adopted by the courts generally.

In the case of People ex rel. Patrick, vs. Frost, Warden, 117 N. Y. S., 524, the court said:

"We may define it (commutation) as the power to change a greater punishment to a less punishment, of which both are known to the law. Lee vs. Murphy, 22 Grat. (Va.), 789, 798; Rich vs. Chamberlin, 107 Mich., 383; State vs. Peters, 43 O. S., 657; ex parte Janes, 1 Nev. 321; State vs. State Board, 16 Utah, 478; Ogletree vs. Doxier, 59 Ga., 802; Long vs. Long, 61 Tex., 193."

Having satisfied ourselves that the governor of Ohio retains the power to commute sentences under the indeterminate sentence law, and having defined what a commutation is, it is our duty to next inquire in what manner the governor may make use of this prerogative with respect to indeterminate sentences, in order that his act may come clearly within the definition of "commutation," laid down by the courts.

An essential feature of a commutation is that it changes the punishment under which a person has been condemned into one less severe. Therefore, when the governor presumes to commute an indeterminate sentence, his act, in order to be a commutation of sentence, must change the punishment to which the person has been condemned, into one less severe. This can be done with respect to an indeterminate sentence by reducing the maximum limit, or both the maximum and minimum limits, of the indeterminate sentence imposed upon the prisoner. By this action the governor effects the release of a prisoner prior to the maximum term fixed by the sentence, and his act is therefore a commutation of sentence, since it clearly changes the punishment into which the prisoner was condemned, by the sentence in court, into one less severe. If he sees fit, the executive may

reduce the maximum to a term less than the minimum imposed by the court. Ex parte Harlan, 180 Fed., 119, page 127.

In your request you refer to the fact that the governor "has commuted a number of sentences from an indeterminate period to a specific or definite term." This definite term should be treated by you as the maximum term of imprisonment, and the sentence should be treated as an indeterminate one with the maximum so changed by the commutation of the governor. In all respects, save the maximum penalty of imprisonment, the prisoner is in the same position as when sentenced by the court.

Section 2163 of the General Code provides as follows:

> "A person confined in the penitentiary or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence: * * *"

Prisoners sentenced to indeterminate sentences, were not "sentenced thereto for a definite term other than life" and do not under this section gain a diminution of sentence; and the fact that the prisoner's maximum term has been reduced by a commutation of sentence from the governor does not, of course, operate to place him in any different position with respect to this section. Such prisoner was not sentenced to a definite term of imprisonment and therefore is not entitled to a diminution of sentence under this section.

In direct answer to your question, it is therefore my opinion that when the governor commutes the term of a prisoner serving an indeterminate sentence, his action is a reduction of the maximum term provided by law and does not change the nature of the prisoner's sentence so as to entitle him under section 2163, General Code, to a further diminution of sentence.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1304.

FIXING THE SALARY OF MEMBERS OF THE BOARD OF REVIEW WHEN THE COUNTY COMMISSIONERS FAIL TO FIX SUCH SALARY —WHEN SALARY MUST BE FIXED.

If the board of county commissioners fail to fix the salary of board of review on or before the first Monday of June each year, the salary shall be deemed fixed at amount determined at first meeting of commissioners in June last preceding.

Any attempt to fix salary at any time after first meeting in June of any year is ineffective for any purpose whatever.

COLUMBUS, OHIO, December 16, 1914.

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

GENTLEMEN:—In your communication of sometime ago you submit the following questions for my opinion thereof:

> "1st. If a board of county commissioners fail to fix the salary of the

members of the board of review on or before the first Monday in June of each year, what shall be considered the salary of the members of the board of review for that year?"

"2d. If the salary would be fixed or attempted to be fixed by the board of commissioners one day, or one month after the opening of the session, i. e., after the first Monday in June, would the attempt to so fix, control the salary of the several members for the session at which said attempt was made?

"3d. If the salary was fixed by the board of commissioners during the session, that is, after the first Monday of June of any year, would their action control for the following year if no action was taken fixing the salary the following year?"

In addition to the facts submitted in your communication other facts were submitted by various parties which would probably raise an issue; but inasmuch as boards of review have been abolished, and that the decision in the case will not be a precedent for the future, and further, inasmuch as the auditor has issued vouchers to the various members of the boards of review named, and at the time all of the parties must necessarily have been acting in the utmost good faith, I am constrained to make such a decision as will avoid the making of any findings and feel perfectly justified in so doing for the reasons I herewith state.

In an opinion to the board of review of Norwalk under date of September 30, 1912, attorney general's report 1912, page 1067, the question was submitted as to the right of the commissioners to change the perdiem compensation of the board of review during the current year, and following the decision of the circuit court of Montgomery county in an unreported case (State ex rel. vs. Edwards), wherein the right to change the compensation of the members of the board was involved, I held that the commissioners were without authority to make such change during the year. That case further held that in the event that the compensation was not fixed at the beginning of each year's session in June, the salary as fixed prior thereto at the beginning of the year's session should obtain. Under this decision, and answering your questions seriatim, it is my opinion:

First—If a board of county commissioners fail to fix the salary of the members of the board of review on or before the first Monday of June each year, the salary of such members for that year shall be whatever salary was fixed at the first meeting of the commissioners in June last preceding the year for which the salary is to be determined.

Second—If the salary would be fixed or attempted to be fixed by the board of commissioners at any time after the first Monday in June, such attempt would not avail to fix the salary for the current year, and would be unavailing for any purpose, and it would make no difference whether the failure occurred one month or one day after the opening of the session.

Third—The answer to the second question answers your third, and since the attempt at a later time in the year to fix the salary would be unavailing for any purpose, it would have no effect to control the salary of the following year. Under the decision in the Edwards case, supra, it is the duty of the commissioners at the opening of their session to fix the salary. If it has not been done, the question of the amount of the salary is regulated by the last preceding time when at an opening of a session in June the salary was fixed. Any attempt to fix or change the salary at later times would be ineffectual for any purpose.

Trusting this answers your inquiry, I am,

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1305.

DISPOSITION OF TAX LEVY MADE BY BOARD OF EDUCATION OF A SPECIAL SCHOOL DISTRICT WHERE THE PROCEEDINGS FOR THE FORMATION OF SUCH DISTRICT WERE DECLARED VOID BY THE COURT.

After a tax levy has been made by the board of education of a special school district and the proceedings for the formation of such district were declared void by final judgment of the court of appeals, it is the duty of the county auditor to extend the levies made by the several boards of education of the districts, parts of which compose the special district, within the territory belonging to said special district, upon the duplicate, and to expunge the levy made by the board of education of the special school district, by way of corrections made under section 2588, *General Code.*

COLUMBUS, OHIO, December 19, 1914.

HON. CARL SCHULER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Under date of December 1st you request my opinion upon the following facts:

> "Sometime ago by proceedings in the probate court of Holmes county, a special school district was attempted to be created, consisting of parts of three townships in that county, and an incorporated village therein. In accordance with such proceedings a board of education was elected in and for said district, which board assumed to make a levy on all the taxable property therein for the local school purposes of said district. The boards of education of the three township school districts, parts of which have been incorporated in the new reformed special district had (as you put it) 'not levied on the property that was included within the limits of the territory of the special school district.'"

From the form of your statement of facts, however I assume that the board of education of the village district did not assent to the formation of the new district, but attempted to exercise its functions after the supposed creation thereof, if there was such a village district; if there was not such a district then, of course, no difficulty on this point is presented.

> "Meanwhile the validity of the proceedings in the probate court was being tested in the common pleas court and the court of appeals. This litigation terminated a short time ago in a decision of the court of appeals holding that the probate court lacked jurisdiction to proceed upon the application made to it, so that its proceedings were entirely void.
>
> "Now you state there is a movement to bring about the same result with respect to the formation of the new district under the new school law through the agency of the county board of education in the exercise of its powers to change district lines and to annex and detach territory for school purposes.
>
> "The duplicate now being made up, how is it possible to secure funds to run the schools in the territory in question, whether the same becomes by action of the county board of education a distinct district or not?"

I start upon the assumption, which I think is a safe one, that the levy attempted to be made by the board of education of the special school district was void. This must be so since the district itself was not in existence, so that the defacto doctrine does not apply. It must be so also, because even if the taxes levied were collected, there would be no place to which to distribute them.

The levy being void, then, it should not be extended upon the tax books, and if such extension has been made, the county auditor should immediately correct the tax list and the duplicate in the hands of the treasurer, by expunging the void levy.

I think you have made one erroneous assumption, viz., that the township boards of education have failed to make any levy on the property in question. Boards of education, like other levying authorities, do not, in submitting their budgets to the budget commission, or in any other of their financial acts in connection with levying taxes, specify the territory to which the levy shall apply. The boundaries of each school district are, or should be, a matter of public record in the office of the county auditor, and when a levy is made for the school district, it is his duty to extend the same on all the taxable property within the boundaries of such district as shown on his records.

In your case the effect of the decision of the court of appeals is to restore the former school district boundaries, defining the various township districts involved (and the village district if there was such a district) so that it became the duty of the auditor, upon receipt by him of a copy of the court's decision, to extend the levies made by the several township boards against the real and personal property located in the parts of the township districts which had been included in the abortive special district. This duty the auditor should now discharge if he has not already done so, and in discharging the same he should correct the duplicate in his office, and the triplicate in the hands of the treasurer for collection.

The authority of the auditor to act in such a case is found in sections 2588 and 2589, General Code, which provide as follows:

> "Sec. 2588. From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other.
>
> "Sec. 2589. After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

In this connection I observe that by virtue of sections 5 and 64 of the Warnes law, 103 O. L. 786, the district assessor is vested with certain powers with respect to the making up of the duplicate and the correction of errors therein, which formerly devolved upon the county auditor, and that these provisions undoubtedly have the effect of depriving the auditor of some of his powers under sections 2588 and 2589. The sections of the Warnes law which I have considered are as follows:

> "Section 5. Whenever any person, company, firm, partnership, association or corporation is by an existing provision of law required to return property to the county auditor for taxation, the same shall be returned to the district assessor; and whenever the county auditor is by any existing provision of law charged with any duty or vested with any powers in making up the original tax list, or in listing and valuing any property which has been omitted from the tax list, or in correcting any returns or statements of property for taxation, either with respect to its valuation or amount, such duty shall devolve upon and be performed by the district assessor, and such power shall vest in him and be exercised by him; provided, that if the county auditor has reason to believe or is informed that any property subject to taxation in his county has been omitted from the tax list, or has been improperly valued or assessed, he shall notify the district assessor to that effect, and furnish him any facts and information within his knowledge bearing thereon.
>
> "Section 64. The district assessor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property; or when property exempt from taxation has been listed therein, and after the same has been delivered to the county auditor, and certify such corrections to the county auditor, who shall enter the same upon the tax list and duplicate."

I do not believe, however, that these sections have the effect of depriving the auditor of the power of making the kind of correction which is required in the case you present. Section 5 does not have this effect because the making of the correction is not an act which relates to "making up the original tax list." Section 64 does not have this effect because the error which has occurred is not "in the name of the person" nor "in the valuation, description or quantity * * * of property," nor in the "listing of exempt property," but is in the "amount of such tax" as specified in section 2588.

It is assumed that the duplicate has been delivered to the treasurer for collection. Therefore, the correction should be made in the margin thereof as specified in section 2588. If the necessary readjustment results in charging a given taxpayer with a less amount of taxes than he would have had to pay had the validity of the special school district been sustained, then a certificate should have been given, on demand, to such person under section 2589. If such adjustment results in charging a greater amount of tax against a given taxpayer than would otherwise have been the case, the correction should, nevertheless, be made. The only question of difficulty which arises is that which would be present in the event that any taxpayer should pay the taxes for the *entire year* before the cerrections have been made, as he would have a right to do. It not being exactly necessary for me to answer this question in passing upon the case which you present, I shall defer a positive opinion thereon, but refer you to the unreported case of State ex rel. Donahey vs. Roose, decided by the supreme court early this year, in which it was

held that a county auditor might be compelled to correct his duplicate by extending an omitted levy after the first half of the taxes had been paid, even in face of the fact that some taxpayers had paid the entire amount of their taxes in December.

I enclose herewith a copy of my brief filed in that case, in which you will observe that I express the view that notwithstanding the giving of a treasurer's receipt in full, a tax may be subsequently charged on the same duplicate, before final settlement time, which ought to have been charged thereon in the first instance.

In view of the outcome of this case I do not hesitate to express the view that the right of the various township school districts to have the duplicate corrected so as to make their levies extend to all property within their legal boundaries cannot be defeated, even as to entries on the duplicate, taxes charged against which have been paid in full before the corrections are made, and even when in such case the change will result in charging a greater amount of taxes than would otherwise have been. The result of such corrections will be to provide funds to operate the schools within the territory of the special district if the present township districts retain control of them; if, however, the county board of education changes the boundaries of the districts and in effect recreates the special school districts (assuming its power to do so) then, as pointed out in the enclosed opinion to the superintendent of public instruction, the county board of education should, at the time the transfer of territory is made, determine upon an equitable distribution or division of funds and indebtedness. In this way the necessary funds for the new district may be provided.

I do not, however, express any opinion as to the power of the county board of education to bring about the result of which you speak by the exercise of its power to transfer territory from one district to another under section 4736, General Code, as amended. This question not being directly asked in your letter, and your statement being merely that a movement has been started with this end in view.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1306.

APPOINTMENT OF DISTRICT ASSESSOR UNDER THE WARNES LAW —SALARIES OF SUCH ASSESSORS.

District assessors under the Warnes law received their appointments on December 5, 1913. Their salaries are fixed by the tax commission and are payable in monthly installments. Such being the case, although the term is indefinite, yet the salary or compensation being payable in periodical monthly installments must be calculated by the year, payable one-twelfth in each month.

COLUMBUS, OHIO, December 21, 1914.

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

GENTLEMEN:—I have your letter of October 9, 1914, in which you inquire:

> "Could a district assessor be legally compensated in a sum equaling one-twelfth of his annual salary for the full month of December, 1913, if he was not officially appointed until the fifth day of that month, even though his bond as such had been approved before that date? In the event that he did

not file his bond and have same approved by the county auditor until some time after the fifth day of December, 1913, would he be only legally entitled to that portion of the month of December, 1913, as represents the number of days following the date of approval of his official bond by the county auditor?"

You also call attention to my opinion of August 1, 1911, in which I held that under section 2989, G. C., a county officer was entitled to receive a full year's salary for each year of his term, regardless of the fact that he may have served a few days more or less, by reason of the term beginning on a certain Monday of a certain month and ending on the same Monday of the same month. While there is some difference in the conditions, I do not feel there is enough to change the rule adopted in that opinion.

District assessors are appointed by the governor, the first appointment to be made on or before the first day of November, 1913 (103 O. L., 787, sec. 2), *to hold his office until his successor is appointed and qualified.*

The *salary* of district assessors is fixed by the tax commission at not less than fifteen hundred dollars (103 O. L., 795, sec. 34), the salaries when so fixed to be paid monthly out of the county treasury (Ibid, sec. 35).

The use of the word "salary" or "salaries," when coupled with monthly payments can only support a yearly compensation payable in monthly installments. It has been said by our supreme court:

> "It is manifest from the change of expression in the two clauses of the section (Sec. 20, Art. 2 of the constitution) 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 upon the time, and not on the amount of services rendered." Thompson, Relator, vs. Phillips, 12 O. S., 617, 618.

This holding made more than fifty years ago, has never been denied, doubted or questioned, so we may safely conclude that the term "salary" as used in the Warnes law meant an annual or periodical payment for services and in the absence of a fixing of the period, no other conclusion can be reached when we consider that the salaries were to be paid monthly and that the period intended was annual.

The tax commission under the authority granted in section 34 of the Warnes law, fixed annual compensations for the different district assessors, in the doing of which they were fully justified by the statute, the decision above cited and many others in which it is cited with approval.

Outside of your letter, I am advised that the appointees under this act were determined prior to December 5, 1913, and were called to Columbus prior to that date for conference with the tax commission. This was done prior to the qualifications of many of the assessors, who were afterwards duly appointed and qualified. Each district assessor, after qualifying, became entitled to his annual salary provided he served the full year; and regardless of the particular date of qualifying. In payment of annual salaries, where the payment, as in this case is fixed at stipulated periods, parts of periods are not considered unless it be when the term expires before the expiration of some given period.

In other words, and to state the matter more clearly—at the end of the year, which from the books of the governor's office we find to be December 5, 1914, each district assessor is entitled to compensation for a full year; if he has received the amount of salary fixed by the tax commission, he is paid and the matter is at an end; if he has not received his year's salary, he is entitled to such additional sum as when added to the amount he has received, will equal his annual salary.

I think this statement should entirely clarify the matter and dispose of the question without the trouble of figuring or considering the date of the approval of his bond, or anything other or further than when the district assessor has served a year he is entitled to a year's salary and if it has not been paid, he is entitled to have it made up to him.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1307.

STATE BOARD OF ACCOUNTANCY REQUIRED TO PAY STATE MONEYS INTO THE STATE TREASURY.

Section 1378, General Code, allowing the state board of accountancy to pay its expenses and compensation of the members from its own receipts, has been repealed by implication in so far as its provisions conflict with the amendment to section 24, of the General Code, which requires the board to pay its receipts weekly into the state treasury.

COLUMBUS, OHIO, December 21, 1914.

State Board of Accountancy, Columbus, Ohio.

GENTLEMEN:—Under date of December 8th you request my opinion as follows:

"The attention of the members of the Ohio State Board of Accountancy has been informally directed to the action of the general assembly last winter, in providing that the receipts of all state boards should be covered into the state treasury, and such expenses as were allowable, paid by warrant through the office of the auditor.

"In the creation of the Ohio State Board of Accountancy, chapter 26, sections 1370 to 1379, inclusive, Codified Laws of Ohio, there were provided the conditions and rules under which this board should operate. Section 1378 specifically provides for the collection of fees and the payment of expenses of the state board. I would respectfully call your attention, however, to the last clause of said section, as follows:

"'In no case shall the expenses of the board or the compensation or traveling expenses of the members thereof be a charge against any fund of the state.'

"Inasmuch as we have been, as stated above, informally notified that our board should cover its receipts for fees into the state treasury, and this requirement appears to us to be contradictory to the section of the statute just referred to, we respectfully request your opinion for our direction in acting, as we have no inclination to violate any statute, but only to carry out the intent of the law."

Section 1378, to which you refer, is as follows:

"From fees collected under this chapter the board shall pay the expenses incident to its examinations and the expenses of preparing and issuing certificates, and to each member of the board for the time actually expended in

the performance of his duties a sum not exceeding five dollars per day and his necessary traveling expenses. In no case shall the expenses of the board or the compensation or traveling expenses of the members thereof be a charge against any fund of the state."

However, on page 178, of 104 Ohio Laws, there appears the following later enactment, the same being an amendment to section 24, of the General Code:

"Be it enacted by the general assembly of the state of Ohio.

"Section 1. That section 24, of the General Code, be amended to read as follows:

"Sec. 24. On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same.

"Section 2. That said original section 24, of the General Code, be and the same is hereby repealed.

"Section 3. All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsistent with the provisions of section 24, of the General Code, as herein amended, are, to the extent of such inconsistency, hereby repealed.

"Section 4. Immediately upon the taking effect of this act all moneys, checks and drafts in the possession of any state officer, state institution, department, board, commission or institution received for the state or for any such state officer, department, board or commission from the sources mentioned in section 24, of the General Code, as herein amended, shall be paid into the state treasury in the manner provided by said section."

In further pursuance of the policy exemplified by this enactment there was appropriated to the state board of accountancy its receipts (104 Ohio Laws, p. 72).

The clear language of section 3 of the act amending section 24, just quoted, is not subject to misconstruction. Its intent is emphatic and its effect is manifestly to repeal the inconsistent provisions of section 1378, of the General Code. That clause of this conflicting section to which you refer must in the best be considered invalid in so far as it attempts to place restrictions upon succeeding legislatures.

I am of the opinion, therefore, that all compensation, traveling and other expenses of your board may be paid only out of the fund which accumulates from the payment of your receipts into the state treasury. This conclusion necessitates the payment of all state moneys which the board has on hand into the state treasury, immediately, and the payment henceforth into the state treasury, on or before Monday of each week, all state moneys which come into the hands of the board from whatsoever source. All vouchers of your board must be paid upon the warrant of the auditor of state, in accordance with section 242, of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1308.

CONSTRUCTION OF SECTION 4736, GENERAL CODE, IN REFERENCE TO RURAL SCHOOL DISTRICTS WHICH GO TO MAKE UP COUNTY SCHOOL DISTRICTS.

Section 4736, General Code, as amended, 10 O. L., 138, applies to rural or village school districts which go to make up county school districts and does not seem to have application to the internal affairs of the rural school districts, formerly township school districts and village school districts, which go to make up and constitute the respective county school districts of the state.

Local boards of education of rural school districts, formerly township school districts, cannot change boundaries of subdistricts for the reason that such boundaries of such subdistricts no longer exist. However, such boards of education under section 7684, General Code, have the authority to make such assignment of the youth of their respective districts to the schools established by them as in their opinion will best promote the interests of education in their districts.

COLUMBUS, OHIO, December 21, 1914.

HON. H. R. LOOMIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Under date of July 30, 1914, you submitted to this department for an official opinion thereon, the following request:

> "A board of education desires to change the boundaries of the subdistricts of the township district. Do they have authority to do so?"

You further state in your communication that section 4716, of the General Code, which said section formerly conferred authority on township boards of education to change subdistricts, has been repealed. The repeal of said section appears in the 104th volume of Ohio Laws, at page 133. Said section 4716, of the General Code, prior to its repeal, read as follows:

> "The division of township school districts into subdistricts as they exist shall continue and be recognized for the purpose of school attendance, but the board of education may increase or diminish the number or change the boundaries of the subdistricts at any regular meeting. A map designating such changes shall be entered upon the records of the board."

Said section 4716, as above stated, was repealed by the legislature at its special session on February 5, 1914, so that under the new school code rural school districts formerly designated as township subdistricts, are not divided into school subdistricts as they were prior to the enactment of the school code, and there are no longer subdistrict boundary lines.

Section 4736, of the General Code, as amended, 104 O. L., page 138, specifies and designates the powers and duties of county school boards, as follows:

> "The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature the county board *shall* ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

Analyzing said section, it appears that the county board in accordance with the last quoted section, shall arrange schools according to topography and population in order that they may be most easily accessible to pupils. Furthermore, in order to accomplish this end, the county board has the power by adopting a resolution at any regular or special meeting, to change school district lines and transfer territory from one rural or village school district to another. Inasmuch as subdistrict lines by virtue of the repeal of section 4716, General Code, are no longer in existence, it necessarily follows that such county board cannot change such subdistrict lines, and therefore the district lines referred to in said section 4736 must necessarily apply to rural or village school districts as the same now exist under and by virtue of the school code. It certainly cannot apply to subdistrict lines when such subdistricts no longer exist as such.

Further along in said section, it appears that the county board in changing boundary lines, may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation.

From the foregoing analysis of the phraseology employed in said section 4736 as amended, it seems to follow that said section applies to rural or village school districts which go to make up county school districts, and does not seem to have application to the internal affairs of the rural school district formerly township school districts, and the village school districts which go to make up and constitute the respective county school districts of the state.

As to the arrangement of the schools within such rural school districts as constitute the respective county school districts of the state, section 7684, of the General Code, which was in nowise amended by the adoption of the school code and which was not repealed, provides as follows:

> "Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

Under and by virtue of this last section, it would seem to be within the power of the respective boards of education of the rural school districts of the state to make such assignment of the youth of their respective districts to the schools established by them as in their opinion will best promote the interests of education in their districts. While there are no longer subdistricts within the rural school districts formerly township school districts, nevertheless under section 7684 just quoted, it seems to have been left by the legislature to the local boards to arrange and equalize school attendance at the respective schools making up such rural districts, as in the judgment of the local board will best promote education.

Therefore, in direct answer to your question, I am of the opinion that while the local board of education of the rural school districts, formerly township school districts, cannot change boundaries of subdistricts, for the reason that the boundaries of such subdistricts no longer exist, they, nevertheless, under section 7684, supra, have the authority to make such assignment of the youth of their respective districts, to the schools established by them as in their opinion will best promote the interests of education in their districts.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1309.

JUDGE OF THE MUNICIPAL COURT OF CINCINNATI—NO FINDING SHOULD BE MADE AGAINST JUDGE OF THE MUNICIPAL COURT OF CINCINNATI FOR SALARY EARNED BEFORE JANUARY 1ST, 1914.

Although it is doubtful that the presiding judge of the municipal court of Cincinnati was entitled to compensation as such before January 1, 1914, *yet in view of the fact that he took such compensation under an opinion of the city solicitor of Cincinnati, no finding for recovery should be made by the board against him.*

COLUMBUS, OHIO, December 21, 1914.

HON. ARTHUR C. FRICKE, *Presiding Judge of the Municipal Court, Cincinnati, Ohio.*

DEAR SIR:—I should have replied sooner to your letter of July 23, 1914, but the question about which you write me is one of such importance as that I felt it my duty to consider it with the greatest care, not only personally, but in conjunction with counsel in this department, and this I have done. In your letter referred to you advise me as follows:

> "Several days ago I received a communication from State Auditor Blau in which the question was raised as to my right to compensation as presiding judge of the municipal court of this city from August 2, 1913, to January 1, 1914. Under section 45, of the municipal court act, the governor was given the appointing power to name four judges of this court. Governor Cox did not do this, but after the November election the judges elected and myself held a great many conferences and meetings in which the rules of the court were formulated. During this time it became necessary for me as presiding judge to arrange for court rooms and the necessary funds to construct them. This required considerable time and work. And as a result, the first of January, 1914, the court went into operation without any delay to the litigants.

"I feel that at the time you advised Mr. Blau that there was a question as to my being entitled to the compensation you were not advised of these facts. I also call your attention to Mr. Bettman's letter advising the city auditor and treasurer to pay me this money. He was fully advised in the premises at the time and carefully considered the subject. I feet that owing to these added duties I am justly entitled to this compensation."

On June 19th, 1914, I gave an opinion to the bureau of inspection and supervision of public offices to the effect that you were entitled to the increase of the salary provided for in the act creating the municipal court of Cincinnati, but that inasmuch as the governor did not appoint any of the additional judges and as the court was not organized until January 1, 1914, your increase of salary could not legally commence until January 1, 1914.

I understand that the common pleas court and the court of appeals in Dayton held that the presiding judge there was entitled to the increase of salary. I have not the opinions of these courts at hand, but my information is that my opinion was followed.

After the most careful consideration of the question you present, I have not changed my mind. I think it only fair to tell you that counsel in the office are about evenly divided in their judgment upon the law. Many of the most competent counsel in my department being of the opinion that you are entitled to compensation from August 2, 1913, but after hearing their views, as well as the views of counsel who entertain the opposite notion, I have not been able to change my mind. I think that much of the trouble presented for the solution of this question arises from the uncertainty as to whether the act of the general assembly is constitutional. We have not been guided one way or the other on that proposition, assuming for our purposes that the act is constitutional, but as you know we have trouble in reasoning to a satisfactory conclusion unless the act to be interpreted is one of manifest soundness.

After entertaining the ideas just expressed, I find that Judge Shauck, in speaking for the court in the case of State ex rel. vs. Yeatman, found in 89 O. S., 44, uses this language:

"In the light of the cases cited we see no valid objection to those provisions of these acts which relate to the organization and jurisdiction of the municipal courts in the cities named (Cincinnati and Dayton). If there are invalid provisions with respect to salaries, they do not require consideration here."

I was constrained to hold in your favor for the increased salary from January 1, 1914, quite largely upon the proposition that new and additional duties came to you not germane to the office of judge of the police court and that therefore even though the constitutional inhibition would otherwise apply, the change in character of the service to be rendered would entitle you to the increase of compensation, and this line of reasoning necessarily would preclude you from the increased compensation until the new duties incident to the organization of the court would arise. If we concede the constitutionality of the statutes and the right of the legislature to assume what might appear to be an appointing power a very close question arises. I do not feel that the public welfare would be subserved by the institution of a suit involving the validity of the act. The right of the other judges to sit on the bench is unquestioned. Your right as judge of the police court of Cincinnati is unquestioned. The public welfare, in my judgment, is best subserved, conclusively so, by the raising of no question concerning the validity of the municipal court in all

of its branches. You did not draw the salary until advised by the city solicitor that you were entitled thereto. The city solicitor is a man of recognized ability, a lawyer of distinction, and a man of the strictest integrity and good judgment; he acted as the legal adviser for the city of Cincinnati; and you and he acted alike in good faith, although, of course, this alone would not be sufficient warrant for me to make the recommendation which is found hereinafter, but all of these considerations put together impel me to the conclusion that it is my duty to advise the bureau of inspection and supervision of public offices to cancel any finding that it may have made against you if one be made, or to refrain from making any finding in case it was the purpose of the bureau so to do. I am accordingly sending a copy of this communication to the bureau of inspection and supervision of public offices, and said copy will be a direction to make the entry accordingly.

Public justice is not subserved by the bringing of an action against the presiding judge of a court for the recovery back of a salary drawn in good faith under the advice of the city solicitor in connection with a statute of doubtful validity unless the attorney general is clearly of the opinion that the amount has been illegally drawn, and the statute is one of general application and similar questions likely to arise in other places. I deem it better to adhere to my own judgment as to the law and waive the disputed claim. The fact that you rendered, as disclosed by your letter, additional service prior to January 1, 1914, adds moral weight to your right to retain the money.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1310.

COUNTY MEMORIAL COMMISSION CANNOT LEGALLY EXPEND MORE THAN $250,000 FOR THE ERECTION OF A MEMORIAL BUILDING UNDER SECTION 3059, GENERAL CODE.

County memorial commission cannot legally expend more than $250,000 *for the erection of a memorial building under section* 3059, *General Code, even though the fund raised by the bond issue for such purpose is increased above such amount by the interest earned upon the moneys thus created.*

COLUMBUS, OHIO, December 21, 1914.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—On December 10th you submitted the following inquiry:

> "On November 17, 1914, you rendered an opinion to me upon the following question:
>
> "'What disposition shall be made of the depository interest upon the proceeds of a bond issue for the purpose of constructing a county memorial building?'
>
> "Your opinion held that the interest followed the fund. This has raised another question, on which I request your opinion, to wit:
>
> "'Can the memorial commission of Clark county, Ohio, legally expend more than $250,000 for the erection of a memorial building, provided for by sections 3059 to 3069, inclusive, General Code?'"

On account of the great importance of the question involved I have given the most careful consideration to your inquiry, aided by your excellent brief of December 10th, a well considered brief of General Keifer of December 17th, and your careful response thereto of December 17th. Every lawyer in this office concurs with me in the conclusion that no more than $250,000 may legally be expended for the purpose of erecting the memorial building.

In coming to this conclusion we follow the line of reasoning contained in your briefs. We think that section 3069 admits of only one conclusion, and that is, that there is a limitation in the amount of money to be expended for the purpose of erecting the building, and that limitation is $250,000.

I still, of course, adhere to my opinion that the interest follows the fund, but when the section providing for the memorial building became law, interest accruing as we have it now in practice was not contemplated and bond issues were ordinarily in the same amount as the amount to be expended. Considerable significance is attached to section 3063, of the General Code, part of which is as follows:

> "If upon the completion of a memorial building an *unexpended* balance of the fund remains in the county treasury, it shall be placed and kept to the credit of such sinking fund."

Therein it is contemplated that the bond issue and whatever accretions might result may in total exceed the amount to be expended. It is quite impossible in practice to keep the receipts and expenditures exactly together. I do not see how anything could be plainer than this language:

> "and to expend for such purpose an amount not to exceed $250,000 in any one instance."

This occurs to me to be primary.

This conclusion also makes rational the conclusion that the interest follows the fund, otherwise, if the building should not be erected for a still greater number of years than that elapsed in the Springfield case, the limitation placed by the general assembly on the amount to be expended would be very uncertain.

I trust that both sides to this friendly controversy will be satisfied with the final conclusion. Whatever doubts and differences existed among counsel in respect to the former question you had before us, none whatever exists upon the disposition of the present question.

I am sending a copy of this opinion to General Keifer, and on behalf of this department I desire to thank him and you for the great assistance rendered by your respective briefs.

Sincerely yours,
TIMOTHY S. HOGAN,
Attorney General.

1311.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—EXTENT OF FINDINGS THAT MAY BE MADE AGAINST PUBLIC OFFICIALS.

The Bureau of inspection and supervision of public offices is authorized to make findings against public officials only for public moneys which have been received or collected or illegally expended under color of office. Recovery against an officer is not authorized upon a finding for failing to collect or receive moneys which it was his duty to so collect or receive.

COLUMBUS, OHIO, December 22, 1914.

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

GENTLEMEN:—Under date of November 16th, you request my opinion upon a question which, I believe, may be stated in short, as follows:

> "In cases where the mayor's docket shows that a fine and costs have been imposed in a case of criminal conviction, but where there is no evidence to show that such fine and costs have been collected, or where it is settled that the mayor has taken no steps whatever, as provided by law, for the collection of the same, is the bureau justified in making a finding against the official and subjecting him to liability for the amount of such fine and costs?"

Section 284, as it appears on page 507 of 103 Ohio Laws, provides in part as follows:

> "* * * On examination, inquiry shall be made into the methods, accuracy and legality of the accounts, records, files and reports of the office, whether the laws, ordinances and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with."

Section 286 provides in part as follows:

> "* * * If the report sets forth that any public money has been illegally expended or that any public money collected has not been accounted for, or that any public property has been converted or misappropriated, within ninety days after the receipt of such certified copy of such report the attorney general or such prosecuting attorney or city solicitor shall institute, and the mayor of such village shall cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * * *
>
> "If a report sets forth any malfeasance, misfeasance or gross neglect of duty on the part of any officer or employe for which a criminal penalty is provided by law, a certified copy thereof shall be filed with the prosecuting attorney of the county in which the offense is committed, and such prosecuting attorney shall, within ninety days after receipt thereof, institute criminal proceedings against such officer or employe. * * *

"The term 'public money' as used herein shall include all money received or collected under color of office whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, their deputies and employes, shall be liable therefor."

These are the only provisions which I am able to find which, in any way, authorize a recovery against public officials by virtue of the examinations of the bureau. It is clear that these statutes authorize the recovery, only, of public money which has been illegally expended, or which has been collected and not accounted for. Indeed the term "public money" is furthermore defined as money *received or collected* under color of office. These provisions clearly cannot be employed to authorize a recovery against a public officer for moneys which he should have collected or received, but which he neglected to collect or receive. The fact that such public officer so failed in his duty may, of course, be set out in the report of the examiner; but under the provisions of the statute there is no authority for charging such public officer with a legal, civil disability for the amount of the moneys which he should have collected, but failed so to do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1312.

PRIVATE BANK ACT—WHO MAY USE THE WORDS "BANK," "BANKER," "BANKING," "TRUST" OR "TRUST COMPANY."

Construction of the amendment of 1912 *to section* 3, *article XIII of the constitution and of the act found in* 103 *O. L.*, 379, *commonly known as the private bank act.*

The restriction upon the use of the words "bank," "banker," "banking," "trust" or "trust company" does not apply to corporations organized under the laws of this state not now transacting or desiring to transact a banking business.

Said constitutional amendment and private bank act do not prohibit the use of said terms to any person, partnership or association not now transacting or desiring to transact a banking business in this state.

No corporation, person, partnership or association (except a national banking association) now transacting or hereafter desiring to transact a banking business in this state, may use any of said terms, unless it submits to inspection, examination or regulation by the superintendent of banks.

COLUMBUS, OHIO, December 22, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you submitted the following request for my opinion:

"In the case of a certain corporation using the words 'bankers' and 'trust,' and being incorporated as an Ohio institution, I desire to make an inquiry as to whether it can use these words legally under the terms of the Kennedy private bank law, No. 46, without coming under the supervision of the banking department."

On December 6, 1913, I gave you an opinion to the effect that the use of the words "bank," "banker" or "banking" or words of similar meaning in any foreign language as a designation or name under which business is conducted in this state, is contrary to law unless the person, partnership, association or corporation using such word or words submit to inspection, examination or regulation by your department, as provided by law, and also pay annually to your department the fees provided by law.

I find that this opinion was too broad. It was sought to restrict the unwarranted use of the words "bank," "banker" or "banking" or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state, by amendment to section 3, article XIII of the constitution adopted in 1912. The last paragraph of the amendment to said section provides as follows:

> "No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank," "banker" or "banking" or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

It will be observed that this amendment was intended to reach persons, partnerships or associations not incorporated, and corporations not organized under the laws of this state, and, therefore, omits corporations organized under the laws of this state. It will also be observed that the amendment was not self-executing.

By the act passed April 17, 1913, 103 O. L., 379, entitled "An act to provide for the examination, regulation, supervision and dissolution of certain banking concerns," it was sought to carry this constitutional amendment into effect. The first section of this act is as follows:

> "That no corporation not organized under the laws of this state, or of the United States, or person, partnership or association, shall use the word "bank," "banker" or "banking" or "trust" or "trust company," or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation, as provided in this act. The superintendent of banks shall execute all laws in relation to corporations organized under the laws of this state or of the United States, persons, partnerships and associations using the word "bank," "banker" or "banking," or "trust" or "trust company," or words of similar meaning in any foreign language as a designation or name under which business is conducted in this state."

It will be observed that this section practically follows the language of the constitutional amendment except that the words "trust" and "trust company" are added. It is also provided that the superintendent of banks shall execute all laws in relation to corporations organized under the laws of this state or the United States, persons, partnerships and associations using any of said words as a designation or name under which business is conducted in this state.

The first paragraph of section 2 of said act is as follows:

> "Every corporation not organized under the laws of this state or of the United States, or person, partnership or association using the word "bank,"

"banker" or "banking" or "trust" or "trust company" or words of similar meaning in any foreign language as a designation or name under which business may be conducted in this state, now transacting or hereafter desiring to transact a banking business in this state, shall, under oath file with the secretary of state a full, complete detailed statement of, * * *."

It will be noted that this section applies only to corporations not organized under the laws of this state and to persons, partnerships and associations using any of said words as a designation or name under which business may be conducted in this state. It further specifies that the business to be reached by the act is the "banking business in this state."

From the constitutional amendment and these two sections it seems clear, first, that the inhibition against the use of the words "bank," "banker" or "banking" or "trust" or "trust company" does not apply to corporations organized under the laws of this state. Second, the use of any of said words as a designation or name under which business may be conducted in this state, by a corporation not organized under the laws of this state, or a person, partnership or association is prohibited, unless such corporation, person, partnership or association submit to inspection, examination and regulation as provided by the act. Third, the superintendent of banks is to execute all laws in relation to corporations, persons, partnerships and associations using any of said words as a designation or name under which business is conducted in this state, without respect to whether such corporations are organized under the laws of this state or of the United States. Fourth, the act only purports to provide for inspection, examination and regulation of corporations not organized under the laws of this state and of persons, partnerships or associations using the word "bank," "banker" or "banking" or "trust" or "trust company" as a designation or name under which business may be conducted in this state, now transacting or hereafter desiring to transact a *banking business* in this state.

Before the passage of this act the laws of Ohio provided fully for the regulation of corporations, organized under the laws of this state, which transacted or desired to transact a banking business in the state; but up to the passage of the constitutional amendment there were no provisions of law regulating what is commonly known as the private banking business, that is, banking business transacted by persons, partnerships or associations, and there was no restriction as to the use of the terms specified above. The constitutional amendment and the first section of the act, I think, clearly prohibit the use of any of the terms to a corporation not organized under the laws of this state or of the United States or to any person, partnership or association, unless such person, partnership or association submit to inspection, examination and regulation by the superintendent of banks *as provided in the act.*

No provision is made for the inspection, examination or regulation of any such corporations, persons, partnerships or associations not transacting or desiring to transact a banking business; it is, therefore, extremely doubtful whether this inhibition applies to such corporations, persons, partnerships or associations, not transacting a banking business for the reasons that until the passage of the constitutional amendment there was no inhibition against the use of any such terms, and the constitutional amendment and the act simply provide that they shall not use any such term unless they submit to the inspection, examination and regulation "as may hereafter be provided for by the laws of this state." It may be assumed that such corporations, persons, partnerships or associations are ready and willing to comply with the laws which may be passed for their inspection, examination and regulation, and therefore until said laws have been passed and they have refused to submit to the same, there is nothing to prevent their using said terms.

This matter should be called to the attention of the legislature, for it was undoubtedly the intention of the people in adopting the constitutional amendment to absolutely prohibit the use of these terms except to corporations, persons, partnerships and associations actually engaged in banking and subject to the inspection, examination and regulation by the banking department of the state.

As to corporations, persons, partnerships and associations engaged in the banking business it is clear that all such corporations, persons, partnerships and associations are now subject to inspection, examination and regulation by the banking department, and none of them can use any of such terms without submitting to such inspection, examination and regulation. This, of course, does not apply to banking associations organized under the laws of the United States and known as national banks.

The inhibition does not apply to corporations organized under the laws of Ohio and not transacting a banking business, for by the terms of the constitutional amendment and the first section of the act, such corporations are excluded. There is nothing in the act which prevents the use of any of these terms by any Ohio corporations; if the corporations are engaged in the banking business then they come under the inspection, examination and regulation of the banking department by section 711, of the General Code, which is as follows:

> "The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations."

The language used in section 1 of the act, being section 744-1, of the General Code, to the effect that "the superintendent of banks shall execute all laws in relation to corporations organized under the laws of this state or of the United States, persons, partnerships and associations using the word 'bank,' 'banker' or 'banking' or 'trust' or 'trust company,' or words of similar meaning in any foreign language as a designation or name under which business is conducted in this state" can only refer to the laws applicable to such corporations, (other than national banks) persons, partnerships and associations now transacting, or hereafter desiring to transact a banking business in this state.

My construction, therefore, of this matter is as follows:

First. The constitutional amendment and the private bank act restricting the use of the words "bank," "banker" or "banking" or "trust" or "trust company," do not apply to corporations organized under the laws of this state not now transacting or desiring to transact a banking business.

Second. Said constitutional amendment and private bank act do not prohibit the use of said terms to any person, partnership or association not now transacting or desiring to transact a banking business in this state.

Third. All corporations, persons, partnerships and associations (excepting national banking associations) now transacting or hereafter desiring to transact a banking business in this state are forbidden the use of any of said terms unless they submit to inspection, examination and regulation by your department.

I do not deem it necessary to define, in this opinion, what constitutes a banking business. I think this matter is determined by section 711, of the General Code, which plainly indicates that the power to receive, and the receiving of money on deposit, is the essential characteristic of banking in this state.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1313.

FOREIGN EXCHANGE BANK NOT SUBJECT TO SUPERVISION OF SUPERINTENDENT OF BANKS OF OHIO.

The so-called "foreign exchange banks," meaning the agencies referred to in sections 290 et seq., General Code, are not subject to supervision by the superintendent of banks of Ohio.

COLUMBUS, OHIO, December 22, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you make the following request for my opinion:

> "Please render to this office an opinion as to whether or not the foreign exchange banks, described in sections 290 and 295, of the General Code, are subject to the supervisions of this department under the provisions of House Bill No. 46, passed April 17, 1913, and approved May 2, 1913."

The sections to which you refer are as follows:

> "Sec. 290. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.
>
> "Sec. 295. Nothing herein shall apply to drafts, money orders or travelers' checks issued by trans-Atlantic steamship companies or their duly authorized agents or to national banks, express companies, state banks or trust companies."

By section 295 it is made plain that these provisions are not intended in any way to apply to state banks, and that these transportation agencies, though sometimes called foreign exchange banks are not classed as banks. The only power they have for the receiving of money on deposit is for the express purpose of transmitting the same, or the equivalent thereof, to foreign countries, and while the power to receive money on deposit is the distinctive characteristic of banking business in Ohio, such deposits, as I view it, must be deposits made generally, at least deposits made for the purpose specified in this act cannot be classed as banking deposits. The act itself provides for the insurance of the deposits by a bond deposited with the auditor of state; it was passed May 1st, 1908, 99 O. L., pages 266 and 267. On the same day, May 1st, 1908, the legislature passed what is known as the Thomas act, 99 O. L., 269, a general act for the regulation and supervision of banking in this state. It is therefore plain that these foreign exchange banks are not regarded by the legislature as in any way under the control or jurisdiction of the state banking department.

I do not think that such agencies became subject to the supervision of the banking department by the provisions of what is known as the private bank act, 103 O. L., 379, to which you refer in your inquiry. This act only refers to corporations

not organized under the laws of this state or of the United States, persons, partnerships or associations transacting a banking business in this state; and as I have said I do not regard the receiving of money for the express purpose of forwarding the same, or its equivalent, to another country as a banking business

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1314.

CONSTRUCTION OF SECTION 51, OF THE WORKMEN'S COMPENSATION ACT IN REFERENCE TO COMMON CARRIERS BY RAIL ENGAGED IN INTERSTATE COMMERCE COMING UNDER WORKMEN'S COMPENSATION ACT.

Section 51, of the workmen's compensation act, 103 O. L., 72, excludes from the operation thereof all common carriers by rail engaged in interstate commerce, even as to their intrastate work, except when such carriers and their employers elect to insure in the state insurance fund, and such election is not forbidden by congressional legislation.

There should be no distinction made between electric interurban railroads and steam railroads under the aforesaid section, as the federal employers' liability act is applicable to the interurban as well as the steam railroad.

COLUMBUS, OHIO, December 22, 1914.

THE HON. WALLACE D. YAPLE, *Chairman, Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—A little while ago you enclosed a letter of Mr. F. V. Whiting, general claim attorney of the New York Central Lines, which raised certain questions relative to the construction of section 51, of the workmen's compensation act. You ask for our opinion upon these questions:

In his letter, Mr. Whiting states that the only employes whom he regards as within the workmen's compensation act are those who are engaged in no commerce, and those who are exclusively and continuously engaged in intrastate commerce. Construing your letter and his communication, I think the questions raised may be stated as follows:

1. What employers and employes engaged in intra and also interstate and foreign commerce come within the purview of the workmen's compensation act of Ohio?

2. Should a distinction be made between electric interurban railroads and steam railroads under section 51, of the workmen's compensation act?

I have delayed in answering this question because a similar question was pending before Judge Sater, of the United States district court, in the case of Connole vs. Norfolk & Western Ry. Co., to the decision in which case I have recently called your attention. It was there held that section 51, of the workmen's compensation act excluded from the operation of this law, all common carriers by rail who engaged in interstate commerce even though certain phases of their work were intrastate. Thus it follows that they do not come within the purview of the act in question even as to their intrastate work, unless both employer and employe otherwise elect as to such intrastate work.

2. It is necessary to examine the federal employers' liability act, in order to ascertain whether it is applicable to electric interurban railroads, because if it is not, the state may by virtue of its powers of police regulation pass a compensation act which will affect such railroads and their employes. This is so fundamental that it is unnecessary to cite authorities in support of it, but nevertheless we should like to call your attention to Stott vs. Pacific Coast Co., 205 Fed., 169, wherein a federal district court held that the Washington workmen's compensation act extended to workmen employed in interstate commerce by water, *in the absence* of congressional legislation on the subject.

Mr. Thornton in both the first and second editions of his work on the federal employers' liability act distinctly states that the present federal law includes common carriers by electric interurban and street railroads engaged in interstate commerce. See pages 43 and 44. In support of the doctrine that street railroads are included, the learned author cites the case of Omaha, etc., Ry. vs. Interstate Commerce Commission, 191 Fed., 40, wherein the commerce court reversed the decree of the circuit court of the district of Nebraska, and dismissed an action to enjoin the enforcement of an order of the interstate commerce commission, reducing street railway rates. The decision of the commerce court was based upon the theory that the statute giving the interstate commerce commission jurisdiction over carriers engaged in the transportation of passengers or property by railroad applied to street railroads. This decision was subsequently reversed in

"Omaha, etc., Street Ry. Co. vs. Interstate Commerce Commission, 230 U. S., 324."

In that case the supreme court of the United States, through Mr. Justice Lamar, held that the statute in question did not apply to a street railroad. His reasoning may be briefly stated as follows:

The statute in terms applies to all carriers engaged in the transportation of passengers or property by *"railroad,"* but in 1887 that word had no fixed or definite meaning, there being a conflict in the decisions of the courts as to whether street railroads were embraced within the provisions of the statute. All of those, however, hold that the meaning of the word is to be determined by construing the statute as a whole, and, if its scope is such as to show that both classes were within legislative contemplation, then the word railroad will include street railroad; while if the act was aimed at railroads proper, then street railroads are excluded from its operation. Ordinarily railroads are constructed upon the company's own property and tracks, extend from town to town, are usually connected with other railroads so that trade may be established, without breaking bulk across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand are local, laid in streets as aids to street traffic, and for the use of a single community, even though that community may be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which congress had in mind when passing the interstate commerce act in 1887. Every provision of that act is applicable to street railroads, they not being guilty of the mischief sought to be corrected, and the remedial provisions of the statute not being applicable to them, because of the nature and character of their business. It is evident that the case before the court was within those authorities holding that the word railroad cannot be construed to include street railroad. It was contended that since 1887, when the act was passed, a new type of interurban railroad had been developed, which possessed most of the characteristics of the steam railroad. The court distinctly stated that it was not dealing with such a case, but with a company chartered as a street railroad doing a street railroad business and hauling no freight.

This decision of the supreme court would indicate that Mr. Thornton's view may be questioned with reference to those street railroads, which are run entirely as street railroads, and not as electric interurban railways, but such decision does not foreclose inquiry as to the status of the latter class of carriers. The federal employers' liability act is entitled: "An act relating to the liability of common carriers *by railroad* to their employes in certain cases." In section 1 it provides that: "Every common carrier by railroad, while engaging in commerce between any of the several states, or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories * * * * * shall be liable in damages to any person * * * * * *;"

Section 2 refers to: "Every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone and other possessions of the United States."

Section 3 contains this language: "That any or all actions hereafter brought against any such common carrier by railroad * * * * * *."

Section 4 states: "That in any action brought against any common carrier under and by virtue of any of the provisions of this act * * * * * *."

Section 7 makes the term common carrier inclusive of receivers, or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Now at the time that this act was passed interurban railroads were doing a great amount of interstate business, and were just as dangerous to the employe, in many respects, as were the steam railroads. Some of them acted as common carriers for express companies, which engaged in interstate business, and almost every reason existing for the regulation of steam railroads was a reason for the regulation of interurban railroads.

Assume that this act was a modification of the common law, and that such statutes in derogation of common law are to be strictly construed, yet, as stated by Mr. Chief Justice Fuller in

"Johnson vs. Southern Pacific Co., 196 U. S., 1,"

this dogma only amounts to a recognition of the presumption against the intention to change existing law, and such laws should be construed sensibly and with a view to the object aimed at by the legislature. They must not be so construed as to defeat the obvious legislative intent.

There can be no question that it was the intention of congress to deprive the common carriers of certain defenses, and to enable an employe who might be injured, or the personal representative of one who might be killed, to recover in case of such injury or death, such damages as might be regarded by the jury as proper under the circumstances. Its purport was to increase the liability of the carrier for its negligence. In other words, its direct object was the promotion of public welfare by securing the safety of employes, and perhaps the traveling public, and was in this aspect remedial, which is substantially what Mr. Chief Justice Fuller said of the safety appliance act in the foregoing decision. Hence, it would seem to follow that congress intended to include within the federal employers' liability act, all those interstate carriers by railroad, and their employes, while both are engaged in interstate commerce, who would come within the reason of the statute, which is not to be governed by extremely technical rules of construction, its aim being to include rather than to exclude.

In discussing the employers' liability act, which was declared unconstitutional, Mr. Justice White said that it included trolley lines moving wholly within a state as to a large part of its business, and yet as to the remainder crossing a state line. This

remark, however, was only obiter, and furthermore would not be in point here, for the reason that the statute he was considering applied to "every common carrier engaged in trade or commerce between the several states, etc." It will be observed that the words "by railroad" were omitted from that act.

The safety appliance act referred to in the case of Johnson vs. Southern Pacific, *supra,* contains much the same language, with reference to railroads, as does the liability act. As originally enacted, it provided that it should be unlawful "for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic, not equipped with a power driving brake wheel and appliances for operating a train brake system * * *." The other sections of that act refer to "such common carrier."

On March 2, 1903, that act was amended in certain particulars, for the purpose of extending its provisions to common carriers by railroads in the territories and District of Columbia, and to all trains, locomotives, etc. The requirements thereof were made to apply to trains, locomotives, tenders, cars and similar vehicles "used on any railroad engaged in interstate commerce, * * * * excepting those trains, cars and locomotives exempted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of April 1st, 1896, *"or which are used upon street railways."*

The very fact that the language "or which are used upon street railways" was inserted in the safety appliance act, clearly shows that it was the belief of congress that the words "common carriers by railroad" included street railroads, as otherwise it would not have expressly excluded them from the operation of the act by amendment. This exception was before the court in the recently decided case of United States vs. Railroad, 206 Fed., 988, it being held that the cars used on railways excepted by statute from the safety appliance act, viz., street railways, did not include cars of an interurban line, even though such cars were run on a street car line.

From this the only conclusion that one can derive is that the court in that decision took the view that the safety appliance act governed interurban railroads engaged in interstate commerce. This holding seems to me to be very pertinent to the matter in hand, as the employers' liability act, and the safety appliance act contain practically the same language in defining those to whom each statute is applicable.

With these provisions in mind, it is my opinion that the federal employers' liability act applies to interurban railroads while they and their employes are engaged in interstate commerce. Although this is still an open question and there are no authorities directly in point, I am inclined to the belief that the supreme court of the United States will, if such question comes before it adopt this view, as that court has given those acts providing for the safety of employes the broadest and most inclusive scope possible in order to attain the objects sought to be accomplished by laws of this character.

From this it must necessarily follow that the construction which was given the Ohio workmen's compensation act by Judge Sater will obtain, and should govern your board with reference to interurban railroads. In other words, they will stand on a parity with steam railroads and no distinction should be made between them under section 51, of the Ohio law.

I have not been unmindful in my consideration of these questions that the supreme court of this state has held in a number of cases, that interurban railroads are to be classified as street railroads, but it must be noted that these decisions will not govern when the supreme court of the United States comes to consider a federal statute such as the one in question. In fact in Railroad Co. vs. Lohe, 68 O. S., 101, which is one of the decisions wherein an interurban electric railroad is classified as a street railroad, the court held that such railroad companies are subject to the law of negligence governing steam cars where the question of the standing on the

platform of a car by a passenger was involved. The opinion was to the effect that when it came to running such cars in the open country upon a track substantially the same as the track of a steam railroad, it would seem that the same rules of negligence and contributory negligence should prevail as are applicable to steam railroads. This indicates that the court in a proper case will not be bound by the charter powers or statutory classifications of such railroads when its liability for tort is involved. Such being the case, it should follow that when statutes are enacted laying down certain rules for the safety of employes and pertaining to the liability of carriers for tort, interurban railroads would be held by the Ohio courts to be included within the word "railroad." Of course, those interurban railroads not engaging in interstate commerce are to be treated as other employers of five or more workmen, and therefore are to be governed by the workmen's compensation act, section 51, not being applicable to them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1315.

RIGHT OF A TOWNSHIP OR VILLAGE TO INCUR INDEBTEDNESS DURING AN EPIDEMIC FOR THE RELIEF OF DESTITUTE PERSONS OR FOR THE PREVENTION OF THE SPREAD OF DISEASE.

In time of epidemic, either a township or a village, as such, may incur indebtedness either for the relief of destitute persons, or for the prevention of the spread of the disease and bonds may be issued to discharge such indebtedness. Where such obligations are incurred by the township trustees, the bonds must be issued by them, and not by the village council, although in the first instance the village authorities would have had power to act in the premises, and although for years the poor of the village had been relieved by township officers through township levies.

COLUMBUS, OHIO, December 22, 1914.

HON. W. L. COUNTRYMAN, *Solicitor for the Village of East Youngstown, Youngstown, Ohio.*

DEAR SIR:—I have your letter of October 28th, requesting my opinion upon the following facts:

> "The village of East Youngstown in the past has made no levy for the relief and support of the poor, these activities being exclusively discharged by the township trustees. At the present time, however, the trustees have on hand an amount of money sufficient only for the anticipated needs of the poor fund for the coming winter. Meanwhile the township trustees have incurred a large indebtedness arising out of the fact that there has been an epidemic of trachoma. It is now suggested that in view of the fact that the township has been bearing the expense of relieving the poor in the past, the village should assume this indebtedness. May this lawfully be done?"

The nature of the indebtedness described by you is not clearly apparent to me. That is, you do not state whether the epidemic gave rise to the necessity for poor relief, as such, or whether the indebtedness was incurred for the purpose of pre-

venting the spread of the disease by measures which are ordinarily taken by the public health agencies for such purpose. Of course, the township trustees constitute both overseers of the poor and a local board of health; and as a local board of health the trustees have all the powers of municipal boards of health. (Sec. 3394, General Code.) Among these powers, I think, is the power to borrow money in time of epidemic for the purpose of preventing the spread of the disease. This power resides, by explicit provisions of law (sections 4450 and 4451, General Code) in the council of a municipal corporation, which must act upon application and certificate from the municipal board of health. In case of the township, however, the trustees possess the fiscal powers of the subdivision as well as those of a board of health, thus combining in themselves the functions distributed by the municipal code between the council and the municipal board of health; so that I think that in a proper case the township trustees would undoubtedly have the power to borrow money to prevent the spread of a contagious or infectious disease in time of an epidemic.

There is no provision of law by virtue of which direct authority can be claimed to borrow money for the relief or support of the poor, either on the part of a municipal corporation or on the part of township trustees. However, in a recent opinion, a copy of which is enclosed herewith, I held, as you will observe, that where proper proceedings have been taken to charge the township or municipality with the relief of indigent persons in need of medical attention or other proper support, the municipality or township becomes obliged to make the necessary expenditure, and this obligation does not depend for its force upon the presence of money in the treasury of the corporation or township; so that in the event that obligations have been so incurred, they constitute indebtedness of the corporation or township which may be funded by the issuance of bonds under section 5656, General Code (by the township), or under section 3916, General Code (by the municipality).

So that under ordinary circumstances money may be borrowed by a township or municipal corporation, not for the purpose of providing a fund in advance for the relief of the poor, but for the purpose of paying obligations arising from the duty to relieve the poor.

The circumstances mentioned by you, however, are extraordinary in their nature, and the question is raised as to whether or not paragraph 19, of section 3939, General Code, applies. This provision which applies to townships and municipal corporations alike by virtue of section 3295, General Code, authorizes the issuance of bonds "for the payment of obligations arising from emergencies resulting from epidemics or floods, or other forces of nature."

This language is very broad, and in my opinion, from the fact that "epidemics" are therein mentioned along with floods and other forces of nature, the conclusion is suggested that in time of epidemic, flood or other calamity, the township or municipality may incur "obligations" for the relief of the sufferers and the preservation of public order not sanctioned under ordinary circumstances. Therefore, to my mind, it is immaterial under this provision whether the obligations are incurred by way of relieving the suffering of destitude persons or by way of preventing the spread of a contagious disease, when the obligations are incurred in time of an epidemic. In either event the power to borrow money to pay such obligations exists, and inferentially the power to incur such obligations which might, in a technical sense, be regarded as moral obligations only, is implied.

I, therefore, conclude that in a case like that which you mention, obligations may properly be incurred (as they have been incurred), and for their payment bonds may be issued under section 3939, General Code.

The conclusion is thus reached that, upon perhaps more than one ground, either the municipal corporation or the township in a proper case would have power to borrow money to pay the indebtedness which has been incurred.

There remains to be disposed of the question as to whether the municipal corporation, as such, may issue bonds under the facts stated by you.

Without passing upon the question as to whether it was proper for the village to relieve itself in the past of the duty of caring for its poor, or for the township to take upon itself the function of extending temporary relief to the poor of the village; and assuming the legality of the levies that have heretofore been made for poor relief, I am of the opinion that if the obligations which have been incurred in time of an epidemic, whether for the relief of destitute persons or to prevent the spread of the disease, were incurred by the township trustee, they constitute, for the purposes of section 3939, General Code, obligations of the township. I do not believe that section 3939 is broad enough to permit a municipal corporation to issue bonds in payment of obligations incurred by a township, even though the municipality was benefited thereby, and even though the township has been caring for the poor of the municipality. In short, the obligations which may be discharged by the issuance of bonds under section 3939 must be those incurred by the authorities of the municipality or township issuing the bonds. The case is even clearer, of course, if it be assumed that the bonds are to be issued under favor of the other provisions of law above referred to. In short, there is no authority of law whatever for the assumption by one subdivision of the indebtedness of another under such circumstances as these.

Of course, if the bonds should be issued by the township trustee for the purpose stated, all levies to pay them would be extended upon the duplicate of the village as well as upon that of the rest of the township.

In conclusion, I am of the opinion that in the case stated by you the power to borrow money exists, but it must be exercised by the township trustees and not by the village council.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1316.

HOW FUNDS MAY BE PAID OUT OF THE COUNTY TREASURY—RIGHT OF THE JUDGE OF THE COMMON PLEAS COURT TO ORDER FURNISHINGS FOR ROOM IN COURT HOUSE.

Funds in a county treasury may only be paid out on allowance by the county commissioners or some other authority authorized by law so to do. A judge of the common pleas court has no authority to order furnishings for a room in the court house, and if he does so, the auditor is not authorized to issue a warrant on the county treasury for the amount thereof.

COLUMBUS, OHIO, December 22, 1914.

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

GENTLEMEN:—I have your letter of November 28, 1914, in which you inquire:

> "Can a judge of the court of common pleas legally order furnishings for the room that he uses as an office in the court when the county commissioners have refused to furnish the articles desired, and then place an order on the journal of the court directing that the clerk certify the cost of same to the county auditor for payment; and can the county auditor issue his warrant upon the treasury upon the allowance of said judge without the approval of the county commissioners?"

Section 2570, General Code, reads:

> "Except moneys due the state which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from such treasury, upon presentation of the proper order or voucher therefor, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose and on what fund. He shall not issue a warrant for the payment of any claim against the county, unless allowed by the county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal authorized by law so to do."

The plain reading of this section points to an answer in the negative, and if no further consideration is made, such answer would be an end to the controversy indicated in the question. However, this matter involves no legal question except the power of the court to furnish its rooms, private or public.

When a judge of a court enters upon a controversy of this character, he does so in a desire to enforce his own views in his own way, and is exercising what by most of such judges would be termed the "inherent power" of the court. What this is may not be susceptible of a clear or well defined statement, as it generally has been considered by the court, as including what was desired where there was no legal way of doing the same pointed out.

In addition to the sections of the General Code above copied, section 2460, G. C., is entitled to consideration. It reads:

> "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 language of this section is not susceptible of either explanation or elucidation. It is for the control of funds in the county treasury and to protect them from inroads by persons not authorized by law to make or authorize drafts upon them. It has as much binding effect upon common pleas judges as upon any other person or officer and until the legislature authorizes a judge or a court to provide an office for himself, he can confer no right upon a county auditor to issue a warrant for what he wants or conceives that he wants; he must act through the county commissioners as the legally constituted authority to allow claims against the county, or secure legislative authority to make the purchase and fix the amounts of the same. Until this is done, the county auditor acting as suggested in your question, does so at his peril.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1317.

EMPLOYES OF LIQUIDATING DEPARTMENT OF STATE BANKING DEPARTMENT ARE SUBJECT TO THE PROVISIONS OF THE CIVIL SERVICE ACT.

The employes of the liquidating department of the state banking department are in the employ of the state and are subject to the provisions of the civil service act.

COLUMBUS, OHIO, December 22, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of December 7, 1914, you inquire:

> "The state civil service commission desires your opinion as to whether or not those persons who were employed in the state banking department, in what is commonly called the 'liquidating department,' are in or out of the classified service."

Subdivision 1 of section 486-1, General Code, defines the term "civil service" as follows:

> "The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof."

The employes in question occupy positions of trust or employment and are appointed by an officer of the state.

Section 742, General Code, provides:

> "Whenever in this act it is provided that the superintendent of banks may take possession of the property and business of any corporation, company, commercial bank, savings bank, safe deposit company, trust company, or any combination of two or more of such classes of business or society for savings, or banking association, doing business under the provisions of the banking laws of this state to liquidate its affairs, the superintendent of banks shall take possession of and administer the assets of such company or association as herein provided."

Section 742-2, General Code, as amended in 103 Ohio Laws, 530, provides in part:

> "Upon taking possession of the property and business of such corporation, company, society or association, the superintendent of banks is authorized to collect money due to such corporation, company, society or association, and do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. * * * The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents, to assist him in the duty of liquidation and distribution, a certificate of appointment to be filed in the office of superintendent of banks

and a certified copy in the office of the clerk of the county in which the office of such corporation, company, society or association was located. * * *."

By virtue of these provisions the superintendent of banks is placed in charge of the liquidation of banks and he may appoint special deputy superintendents of banks to assist him in such liquidation.

Section 742-4, General Code, provides:

"The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, of deputies or assistants, clerks and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located, on notice to such corporation, company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first, in the order of priority."

By virtue of this section the compensation of these employes is paid from the assets of the banks being liquidated. This manner of payment does not alter the status of these employes.

The state places the superintendent of banks in charge of a bank during liquidation. The liquidation is being carried on by the state through its officers and their appointees.

These persons are employed by the state to carry out one of the purposes of the banking act. The fact that their compensation is paid from the assets of the bank does not change their status as employes of the state.

By virtue of section 736, General Code, as amended in 103 Ohio Laws 180, an assessment is made against the persons and companies subject to the banking act in order to pay the expenses of the banking department. This does not make the persons employed in the banking department, employes of these companies. They are in the service of the state.

Said section 736, General Code, provides in part:

"That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio."

It is my conclusion therefore, that the persons employed in the liquidating department of the state banking department are subject to the provisions of the civil service act.

I take it from your inquiry that you do not desire that I pass upon the particular positions which are in the classified or unclassified service.

If you desire an opinion upon that question, it will be prepared upon request.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1318.

CONSTRUCTION OF ACT OF THE LEGISLATURE CREATING MUNICIPAL COURT OF CINCINNATI—LIMITATION OF THE POWER AND JURISDICTION OF MAGISTRATES OUTSIDE OF CINCINNATI IN SIMILAR CASES.

The act of the legislature in creating a municipal court in Cincinnati limits the power of magistrates outside of Cincinnati, and prevents them from issuing executions on judgments by them rendered to constables within said city, whether such judgments were rendered before or after the taking effect of said municipal court act.

Said act further limits the power and jurisdiction of magistrates outside of said city in criminal cases to offenses alleged to have been committed in the township, city or village, where the action is brought.

COLUMBUS, OHIO, December 22, 1914.

HON. THORNTON R. SNYDER, *Member House of Representatives, Cincinnati, Ohio.*

DEAR SIR:—I have your letters of July 28th and November 19th, in the latter of which you inquire:

> "1. Has a magistrate outside of Cincinnati, jurisdiction over judgments recovered prior to the time our municipal court act went into effect?"
>
> "2. Have magistrates concurrent jurisdiction in Cincinnati township with the municipal court of the city of Cincinnati?
>
> "3. Have magistrates still jurisdiction as formerly in the county in criminal cases?"

I can hardly think you intend to ask whether magistrates have jurisdiction to levy execution upon old judgments, when it is known that magistrates issue and constables make levy of executions, and presume that what you desire to inquire is whether magistrates outside of Cincinnati have power to issue executions to constables within the city of Cincinnati, since the passage of the municipal court law, to which you refer.

By reference to section 10714, General Code, you will observe that authority is granted magistrates to issue executions to a constable of the county. Section 41, of the Cincinnati municipal court act reads:

> "No justice of the peace in any township in Hamilton county, other than in Cincinnati township, nor mayor of any village or city in any proceeding, whether civil or criminal, in which any warrant, order of arrest, summons, order of attachment or garnishment or other process except subpoena for witnesses shall have been served upon a citizen or resident of Cincinnati or a corporation having its principal office in Cincinnati, shall have jurisdiction unless such service be actually made by personal service within the township, village or city in which said proceedings may have been instituted or in a criminal matter unless the offense charged in any warrant or order of arrest shall be alleged to have been committed within said township, village or city."

This being a later and a special act, while section 10417 is general, it must be construed as controlling, and as limiting the power of magistrates outside of the

city of Cincinnati, to issue executions to constables except constables outside of the city of Cincinnati and Cincinnati township. This same section controls as to criminal jurisdiction, and, as I construe it, further limits the jurisdiction of magistrates in Hamilton county to criminal offenses committed in their own townships.

I believe this fully answers your question, and hope I have so stated it as it will be fully understood.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1319.

A VACANCY IN THE OFFICE OF PROBATE JUDGE CAN ONLY BE FILLED BY APPOINTMENT UNTIL THE NEXT GENERAL ELECTION, WHEN A SUCCESSOR MUST BE QUALIFIED FOR THE UNEXPIRED TERM.

Inasmuch as the probate judge is elected quadrenially, a vacancy can be filled by appointment only until the next general election, and then the election is for the "unexpired term" of the judge causing the vacancy, and not for the full term of four years.

COLUMBUS, OHIO, December 22, 1914.

HON. CHARLES A. ESTILL, *Probate Judge of Holmes County, Millersburg, Ohio.*

DEAR SIR:—I am in receipt of your favor of the 15th wherein you advise as follows:

> "In 1912 Judge Tannehill was elected probate judge of Holmes county, and in July, 1913, he died, and I was appointed to the vacancy by Governor Cox. On November 3d last I was elected as probate judge of this county. Now, does my election hold for four years or only for the unexpired term of Judge Tannehill?"

In reply thereto, I beg to advise that section 1580, of the General Code, provides as follows:

> "*Quadrennially,* one probate judge shall be elected in each county, who shall *hold his office for a term of four years,* commencing on the ninth day of February next following his election."

Article IV, section 7, of the Constitution of Ohio, provides:

> "There shall be established in each county a probate court * * holden by *one judge who shall* hold his office for the term of four years. * *"

Article IV, section 13, of the constitution provides:

> "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; *and such successor shall be elected for the unexpired term,* at the first annual election that occurs more than thirty days after the vacancy * *."

This section of the Constitution of Ohio is so clear and unequivocal that an attempt to make it more lucid could not be successful.

In 1912 Judge Tannehill was elected for a term of four years, which term would not expire until February, 1917; in July following his election he died, and you were appointed by Governor Cox to fill the vacancy until the next general election, which was held in November, 1914, and at that election you were elected as his successor, and in the words of the constitution *"such successor shall be elected for the UNEXPIRED* term." This means that on November 3d, 1914, you were elected probate judge of Holmes county for the unexpired term of Judge Tannehill, which office you will hold until the ninth day of February, 1917.

I am advised by the secretary of state that the certificate of election for your office as forwarded to him by the deputy state supervisors and inspectors of elections, specifically states that your election was for the "unexpired term" of Judge Tannehill, so there can be no anticipated irregularity in that connection, and I am further advised by the secretary's office that all certificates of election in such instances are, without exception, made according to the mandates of the constitution for the "unexpired term."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1320.

NEWSPAPERS NOT REQUIRED TO MAKE PROOF OF PUBLICATION IN TRANSCRIPT FOR THE ISSUANCE AND SALE OF BONDS.

In transcripts of the issuance and sale of bonds it is not necessary that the newspapers making the various publications in connection therewith prove same by affidavit and the taxing district is not liable for the charge for such affidavits.

COLUMBUS, OHIO, December 23, 1914.

HON. F. W. GREEN, *Solicitor of the Village of Newburgh Heights, Cleveland, Ohio.*

DEAR SIR:—On October 6th you asked whether charge for affidavits made by the publishers of newspapers in connection with advertisements necessary to be attached to transcript of proceedings in issuance and sale of bonds are illegal. By this I apprehend you mean to inquire whether the taxing district issuing the bonds is liable to the newspaper for the charge of such affidavit.

In 103 O. L., at page 179, is enacted the following:

"H. B. No. 121. (Sec. 2295-3.)

"Sec. 1. That it shall be the duty of the clerk, or other officer having charge of the minutes of the council of any municipal corporation, board of county commissioners, board of education, township trustees, or other district or political subdivisions of this state, that now has or may hereafter have, the power to issue bonds, to furnish to the successful bidder for said bonds, a true transcript certified by him of all ordinances, resolutions, notices and other proceedings had with reference to the issuance of said bonds, including a statement of the character of the meetings at which said proceedings were had, the number of members present, and such other information from the records as may be necessary to determine the regular-

ity and validity of the issuance of said bonds; that it shall be the duty of the auditor or other officer, having charge of the accounts of said corporation or political subdivision, to attach thereto a true and correct statement certified by him of the indebtedness, and of the amount of the tax duplicate thereof, and such other information as will show whether or not said bond issue is within any debt or tax limitation imposed by law.
"Passed April 8th, 1913.
"Approved April 23d, 1913."

The foregoing statute provides the procedure for the furnishing of a transcript, and it will be seen that it is not necessary for a newspaper to furnish affidavit with the publication. Consequently, since the going into effect of the above act, newspapers cannot collect for furnishing affidavits of proof of publication of the different publications in issuance and sale of bonds.

Before the above enactment there was no statute on the subject, but on May 2, 1912, in an opinion rendered to the bureau of inspection and supervision of public offices, I held as follows:

> "The statutes concerning issuance and sale of bonds for municipal and city improvements and the duties of the various city officers in relation thereto do not disclose that the bond buyer as a matter of right to receive without payment therefor a copy of such transcript, or that any officer or department of the city government is in duty bound to furnish the same and receive compensation therefor from the city treasurer in addition to his regular salary. The successful bidder at a bond sale takes the bonds at his own risk, and if he deem it necessary to have a transcript of the proceedings in order to determine their validity, the expense thereof must be borne by himself. I conclude therefore in answer to your first question that it is not a legal expense chargeable against the city to furnish a transcript to the purchaser of municipal bonds."

While the matter quoted above was in answer to a question with reference to the issue of municipal bonds, I am of the opinion that the same reasoning applies to charge for affidavits made by the publishers of newspapers for bonds issued by any taxing district, and if there was no obligation to furnish a transcript, of course, there would be no liability on the taxing district to pay for affidavits in proof of publication.

I trust the foregoing furnishes you the information you desire.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1321.

RIGHT OF THE BOARD OF EDUCATION UNDER SECTION 7730, GENERAL CODE, TO SUSPEND SCHOOL WHEN THE AVERAGE DAILY ATTENDANCE THEREOF IS LESS THAN TWELVE—POWERS OF SUCH BOARD UNDER SECTION 7730, GENERAL CODE, AS AMENDED.

Under section 7730, General Code, prior to its amendment, 104 *O. L.,* 139, *it was optional with the board of education of a township school district to suspend the schools when the average daily attendance thereof was less or became less than twelve. If a township board of education entered into a contract with a teacher for teaching a subdistrict under its jurisdiction, and such subdistrict was abolished in accordance with section 7730, General Code, such act operated as a termination of the contract, provided such act occurred before the termination of the contract because of the lapse of time such contract was to run. Likewise such contract would be terminated if the school should be suspended in accordance with the mandatory provisions of section 7730, General Code, as amended,* 104 *O. L.,* 139. *An expenditure of money upon such contract, after being so terminated under the provisions contained in said section as the same existed both prior to its amendment and since its amendment above referred to would be illegal.*

By virtue of section 7684, General Code, a board of education may assign pupils to attend a school which had been previously suspended under section 7730, supra, because of the attendance being less than twelve for the preceding year and such school may again be continued as such school, provided that this course in the opinion of the board, will best promote the interests of education in the district.

COLUMBUS, OHIO, December 23, 1914.

HON. CHAS. F. CLOSE, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—Under date of July 25, 1914, you submitted a communication to this department, which reads as follows:

> "The enclosed questions were submitted to me by Mr. Charles H. Lewis, of Harpster, Ohio, president of the Wyandot County School Board, and inasmuch as the questions are of such nature as to indicate that they will arise in practically every county in the state, I have deemed it the part of wisdom to refer them to you for answer, so that there may be a decision in reference to them that will be binding in every county and bear the authority of the highest officer in the state."

The questions referred to therein concern section 7730, General Code, as amended in 104 O. L., 139, which in brief provides for the suspension of rural or village school districts when the average daily attendance of any such school for the preceding year has been below twelve. Said questions may be stated as follows:

> "First—Is a township board of education liable on a contract with a teacher made prior to the amendment of said section?
>
> "Second—Is a township board of education liable on a contract with a teacher made since the amendment of said section?"

Section 7730, of the General Code, prior to its amendment, provided as follows:

> "The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No subdistrict school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

It is to be noted that the first part of said original section provides that the township board of education may suspend the schools in any or all subdistricts. Such suspension was therein made optional with such board. However, if suspended, then it was mandatory upon the board to provide for the conveyance of the pupils residing in such subdistrict or subdistricts, to a public school in the township district or to a public school in another district, the cost to be paid out of the funds of the township school district. Then follows a provision that the board may abolish all the subdistricts provided conveyance is furnished, etc. This, however, is qualified to the effect that no subdistrict school, where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when such election results in a majority against centralization. It was optional, therefore, with the board of education of township districts, to abolish all subdistricts, providing conveyance was furnished, etc., with the exception that if the average daily attendance exceeded twelve, then such board of education was without authority to so abolish such schools, if the election for the abolishment thereof and centralization resulted in favor of not abolishing and centralizing the subdistrict schools. Section 7730, as amended, 104 O. L., 139, now provides as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide and in such rural school districts shall provide for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district."

It is to be noted that as said section now reads, it is mandatory upon the part of the board of education of any rural or village school district, to suspend any school where the attendance of such school for the preceding year has been below twelve. Prior to its last amendment, section 7730, supra, although awkwardly

worded, made it optional on the part of the board of education as to whether or not a school wherein the average daily attendance was less than twelve, should be suspended.

I will now take up your first question.

In the case of Railroad Co. vs. Defiance, 52 O. S., 262, at page 314 thereof, the court says:

> "When the ordinance (in question) was passed, those statutory provisions were enforced which invest the legislative bodies of municipal corporations with the entire control of the streets and confer upon them power to make improvements thereon from time to time in the public interest, by grading, etc.; and persons and corporations contracting with the municipal authorities must be presumed to contract with reference to the obligations and duties arising under those laws, and subjected to the consequences resulting from their operation and enforcement. *Impliedly they enter into and become a part of such contracts as much so as if embodied therein, and such is the presumed intention of the parties.*"

In the case of Smith vs. Parsons, 1 Ohio Report, at page 239 of the opinion, the court says:

> "As was observed in the argument, contracts are either expressed or implied, or part expressed and part implied. A provision created by law for the government or construction of all contracts made under it, need not be recited or expressly referred to in a contract; it will be considered as implied, and have the same force and effect as if it were set out."

Section 7705, of the General Code, prior to its last amendment, at page 144, of the 104th Volume of Ohio Laws, authorized the board of education of each village and township school district, to employ the teachers of the public schools of such district, as follows:

> "The board of education of each village, township and special school district may appoint a suitable person to act as superintendent, and to employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. But nothing herein shall prevent two or more districts uniting and appointing the same person as superintendent."

Said section was in effect prior to the last amendment of said section 7730, supra, and I assume that the contract referred to in your first question was entered into under sections 7705 and 7730, prior to their last amendment, as above quoted.

When the contract so mentioned was entered into, the party with whom such contract was made, under section 7705, was entered into while said original section 7730, supra, was in full effect. It has been heretofore pointed out that it was optional with the board of education of such township district to suspend the schools under said original section 7730, when the average daily attendance thereof was less than twelve.

The contract with the teacher referred to in your first question was made at a time when the provision contained in said section 7730 was in effect, and it would follow that such provision impliedly became a part of the contract. This follows because the provision of said section 7730, prior to its amendment, applied to section 7705, prior to its amendment. The teacher so employed entered into the con-

tract under the statutory limitation in section 7730, prior to its amendment, that the school by which such teacher was so employed to teach might be suspended by the board of education, provided the average daily attendance for the preceding year was less than twelve. Therefore, in answer to your first question, it is my opinion that if a township board of education entered into a contract with a teacher for teaching a subdistrict under its jurisdiction and said subdistrict was abolished by such board under and in accordance with the provisions contained in section 7730, then this act operated as a termination of the contract, provided such act occurred before the termination of such contract.

In answer to your second question, all of the reasoning employed in answering the first question, also applies to your second. Section 7705, of the General Code, as amended in 104 O. L., page 144, provides as follows:

> "The board of education of each village and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

It is to be noted that said section vests the employment of teachers in public schools of their respective districts, in the board of education of each village or rural district. If the board of education of such district should enter into a contract with a teacher for a certain term, as provided by section 7705, General Code, as amended, supra, and before the termination of such contract, if the school for the teaching of which such teacher was employed, should be suspended in accordance with the mandatory provision of section 7730, as amended, supra, because the average daily attendance of such school from the preceding year had been below twelve, then such suspension would operate as a termination of such contract. This follows upon the same reasoning as employed in reaching the conclusion to your first question, i. e., because such contract of employment is made subject to the provision contained in said section 7730, supra, as amended.

The communication which you enclose with your inquiry also contains two further questions with reference to the contracts inquired about in your first two questions, which may be stated as follows:

> "Would the payment of such contract be an illegal expenditure of money and would the fact that the teacher in question had knowledge of the suspension of such school effect the contract?"

In answer to this question, it is apparent from my conclusion in answer to your first question, that such expenditure of money would clearly be illegal, and of course if the school had already been suspended and the teacher had knowledge of that fact, certainly there could be no legal contract for teaching a school which had already been suspended, and the knowledge of that fact would clearly render the contract of no effect.

The question as further asked in the communication attached to your letter is, as to whether or not a suspended district may be revived by the addition of resident pupils to the district so as to make certain an average attendance of more than twelve. To answer this question it is necessary to again refer to section 7730, as

amended, supra, and to note the language employed therein, which is that "when the average daily attendance of any school for the preceding year has been below twelve, such school *shall be suspended.*" Such language seems to make it mandatory that when the average daily attendance for any preceding year has been below twelve, then such fact shall operate as a suspension of such school, after the notice is given as required in the last provision of said section.

This department in an opinion rendered to Hon. B. F. Enos, prosecuting attorney of Guernsey county, Cambridge, Ohio, on August 10, 1914, in construing said section 7730, as amended, held as follows:

> "Section 7730, of the General Code, as amended, 104 O. L., at page 139 thereof, contains a provision to the effect that when the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. This provision, by virtue of the use of the word 'shall' is mandatory, and it is apparent that it was the intent of the legislature that schools should be suspended when the average daily attendance thereof for the preceding year falls below twelve, and that thereupon the pupils should be transferred to such other school or schools as the local board may direct. The provision that 'no school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district,' is merely a part of the procedure to accomplish such suspension. Also the provision that 'such notice shall be posted in five conspicuous places within such village or rural school district,' is part of the procedure to accomplish the suspension provided for in said section 7730, supra."
>
> "When a school is suspended because its average daily attendance falls below twelve for the preceding year, such suspension shall not go into effect or take place until, after sixty days' notice has been given thereof, in the manner provided in said section, to wit, by posting notice in five conspicuous places within such village or rural school district. As before stated, it is mandatory upon the board of education, in such situation, to suspend such schools, and it is also mandatory to give the notice required by said section, in the manner therein provided. I know of no reason why this notice should be given, such as the notice required in said section, except that the legislature has seen fit to carry this proviso into the statute as a part of the proceeding in accomplishing the suspension, when the same is required by virtue of said section 7730, of the General Code, above quoted."

The statute provides for but one suspension in such case, such suspension to take place at any time when the average daily attendance of any such school for the preceding year has been below 12. There is no statutory provision for such district resuming, in the event that such number of pupils again move into the district to make the average daily attendance more than twelve. However, section 7684, General Code, may have some application. Said section was not repealed by the recently enacted school code, and provides as follows:

> "Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

Under this section it would seem to be within the power of the board of education to assign pupils to such schools, where the average daily attendance for the

preceding year fell below twelve, by increasing the territorial limits of the districts of such schools, to include the pupils so assigned to such schools. In other words, a board of education might assign pupils to attend a school which had been suspended under section 7730, supra, because of the attendance being less than twelve for the preceding year, and such school again be continued as such school, provided that this course, in the opinion of the board, will best promote the interests of education in the district, as provided by section 7684, supra.

Therefore, I am of the opinion that a suspended school district may be continued by the assignment of pupils to such district, provided the board deems this course best for the advancement of education as provided by section 7684, General Code, supra.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1322.

DISPOSITION OF FINES ASSESSED AND COLLECTED BY THE JUDGE OF THE PROBATE COURT OR COMMON PLEAS COURT EXERCISING THE JURISDICTION OF THE JUVENILE COURT.

Fines assessed and collected by a judge of the probate court or common pleas court, exercising the jurisdiction of the juvenile court, must be paid to the county law library association, in accordance with the terms of section 3056, *General Code.*

COLUMBUS, OHIO, December 23, 1914.

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

GENTLEMEN:—Under date of November 21st, you requested my opinion on the following questions:

> "Can fines assessed and collected in a juvenile court be paid to the law library association, under the provisions of section 3056, General Code?"

Section 3056, of the General Code, is as follows:

> "* * * * * In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts as the trustees of such library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not exceed five hundred per annum. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

Section 1639, General Code, as amended 104 O. L., 176, provides for the powers and jurisdiction of so-called juvenile courts 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 conferred in this chapter. The judges of such courts in

each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.

"The words, juvenile court, when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words "judge of the juvenile court" or "juvenile judge" as meaning such judge while exercising such jurisdiction.

"The foregoing provisions shall not apply to Hamilton county, in which county the powers and jurisdiction conferred in this chapter shall be exercised by the court of common pleas, and in 1914 and every sixth year thereafter, one of the common pleas judges to be elected at said times shall be elected as a judge of the court of common pleas, division of domestic relation. To him shall be assigned all juvenile court work arising under this chapter, and all divorce and alimony cases, and whenever said judge of the court of common pleas, division of domestic relations, shall be sick, absent, or unable to perform his duties, the presiding judge of the common pleas court shall assign another common pleas judge to perform his duties during his illness, absence or indisposition."

In an opinion rendered to the Hon. Thomas L. Pogue, prosecuting attorney of Cincinnati, Ohio, under date of March 18th, 1914, I used the following language:

"As I see it, the primary question here presented is whether the juvenile court so called, is in a broad and complete sense a court separate and distinct from the several courts mentioned in section 1639, General Code, the judges of which designate the judge of the juvenile court; for if the juvenile court in legal contemplation is a separate and distinct court, I am unable to see any statutory authority for the appointment made. There are no statutory provisions authorizing the appointment of court constables as such, in juvenile courts so called, and section 1692 authorizes the courts therein named to appoint constables for their own respective courts only."

In the case of Mendleson vs. Miller, 11 N. P. n. s. 586, 588, the court (Phillip, J.) says:

"We are dealing with a court. And what is a court? Without attempting to be severely accurate, I will say that a court is a governmental body or tribunal, clothed with a judicial function. To constitute a court, there must be a judge or judges, and he or they must have a defined and delegated jurisdiction. But before we can have judges and jurisdiction, these must be provided for by the constitution or by-laws.

"For the legislature to enact that there shall be a court, for it to fix the number of judges, to define the jurisdiction, and to prescribe the procedure, etc., is to establish a court."

In the case of ex parte Bank 1 O. S., 432, 434, the court, speaking with reference to sections 1 and 10 of article IV, of the state constitution, as they then stood, says:

"Thus all the judicial power of the state is vested in the courts designated in the constitution, and in such courts as may be organized under the

first section. But it is perfectly clear that, upon the creation of any additional court by the legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the legislature to clothe with judicial power any officer or person, not elected as a judge."

Measured by the principles above stated, it is apparent that the juvenile court, so called, of Hamilton county, is not in any complete or proper sense, a separate and distinct court, either as to organization or jurisdiction, but is only a form for the transaction of certain distributed business, concurrent jurisdiction of which is vested in the courts first specifically named in section 1639. In recognition of this status of the juvenile court in the case of Travis vs. State, 12 C. C. (n. s.) 374, it is said:

"The judges of courts having like original jurisdiction, may arrange for a proper distribution of the business coming before said courts. * * * * The act in question (juvenile court act) authorizes the judges of the several courts of equal jurisdiction, to designate one who shall hear and dispose of the business in which each is given equal original authority. Jurisdiction consists of the power to hear and determine. The source of this power resides in the legislature. In this act it is conferred upon the several courts named by that authority, and the mere selection by the several judges of one to dispose of the business, is not conferring jurisdiction. For, without such designation, either of the courts named could entertain jurisdiction of the matter specified in the act; whilst if the authority was conferred upon the judges, neither of said courts should exercise the power to hear and determine unless authorized by the judges beforehand. The court first acquiring jurisdiction would hold it until the action was finally disposed of.

"It seems clear that the fact that a particular judge of the common pleas court is designated to sit in a juvenile court, does not in any way change the quality of that particular judge. He is still a common pleas judge and in transacting the business of the juvenile court, he is exercising the jurisdiction of the common pleas court. In the exercising of his judicial functions, he remains the common pleas court of the county as much so as any other of the judges of said court."

While at that time I had in view a situation different from the one now presenting itself, I am of the opinion that the general principles laid down therein apply with equal force to the situation here presented. Throughout the act providing for the exercise of the powers and jurisdiction of the so-called juvenile court, reference is made to *the judge exercising the jurisdiction* provided by the juvenile court act. See sections 1639, 1642, 1662, 1670 and 1683-1.

The language of the statutes, therefore, establishes clearly a plan which permits the respective judge to all practical intents and purposes to occupy the bench he was originally elected to while extending to him the further jurisdiction and powers provided by this act, and everywhere throughout the act the language clearly bears out the stipulation of section 1639 to the effect that the judges *of such courts* shall have and exercise the powers and jurisdiction conferred by the juvenile chapter. The fact that section 1640 requires the judge exercising such jurisdiction to attach the seal of the court of which he is a judge to all writs and processes forcibly confirms this conclusion.

I am, therefore, of the opinion that the language of section 3056 in so far as it

relates to fines and penalties assessed by common pleas and probate courts for offenses and misdemeanors prosecuted in the name of the state, include fines and penalties assessed by a judge of either of such courts when such fines and penalties are assessed in the exercise of the jurisdiction provided by the chapter relating to juvenile courts. When a superior court or a court of insolvency, however, is exercising such jurisdiction, the fines and penalties assessed do not, of course, come within the terms of section 3056 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1323.

RIGHT OF CITY COUNCIL TO ACCEPT THE GRATUITOUS SERVICES OF AN ATTORNEY WHERE THE CITY SOLICITOR FAILS OR REFUSES TO ACT.

Council of a city may accept the services of an attorney offered gratuitously to represent the city in certain litigation wherein the city solicitor refuses or neglects to represent the city's interest.

COLUMBUS, OHIO, December 23, 1914.

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

GENTLEMEN:—Under date of December 9th you request my opinion upon the following question:

> "May the council of a city accept the services of an attorney offered gratuitously to represent the city in certain litigation wherein the city solicitor, in the opinion of council, refuses or neglects to properly represent the city's interests, said acceptance of the special counsel being objected to by the city solicitor?"

Section 4308, of the General Code, provides:

> "When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

As far as is material the statutes were substantially the same when the court rendered its opinion in the case of Dietrich vs. City of Defiance, 1 O. C. C. R. 340. On page 341 the court said:

> "On the first motion to strike the petition from the files it was urged by counsel in this court that the city solicitor did not sign the petition, and

to sustain this proposition section 1774 was cited by counsel, which defines simply the duty of the city solicitor, that 'he shall when required bring suit.' Section 1516 provides that a city or village or corporation may sue or be sued in its corporate name.

"Section 1775 simply defines the duties of the city solicitor; it does not authorize suit in favor of the city to be brought in the name of the city solicitor. It just defines his duties as solicitor. The city in another section is authorized to employ other counsel than its solicitor. Section 1152 authorizes suit in its own name. Who shall act as its attorney, whether its solicitor or other counsel, can in no way affect this right to bring action in its name. Who it will pay for its service its council may say. Section 1552 provides that a city may sue or be sued and this power is conferred upon the council, and not upon the city solicitor, and against this motion is absolute. In the opinion of this court the action of the court below in overruling this motion was proper."

Section 1774, referred to in the court's opinion appears in substantially the same form as section 4308, General Code, in Williams' Revised Statutes of 1886. The section referred to by the court, under which the city was authorized to employ other counsel than its solicitor, was section 1781, Revised Statutes. This section was as follows:

"He (the solicitor) shall receive such stated salary, payable quarterly out of the corporation treasury, and such fees or compensation for particular services, as the council may prescribe, and no additional counsel shall be appointed or employed at the expense of the corporation except by resolution of the council adopted for that purpose specifying the case in which such additional attorney is employed, the reasons therefor, and may fix the compensation so paid."

The statutes as they exist at the present time do not contain any specific authorization for the employment of counsel other than the city solicitor, except that it may allow an assistant or assistants to the solicitor, under section 4306, General Code. Neither, however, do the present statutes make any express prohibition against employing other counsel except under prescribed conditions, after the manner of former section 1781, R. S.

From the argument of the court, above referred to, based upon the right of the city to sue and be sued, and upon the predicament in which a city would be placed when its solicitor refused to respond to council's order to prosecute or defend a suit, and upon the further corroborative argument that it was formerly deemed necessary by the legislature to prohibit the employment of extra counsel except under special circumstances and conditions, I am of the opinion that council is to be deemed to have within its legislative authority the power to employ additional counsel when in its discretion it is deemed necessary. The power to employ, of course, includes the power to accept the gratuitous services of an attorney for the purpose of representing the city in litigation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1324.

SUPERINTENDENT OF BANKS HAS NO AUTHORITY TO PAY FINAL DIVIDEND IN THE LIQUIDATION OF A BANK BEFORE THE EXPIRATION OF ONE YEAR.

There is no authority for the superintendent of banks to pay a final dividend in the liquidation of a bank before the expiration of one year from the first publication of notice to creditors. Should he pay a dividend before the expiration of said year, he must do so at his own risk.

COLUMBUS, OHIO, December 24, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On December 10th, 1914, you made the following request for my opinion:

> "On the 18th of March, 1914, I closed two private banks; one at Custar and the other at Liberty Center. All claims so far shown by the books or records of the bank have been filed. It seems all assets could be collected or compromised and these banks wound up and the final dividend paid early in next month. The statute seems to require the expiration of one year from the first publication of notice to the creditors before the payment of the final dividend. In this connection I refer you to section 742-7, of the General Code.
>
> "In view of this provision, please advise me whether I have the authority to pay the final dividend before the expiration of the period of one year, and if so, how?"

The sections of the General Code providing for the liquidation of banking corporations are sections 742-1 to 742-16 inclusive. By section 744-9, of the General Code (being section 9 of the act passed April 17, 1913, 103 O. L., 579), these sections of the General Code are, by reference, made applicable to the liquidation of private banks.

Section 742-3 provides that upon taking possession of a bank, by the superintendent of banks, for the purpose of liquidation, he shall give notice by publication for three consecutive months, calling on all persons who may have claims against such bank, to present the same to the superintendent of banks and make proof thereof at a time not earlier than the last day of publication. The section further provides:

> "Claims presented and allowed after the expiration of the time fixed in the notice to creditors, shall be entitled to be paid the amount of all prior dividends therein if there be funds sufficient therefor and share in the distribution of the remaining assets in the hands of the superintendent of banks equitably applicable thereto."

Section 742-7, of the General Code, is as follows:

> "At any time after the expiration of the date fixed for the presentation of claims, the superintendent of banks may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of notice to

creditors, he may declare a final dividend—such dividend to be paid to such persons and in such amounts and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located."

When the statute provides a certain method of procedure, the only safe course is to follow the statute strictly.

If you were absolutely certain that all claims had been presented to you, and that no other claims were in existence which would be entitled to allowance by you, or which could be established as valid claims against the bank; then you could make a final distribution before the expiration of the year if you cared to do so; that is, this would be discretionary with you and if you did not feel it necessary for your own protection to allow the period of safety provided by the statute to elapse before paying the final dividend, you could make application to the court, setting forth the facts that all claims had been presented against the bank and asking for authority to pay the final dividend. The court might grant the application, but its order doing so, in view of the statute which I have quoted, would be absolutely no protection to you in case valid claims were presented before the expiration of the year. In short, there is no authority whatever for you to pay a final dividend before the expiration of a year from the first publication to creditors. There is authority for you to pay such dividend after the expiration of said year and, therefore, if you should pay the dividend before the time provided by the statute has elapsed you would do so entirely at your own risk.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1325.

QUALIFICATION OF A FOREIGN TRUST COMPANY TO ACT AS TRUSTEE IN A FOREIGN WILL.

Where a foreign trust company has been appointed trustee under a foreign will and under a deed of trust made by a non-resident, and has been appointed by an Ohio court as trustee to fill a vacancy caused by the death of a trustee named in the will, all that is necessary for such a trust company to qualify in Ohio, so that it may pass title to real estate, is to make a deposit in the manner provided under section 9778, General Code, and pay the fees required under section 736, General Code, paragraph c.

COLUMBUS, OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—In your letter of December 17th, 1914, you make certain inquiries in regard to a foreign trust company organized under the laws of another state, and having its principal office and place of business in a city in said state. This trust company has been appointed trustee under a foreign will and under a deed of trust made by a non-resident; and has been appointed by an Ohio court as trustee to fill a vacancy caused by the death of a trustee named in another foreign will. The company now desires to qualify in Ohio so that it may pass title to real estate belonging to the above named trusts situated in Ohio. It is stated that the company is satisfied that it must comply with section 9778 of the General Code, which is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

Said company desires to know, first, whether it is necessary for a foreign trust company, under the conditions named above, to comply with section 178, of the General Code. Section 178 is as follows:

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

I think a foreign trust company comes fairly within the exception contained in the last sentence of this section, as a trust company in Ohio is considered as a banking corporation. I think the exception is made for the reason that Ohio has special provisions with regard to foreign banking, insurance, building and loan or bond investment companies doing business in this state, for example section 9778 above quoted with reference to foreign trust companies.

The second question is, as to whether or not it is necessary for a foreign trust company, under the above conditions, to comply with paragraph "c," of section 736, General Code (103 O. L., 180). This section is as follows:

"(c) Each foreign trust company desiring and intending to do business in this state shall pay to the superintendent of banks a fee of fifty dollars for issuance to it of a certificate authorizing it to transact business in this state. Such fee to be paid before such certificate is issued."

This paragraph is part of section 1 of the act of April 9, 1913 (103 O. L., 180). Section 1 provides in part as follows:

"That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio: * *"

Paragraph "a" of said section provides for a graduated annual fee to be paid by existing Ohio banks, such fee to be based upon the total aggregate resources of

such bank. Paragraph "b" provides for a fee of $30.00, to be paid by all Ohio banks for the preliminary examination required to be made by the superintendent of banks before being given authority to commence business, and paragraph "c" is as above quoted.

The test, as I take it, as to whether a foreign trust company will be subject to said fee, is whether or not it is doing or intends to do business in this state.

It is difficult to determine this question, and in each instance the particular facts as to the transactions conducted in this state by a foreign corporation must determine whether or not it would be considered as doing or transacting business in this state. There are many authorities on this question, but as I have stated, each case seems to have been decided strictly on the peculiar facts pertinent to it. As near as I can come to stating the general rule, it is this: The term "doing business" has reference to a continuation in some form of the business and does not necessarily apply when a foreign corporation does a single act of business within the state.

In the question propounded by you I am unable, without further information to arrive at the conclusion that the acts intended to be performed by this corporation would not constitute doing business. The acts intended to be performed are certainly among those usually performed by trust companies, and for the purpose of doing which trust companies incorporate. They are acts performed in carrying on a portion of the business of the trust company.

From what is stated, as this particular company has been appointed as trustee under one foreign will and desires to perform certain acts with reference to real estate in Ohio, in performing the trust vested in it by said will, and as it has also been appointed as trustee by an Ohio court under another foreign will and desires to perform certain acts with reference to real estate in this state in the performance of the trust vested in it by said appointment, is it not fair to assume that this trust company intends to and will do, or transact, all business of this character which may be entrusted to it in Ohio?

From the facts given, therefore, it is my opinion that it is necessary for this particular company to comply with paragraph "c" of section 736, and pay the fee therein specified.

The third question is, as to whether in such qualification (meaning the qualification which may be required of a foreign trust company under the above conditions) it is necessary to file a list of stockholders, or whether any reports or accounts will be required by the banking department or any other department of the state?

I know of no provision of the laws of Ohio which would require a foreign trust company, under the above conditions, to file with any department of state a list of its stockholders or any reports of any kind.

In short, as I view it, under the conditions which you have named, all that is necessary, is for a foreign trust company to make the deposit in the manner provided in section 9778, of the General Code, and pay the fee required by paragraph "c" of section 736.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1326.

DISPOSITION OF BOND GIVEN BY DEPOSITARY BANK UNDER SECTIONS 4295, 4296, 4515, 4516, GENERAL CODE.

The legal custodian of a bond given by a depositary bank under sections 4295, 4296, General Code, is the treasurer of the municipality. Also, under sections 4515 and 4516, General Code, the legal custodian of such bond is to be designated by trustees of the sinking fund; they may deposit with the treasurer of the corporation, or with a safety deposit company within the corporation.

COLUMBUS, OHIO, December 28, 1914.

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

GENTLEMEN:—Under recent date you made the following request for my opinion:

> "We respectfully request your written opinion upon the following question:
>
> "Who is the legal custodian of bond given by depositary bank under sections 4295 and 4296, General Code; also under sections 4515 and 4516, General Code?"

Sections 4295 and 4296 provide for the manner in which depositaries for public moneys coming into the hands of the treasurer of a city or village may be designated and in what manner such deposits may be made. These sections also provide that the bank chosen as a depositary shall give a good and sufficient bond issued by a surety company, or furnish good and sufficient surety, or secure said deposit by the *deposit* of bonds or other interest-bearing obligations of the United States, etc.

Nothing is said in either section as to the custodian of the bond to be given by the bank to secure the deposit, nor as to the custodian of the securities, should such securities be deposited instead of a bond.

Sections 4298 et seq., General Code, provide for the duties of the treasurer of a municipality, among which are the duties of demanding and receiving from the county treasurer taxes levied and assessments made and certified to the county auditor by order of council; and of demanding and receiving from persons authorized to collect or required to pay them, moneys accruing to the corporation from judgments, fines, licenses, costs, etc., and debts due the corporation. In brief, the treasurer might well be called the financial custodian for the corporation; he is accountable for the safekeeping of all funds belonging to the corporation and can only be relieved from responsibility when such funds are deposited in banks in conformity with law; that is, if there were no law authorizing the deposit of funds of the municipality by the treasurer in a bank, then, he would have to keep the said funds in his own personal custody.

As the treasurer is responsible for the safekeeping of the funds, it seems to me that he is the only officer with whom the bond given to secure said funds—that is, the security held by the municipality in place of said funds, should be lodged. While there is no direct statutory authority for his having the custody of such bond, or securities in case securities are deposited instead of a bond, still, as he is responsible for said funds and is required to exercise due care when said funds are deposited with a bank in pursuance of law, I think it would be his right to demand, as treasurer, the custody of said bond or securities.

I have stated that section 4295 provides that instead of a bond or other surety the bank may "secure said moneys by a deposit of bonds or other interest-bearing obligations."

In the absence of statutory direction to the contrary it would undoubtedly be held that the deposit must be made with the officer who is responsible for the safekeeping of the funds of the corporation. My answer to your first question, therefore, is, that the legal custodian of bonds given under sections 4295 and 4296 is the treasurer of the municipality.

As to your second question, sections 4515 and 4516, of the General Code, provide for the deposit of all sums held in reserve in the sinking fund, by the trustees of the sinking fund, in a bank or banks under competitive bidding; and provide that the bank chosen as depositary shall give a good and sufficient bond or furnish good and sufficient surety to secure said deposit.

Section 4518, of the General Code, provides:

> "Money shall be drawn by check only, signed by the president and at least two members of the board, and attested by the secretary or clerk. All securities or evidence of debt held by the trustees for the corporation shall be deposited with the treasurer thereof or with a safety deposit company or companies within the corporation, or, if none exists, then in a place of safety to be indicated or furnished by council, and when so deposited they shall be drawn only upon the application of three members and in the presence of at least two members of the city board, or upon the application and in the presence of at least two members of the village board."

I think it is clear from this section that the legal custodian of such bond is to be designated by the trustees of the sinking fund; they may deposit said bond with the treasurer of the corporation or with a safety deposit company within the corporation; or, if there is no such safety deposit company in the corporation, the trustees may deposit such bond in a place of safety to be indicated or furnished by council. That is, this matter is to be determined by the sinking fund trustees, in the manner provided by the statute.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1327.

FEES RECEIVED BY PROBATE JUDGE FOR TAKING DEPOSITION IN WILL CASE DO NOT BELONG TO FEE FUND.

Where the probate judge of one county appoints a probate judge of another county to act as commissioner to take the deposition of a witness to a will, the fees received by the probate judge for executing such commission do not come to him by virtue of his office and need not be accounted for to the fee fund.

COLUMBUS, OHIO, December 28, 1914.

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

GENTLEMEN:—Under date of December 3, 1914, you inquired of me as follows:

> "If a probate judge of one county appoints the probate judge of another county to act as commissioner to take the deposition of a witness to a will, as provided by section 10518, General Code, or if he should appoint a probate judge of another county to act as commissioner to take the election of a widow, or widower, as provided by section 10573, General Code, would the fees of such appointed probate judge, acting as commissioner, be a perquisite within the meaning of section 2977, General Code, to be accounted to the fee fund of his office."

Sections 10518 and 10573, General Code, provide:

> "Sec. 10518. The court may issue a commission with the will annexed, directed to any suitable person or persons, to take the deposition of a witness to a will who resides out of its jurisdiction, or who resides within it but is infirm and unable to attend court. Every deposition so taken, certified, and returned by one or more of the persons named in such commission, shall be as valid as if taken in open court.
>
> "Sec. 10573. If the widow or widower of the testator be unable to appear in court by reason of ill health, or is not a resident of the county in which such election is required to be made, on an application in behalf of such person, the probate court shall issue a commission, with a copy of the will annexed, directed to any suitable person, to take the election of such widow or widower, to accept the provisions of such will in lieu of the provisions made by law. In such commission the court shall direct such person to explain the rights of such widow or widower under the will, and by law."

Section 2977 requires a probate judge, among other named county officers, to pay into the county treasury all the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law, as compensation for services.

You will observe that a probabte judge acting under sections 10518 and 10573, may direct commissions to any suitable person. He is not limited in the selection of commissioners in those cases, to the appointment of the probate judge of the county in which the commission is to be executed. It is no part of the duty of a probate judge of one county to execute commissions sent to him by the probate judge of another county. When a probate judge is appointed to execute such commission, he does so in his individual capacity and solely by virtue of his appointment by the probate judge of another county.

Since the fees received by the probate judge for executing commissions in the two cases mentioned do not come to him by virtue of his office, they are not perquisites, etc., within the meaning of section 2977, and need not be accounted for to the fee fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1328.

DISPOSITION OF A LUNATIC HELD UNDER A WARRANT FOR ARREST.

A lunatic held under a warrant for arrest, order or commitment of a proper court, is a prisoner within the meaning of section 2845, General Code, and a sheriff is entitled to jail fees and for taking a prisoner before a court, as provided in said section.

COLUMBUS, OHIO, December 28, 1914.

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

GENTLEMEN:—I have your letter of December 11th, in which you inquire:

> "Can a sheriff tax the fees as set forth in section 2845, General Code, viz.: '* * * * jail fees for receiving, discharging, or surrendering each prisoner, to be charged but once in each case, fifty cents; taking a prisoner before a judge or court per day, seventy-five cents; * * *' in a lunacy proceeding to be paid upon the certificate of the court, out of the county treasury? Is a lunatic a prisoner within the meaning of this section?"

You have in your letter all of section 2845 necessary for consideration in answering your question, which must depend upon what is meant by the word "prisoner." To my mind, a distinction will have to be made between jail fees and a taking of a prisoner before a court. Of course, if a prisoner is in jail and is taken before a court, the jail fees and fees for taking before the court must both be allowed. However, if the prisoner is held upon a warrant commitment or order of a court of competent jurisdiction, he may be taken before a court without having been placed in jail, for which reason the above distinction is made.

In Vol. II of Bouvier's Law Dictionary, a prisoner is defined:

> "PRISONER: One held in confinement against his will.
>
> "2. *Lawful prisoners* are either prisoners charged with crimes or for a civil liability.
>
> "3. Prisoners unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative or other proceeding."

In 32 Cyc., 316, a prisoner is defined as a person deprived of his liberty by virtue of a judicial or other lawful process, which language is substantially copied from the case of Royce vs. Salt Lake City, 15 Utah, 401.

Taking these definitions as correct, and applying them to the plain language of section 2845, and the answer to your question must be, a lunatic held under an order

of commitment, an order of the probate court or a warrant for his arrest, is a prisoner within the meaning of this section. If he is confined in jail, jail fees may be charged, otherwise not, but for taking him before a judge or court under a proper warrant or order, the sheriff is entitled to the fee prescribed in section 2845. Of course, as stated in your letter, in a lunacy proceeding these fees are paid out of the county treasury upon a certificate of the probate court.

I believe this answers your question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1329.

PROCEEDINGS FOR THE ESTABLISHMENT OF COUNTY ROAD INSTITUTED BY COMMISSIONERS.

Determination of rights of parties in proceedings in county road instituted before the commissioners—Kalebaugh leases.

COLUMBUS, OHIO, December 28, 1914.

HON. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your letter of October 23, 1914, and also one of December 17, 1914, with copies of the Kalebaugh leases. Your inquiry, as I understand, involves a determination of the rights of parties, where proceedings for the establishment of a county road have been instituted before the county commissioners. Viewers have been appointed, have acted and assessed compensation and damages; the commissioners have ordered the road to be established and made the proper order concerning compensation and damages; no appeal was taken; an order to open the road has been made and in doing so it is discovered that some oil or gas pipes, or both, for conveying the oil or gas from or across these premises, are located upon the roadway. The question is—the rights of the owners of the pipe lines not having been taken into consideration—whose duty it is to move the pipes or to pay for moving them. The two leases you enclose are dated November 10, 1894, and August 5, 1895. They both seem to be from N. J. Kalebaugh to C. Thompson & Co., one of them for seventy-six acres of land, with the exception of five acres surrounding the buildings, and the other for the five acres excepted in the first lease.

There is no specific covenant for quiet enjoyment in either of these leases, neither is there any specific grant for the placing of oil or gas pipes on said land. The term of each of the leases is for "three years and so much longer as oil and gas may be produced thereon in paying quantities," and the purpose of the lease is for operating, producing, storing, transporting over and carrying away oil and gas during said term. I have no information as to whether oil is being produced from these premises or not, but assume such to be the fact for the reason that the claim to the pipe lines is made through these leases; while as stated, there is no specific provision for quiet enjoyment found in either of these leases, yet there is sufficient in each to carry that covenant.

It cannot be contended that the owners of the land and the owners of the pipe lines are tenants in common, for the reason that the relation of landlord and tenant under these leases, is made perfectly clear, the only question being as to the

character of the tendency and the conditions under which these pipe lines were laid. One thing is clear, however, the commissioners in paying damages are limited to the amount allowed by the viewers, and as there is no provision for notifying an occupant or tenant of lands, the owners of these leases cannot complain because of not having notice. The most serious question, to my mind, arises out of the consideration of the question as to whether it was the duty of the land owner to protect these lesses under the covenant for quiet enjoyment contained in these leases. If the lessees were present at or had knowledge of the view being made, and knew that the line of road would interfere with their pipe lines, and knew that the land owner was going to claim compensation and damages, and kept silent, I would be of the opinion that their mouths were closed to further complaint, and that it was up to them to protect their lines as best they might. I have no knowledge of any authority to review the action of the county commissioners in establishing a road, except by the probate court on an appeal under the statute. Therefore, there is no power on the part of the county commissioners to start anew with these road proceedings, which will have to be settled on the basis of existing facts, and, as I view it, without further action upon the part of the county commissioners.

In determining some of the questions which have or may be considered, the fact as to whether these pipe lines were above or below the surface might be of considerable value. If they were above the surface and in plain view, and the land owner was claiming damages, I cannot understand how both the land owner and the viewer should give the matter no attention. If the matter had been called to the attention of the viewers, it would have been a matter proper for their consideration, although the allowance probably could not have been made to the owners of the pipe lines but would have to be made to the land owner in order that he might protect his lessees under the covenants of the lease.

I am of the opinion that the commissioners have nothing further to do with the matter; that the question as to the removal of these pipe lines is between the township trustees, the land owner or owners of the pipe lines and the contractor who is engaged in opening this road, and while I am not at all positive, my better view is that when the matter is fully considered, it will resolve itself into a question between the land owner and his lessees, as to who shall bear the expense rendered necessary by the establishment of the road, and the removal of these pipe lines.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1330.

RIGHT OF TOWNSHIP TRUSTEES UNDER SECTIONS 7033-7052, GENERAL CODE, TO PAY PART OF THE COST OF A CERTAIN ROAD IMPROVEMENT.

Township trustees, when improving roads under sections 7033-7052, General Code, may not pay a part of the cost of the improvement of a road designated by them under those sections, out of the ordinary township road fund.

COLUMBUS OHIO, December 28, 1914.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of November 17, wherein you state:

> "The township of Grafton, this county, was created into a road district by resolution of the trustees under section 7033 to 7052.
>
> "One of the roads in said district known as Road No. 8, was mentioned in the resolution as a road to be improved. The question of the issuance of bonds to improve this road was submitted to the people and carried, and the bonds sold. During the interval between the sale of said bonds, and before the letting of the contract for the improvement of said road, the trustees, by resolution, authorized the road superintendent to grade a certain portion of this road for which obligations aggregating $150 00 were incurred and ordered by the township trustees to be paid out of the township road fund. The legality of payment of such obligations out of said fund is an issue, and I would appreciate your opinion in this matter."

I am also in receipt of a letter from one of the trustees of Grafton township, who states that the people residing along the line of Road No. 8, in order to secure the improvement of that road, agreed to grade it at their own expense, which was partly done; but after the residents did what they considered sufficient, there yet remained some work to be done in order to complete the grading. The trustees then adopted a resolution instructing the road supervisor to have this work done and fixed the price per day to be paid for labor and teams.

Sections 7033-7052 constitute one of the several methods provided by our statutes for the making of road improvements by township trustees.

The trustees must first create a road district, which may include a whole township or part thereof. After the creation of the district, and before the improvement of any of the public ways therein is undertaken, the trustees must submit to the qualified electors of the district, at a general or special election, the question of the policy of improving the public roads of the district and of issuing bonds therefor. If the proposition carries, the trustees must issue the bonds, and they may levy a tax on all the taxable property of the district to pay the principal and interest on the bonds. It is the duty of the trustees, under section 7045, to determine the order and manner in which the roads are to be improved. You state that all the preliminary steps have been taken and that the road in question has been designated by the trustees for improvement.

The disbursement of the ordinary road fund of a township is governed by section 3274, of the General Code, which provides:

> "When money is received into the township treasury from the county treasury for road purposes, the trustees shall cause such money to be appropriated to building bridges or repairing public roads within the town-

ship. After public notice, they shall let by contract to the lowest bidder, such part or parts of any road as they deem expedient, equal to the amount of money to be appropriated, if in their opinion such bidder is competent to perform the work. When such labor is performed in accordance with the contract or conditions of the letting, the trustees shall draw an order in favor of the person who has performed such labor for the amount due therefor."

It is clear, from the action of the trustees above noted, that the work of grading this road is to be regarded as a part of the construction of the improvement thereof rather than a repair of the same.

Since the township road fund may be expended only for the *repair* of roads, I am of the opinion that payment of the aforesaid obligations, out of the township road fund, would be illegal.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1331.

THE LEGISLATURE OF OHIO IS THE SOLE FINAL AND ONLY JUDGE OF THE ELECTION AND QUALIFICATION OF ITS MEMBERS.

The legislature of Ohio, under favor of section 6, article II of the constitution, is the sole, final and only judge of the election and qualification of its members and the attorney general is not called upon and will not express an opinion upon such subject in advance of the meeting of the legislature.

COLUMBUS, OHIO, December 28, 1914.

HON. GEO. M. MORRIS, *Member of the General Assembly, Lancaster, Ohio.*

DEAR SIR:—I have your letter of December 4, 1914, in which you inquire:

"Whether or not a member of the general assembly of Ohio may serve as normal school director in any county normal school after January 1, 1915, or as instructor in any state college or normal school?"

I also have your letter of December 7, 1914, in which you state in reference to your former letter:

"I had in mind the act of February 16, 1914, 104 O. L., 252, and wanted an opinion as to whether a member of the general assembly of Ohio would be barred from serving for pay as normal school director (secs. 7654-3 and 7654-4 new school code) since part of the money comes from the state."

The act of February 16, 1914, above mentioned, is an amendment of section 15 of the General Code, and so far as applicable here reads:

"Sec. 15. No member of either house of the general assembly except in compliance with the provisions of this act shall;

"(1) Be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury;"

Section 6 of article II of the constitution, reads:

> "Each house shall be judge of the election, returns and qualifications of its own members; a majority of all the members elected to each house shall be a quorum to do business; but a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law."

For reasons hereafter made plain, it is not thought necessary to discuss the validity of the act of February 16, 1914, nor whether it was intended to make the same a general law, or a mere rule as to the actions and conduct of the eightieth general assembly.

It has been held, in considering a similar constitutional provision to the one above quoted:

> "It cannot be doubted that either branch of the legislature is thus made the final and exclusive judge of all questions whether of law or of fact respecting such elections, returns or qualifications so far as they are involved in the determination of the right of any person to be a member thereof; and that while the constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein, cannot be disputed or revised by any court or authority whatever."
>
> Peabody vs. School Committee, 115 Mass., 383; (quoted with approval in Covington vs. Buffet, 90 Md., 569; 47 L. R. A., 622).
>
> To the same effect see 36 Cyc., 848, and cases cited.

With these authorities in mind, and giving full credit to the fact which cannot be doubted that the incoming legislature may, if it pleases, repeal, change, modify or ignore the act of February 16, 1914, I will not attempt to anticipate its action nor lay down a rule of law by which it would be governed in the case presented other than to say that the legislature, being the sole, exclusive and final judge of the election, returns and qualifications of its own members, is not bound by the act of February 16, 1914, and might, if it deemed proper, hold that a person who held the position of director of a normal school was, or was not eligible to a seat in the general assembly.

Inasmuch as you were a member of the eightieth general assembly and cognizant of the reasons for presenting and passing the act of February 16, 1914, it is thought unnecessary to further discuss this matter or to say more than it is up to you to determine what course to pursue in the light of the fact that there is no law which can be laid down which will control the action of the legislature in the premises, and when once it acts, its action is final and not a subject for review by the courts.

From the foregoing, you can plainly see that from my point of view, any opinion I might give, or rule I might lay down, would be of no value to you.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1332.

A NATIONAL BANK SURRENDERING ITS CHARTER CEASES TO BE A MEMBER OF THE FEDERAL RESERVE BANK.

A national bank surrendering its charter ceases to be a member of the federal reserve bank, and if the persons in it incorporate as a state bank, then such state bank could become a member bank in the federal reserve system in the manner provided by the federal reserve act.

COLUMBUS, OHIO, December 28, 1914

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you made the following request for my opinion:

> "Under the national regency act, governing national banks, could a national bank once entering the federal plan, surrender its charter, taking out a charter under the state banking law of Ohio and yet retain the national features by taking stock in a regency bank?"

First. As to the question whether under the national regency act (by which I presume you refer to the federal reserve act), a national bank which had once entered the federal plan could surrender its charter, this is a question which involves the laws of the United States governing national banks, and as to which I am not authorized to express an opinion. I assume, however, that it is quite possible for a national bank which has entered the federal reserve system to surrender its charter under conditions which may be prescribed by the national laws and authorities.

Second. When such a bank has surrendered its charter and ceased to be a national bank it, or rather the persons interested in it, could incorporate as a state bank.

Third. I take it that when such national bank surrendered its charter as a national bank it would undoubtedly at the same time cease to be a member of the federal reserve bank.

Fourth. If, after surrendering the national charter, the persons interested in the bank incorporated as a state bank, then such state bank could become a member bank in the federal reserve system under the terms provided by the federal reserve act for state banks becoming members; authority for banks of this state to become members of federal reserve banks being expressly granted by the act passed February 6, 1914, 104 O. L. 185.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1333.

SUPERINTENDENT OF BANKS OR HIS ASSISTANTS MAY NOT DISCLOSE INFORMATION OBTAINED IN EXAMINATIONS TO CLEARING HOUSE EXAMINERS AND AUDITING COMMITTEES.

Under the provisions of section 12898, *General Code, the superintendent of banks, his deputies, assistants, clerks and examiners cannot disclose information obtained in the course of examinations to clearing house examiners and auditing committees.*

COLUMBUS, OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you made the following request for my opinion:

"This office receives from various sources requests for reconcilement or confirmation of representations made by banks to clearing house examiners and auditing companies, such as the adoption of certain banks as reserve depositaries, as to whether or not certain directors have taken the oath of office, as to the number of shares of stock held by directors, etc.

"I would be pleased to have you render to me an opinion as to the rights and privileges of this department in this respect, under the restrictions of section 12898."

Sections 12898 and 12899 of the General Code are as follows:

"Sec. 12898. Whoever, being the superintendent of banks, a deputy assistant, clerk in his employ or an examiner, fails to keep secret the facts and information obtained in the course of an examination, except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the corporation, company, society or association so examined, or wilfully makes a false official report as to the condition of such corporation, company, society or association, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. Nothing in this section shall prevent the proper exchange of certain valuable information relating to banks and the business thereof, with the representatives of the banking departments of other states or with the national bank authorities.

"Sec. 12899. An official, violating any provision of the next preceding section, in addition to the penalties therein provided shall be removed from office and be liable, with his bondsmen, in damages to the person or corporation injured by the disclosure of such secrets."

This provision is essential to the public welfare and cannot be too strictly followed. The exception in the case of exchanging information between your department and the banking departments of other states and national bank authorities precludes any other exception; that is, you can only divulge facts and information obtained in the course of examinations to representatives of the banking departments of other states, national bank authorities or when your duty as superintendent, or the duty of any of your assistants or examiners, requires you to report to some other state or county official or to take official action which makes necessary the disclosure of such facts.

Clearing house examiners and auditing committees are not representatives of banking departments of other states nor are they national bank authorities; and therefore, though there may be many reasons for the exchange of information, and checking up reports with the representatives of different clearing houses, permission to do so not having been granted by statute, it is prohibited.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1334.

RIGHTS OF TRUST COMPANY ORGANIZED PRIOR TO PASSAGE OF THOMAS ACT, WHICH TRANSACTED NO TRUST BUSINESS PRIOR TO PASSAGE OF THOMAS ACT.

A trust company organized prior to the passage of the Thomas act, with a paid in capital of less than $100,000, *which transacted no trust business prior to the passage of the Thomas act, cannot perform any of the acts specified in sections* 9778, 9779, 9780, *General Code, until its paid in capital is at least* $100,000, *and until it has made the deposit required by said sections with the treasurer of state.*

COLUMBUS, OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you made the following request for my opinion:

"A certain bank and trust company incorporated prior to the passage of the Thomas act with an authorized capital of $75,000.00 and paid in capital of $50,000.00 has not heretofore transacted a trust company business but wishes now to do so by paying in the full authorized capital.

"Our present law provides a minimum amount of $100,000.00 capital stock for a trust company. Please advise me as to whether or not this company, organized prior to the passage of the present banking law, could accept and execute trusts with a paid in capital of $75,000.00 after having of course made the deposit with the treasurer of state as required by section 9778."

Section 9778, of the General Code, is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least $100,000.00, and until such corporation has deposited with the treasurer of state in cash $50,000.00 if its capital is $200,000.00 or less, and $100,000.00 if its capital is more than $200,000.00, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

Section 9779, General Code, provides as follows:

"The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided."

Section 9780, General Code, provides as follows:

"No such corporation, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning, property located wholly or in part in this state without complying with the provisions of this and the two preceding sections. Any trust, deed or mortgage given or taken in violation of the provisions thereof shall be null and void."

There is some question, in view of the above sections, as to the right of a trust company incorporated and doing the business of a trust company prior to the passage of the Thomas act, with a capital stock of less than $100,000.00 to continue the trust company business specified in sections 9778 and 9780 without increasing its capital stock.

It was held by the common pleas court of Franklin county that banks incorporated prior to the passage of the Thomas act need not increase their capital stock to the amount required by the act, but this opinion was with reference to the capital stock of banks and did not in any way construe the question raised by sections 9778 et seq.; said opinion might be in entire harmony with a holding that while banks and trust companies incorporated prior to the passage of the Thomas act were not required to increase capital stock to the amount named by the act, still sections 9778 et seq., are special sections referring to trust companies and to specific acts to be performed by such trust companies, and section 9780 seems to me both explicit and mandatory.

I do not consider it necessary to go further into this question at this time, however, for it is clear to me that a trust company which had not performed the acts specified in these sections prior to the passage of the Thomas act and did not have the capital prescribed by section 9778, cannot now, by paying in the full amount of its capital stock, which would bring its capital to only $75,000.00, thus obtain authority to do the acts which by section 9780 are expressly made void if performed by a trust company which has not a capital of $100,000.00, and in addition has made the required deposit with the treasurer of state.

Such a company, incorporated as a trust company, but which has not performed the business of a trust company, must comply with section 9778 et seq., before accepting trusts in any way vested in, transferred or committed to it by an individual or court, or certifying to any bond, note or obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning, property located wholly or in part in this state.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1335.

RIGHT OF A CORRESPONDENT BANK TO CHARGE OUT OF THE ACCOUNT OF AN INSTALLMENT BANK ANY INDEBTEDNESS OF INSTALLMENT BANK TO CORRESPONDENT BANK.

In case of the insolvency of a bank, its correspondent bank may charge out of account of the insolvent bank any indebtedness such correspondent bank may have against such insolvent bank to the account of bills payable held by it, whether the same are due or not due.

COLUMBUS, OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you make following request for my opinion:

> "First. In the closing of a bank by this department, correspondent banks have been in the habit of charging out of the account of the defunct bank any indebtedness they might have against the defunct bank in the case of bills payable. Can they do this legally, where bills payable are not due, the same as where they are due?
>
> "Second. Can a bank holding bills payable against another bank charge the bills payable into the account of a correspondent bank before the note is due, while the bank is a going concern?"

Answering your first question, it is well settled that a bank has a general lien on all of the moneys and funds which have been placed in its possession, and may use the same to cancel any matured debt owing by the debtor to the bank, unless the deposit is for some specific purpose or impressed with some trust.

In the case of Wheaton vs. Daily Telegraph Co., 124 Fed. 61, it was held that where at the time of the appointment of a receiver for a corporation it was indebted to a bank in a sum largely exceeding the amount of the corporation's deposit, the bank was entitled to set off such deposit against the corporation's indebtedness to it.

In the case of Thomas vs. Exchange Bank, 99 Iowa, 202, it was held that a bank may offset as against an immatured debt of an insolvent debtor any sum which it may be owing to the debtor; except in the case of trust deposits.

The general rule is that a correspondent bank, indebted to an insolvent bank on an open account, is entitled to apply the amount thereof on the indebtedness due to the correspondent bank from the insolvent bank: and it has been held (Union National Bank vs. Hunt, 7 Mo. App. 42) that as between the correspondent bank and the initial bank between which an account current has been kept, in which each bank mutually credited the other with the proceeds of all negotiable paper transmitted for collection when received, and accounts were regularly transmitted from the one to the other and settled and balances remitted when called for, and where upon the face of the paper transmitted it always appeared to be the property of the respective banks, and the collecting bank had no notice that the transmitting bank did not own the paper, and such paper was transmitted by each of the two banks on its own account, that there is a lien for a general balance of the account no matter who may be the real owner of the paper.

It seems clear to me, therefore, that in a matter of bills payable, the corresponding bank having a lien on the same, or the proceeds thereof, for the amount due to it from the initial bank, in case of insolvency of the initial bank, it would be

entitled to charge out of the account of the defunct bank any indebtedness it might have against such bank, to the amount of the said bills payable held by it, whether the same were or were not due.

Your second question would be a matter for the banks themselves to settle. As stated in my answer to your first question, one bank has a lien upon bills payable transmitted to it by another bank (unless there is some special reason which frees such paper from the lien, on account of third parties), to the extent of the debt owned by the initial bank, and, therefore, if it deemed it necessary to protect the debt due to it, might charge the bills payable into the account of the correspondent bank before the debt was due; or hold the proceeds until its debt was secured or paid off; but I presume it could be compelled to credit the initial bank with interest on the amount of such bills payable from the time they were charged to the account of the initial bank. This matter, however, is essentially a business transaction between the two banks which they must settle themselves.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1336.

CIVIL SERVICE ACT—CIVIL SERVICE COMMISSION MAY NOT HOLD PROMOTIONAL EXAMINATION WHERE ONLY ONE PERSON IS ELIGIBLE FOR SUCH EXAMINATION.

The civil service commission cannot hold a promotional examination whereby its rules or classification of positions, only one person is eligible for such examination. The rule or classification should be broadened so as to make it possible for more than one person to take a promotional examination.

COLUMBUS, OHIO, December 28, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Your favor of December 14, 1914, is received, in which you inquire:

> "A question which we desire you to answer is as to whether or not we can hold a promotional examination that complies with section 15 of the civil service act where there is only the one person entitled to take the examination.
>
> "We have cases confronting us from time to time in which promotion seems to be the natural and logical thing to do, but in many cases, under our classification, there will be only one person eligible to take the promotional examinations."

Section 486-15, General Code, provides:

> "Vacancies in positions in the competitive class shall be filled so far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the competitive classified service, and for making promotions in the competitive classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service;

> and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest of the service so to fill such vacancies. All examinations for promotions shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing power only the name of the person having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations."

By virtue of this section "all examinations for promotion shall be competitive." The civil service commission is required to make rules providing for making promotions. The commission is also required to classify positions.

There can be no competition where only one person is eligible, under the rules of the commission or by its classification, to take an examination. Competition means a contest or controversy between two or more.

The word "competitive" is defined in the New Standard Dictionary:

> "Of, pertaining to, or characterized by competition."

"Competition" is defined:

> "The act or proceeding or striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority."

To have competitive examination it is necessary to have a contest between two or more.

The rule of the commission must be made so as to make it possible to have two or more persons eligible to take an examination for promotion. If the rule is so made so as to permit only one person to take a promotional examination, then such rule prevents competitive examination, as required by the statute. The rule of the commission is adopted to carry out the terms of the statute, not to make them ineffective.

If the rule of the commission makes it possible for two or more to take a promotional examination and only one person appears for such examination, such person may be examined and if he passes, may be placed in order for promotion.

In such case it is not the fault of the commission or of the applicant that there is no actual competition.

I am of opinion, therefore, that your commission cannot hold a promotional examination, where, under the rules of the commission, only one person is entitled to take such examination. The rule or classification should be broadened so as to make it possible for more than one person to take a promotional examination.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1337.

ACCEPTANCE BY RELIGIOUS CORPORATION OF GIFT IN RETURN FOR AN ANNUITY, NOT CLASSED AS INSURANCE.

The acceptance of a gift by a religious corporation of this state in return for which it agrees to pay to the donor an annuity, does not bring such corporation within the provisions of the insurance law of the state—Such contracts cannot be classed as insurance.

COLUMBUS OHIO, December 28, 1914.

HON. PRICE RUSSELL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On November 19, 1914, you submitted to me, with a request for my opinion, the following inquiry, which had been submitted to you:

> "At a recent meeting of the board of trustees of a religious corporation of this state, a proposition was made to accept from a donor a sum of money upon the agreement that the society would pay to the donor an annuity during the balance of the donor's life. A well-versed insurance man, a member of the board of trustees, was of the opinion that the acceptance of such a gift might bring the society within the provisions of the insurance laws of the state of Ohio and require a deposit to be made with you, etc. We find nothing in the statutes that seems to us to support this view.
>
> "Will you kindly advise us whether your department holds that the acceptance of a gift by a religious corporation of this state in return for which it agrees to pay to the donor an annuity, brings such corporation within the provisions of the insurance laws of the state? If your department does so hold, will you be kind enough to refer us to the sections of the General Code upon which such holding is based?"

Section 665, of the General Code, is as follows:

> "No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto have been complied with."

The only question to be determined, therefore, is whether the transaction outlined in the above request is insurance, or substantially amounts to insurance.

The briefest and perhaps the most satisfactory definition of insurance is that given by Mr. May, in his work on insurance (Sec. 1, chapter 1):

> "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

The contract to which you call my attention does not in any way fall under the terms of this definition; there is no indemnity agreement; no agreement, direct or implied, to compensate for any loss, or to make any payment subject to any con-

tingency. Contracts of this character, it is true, are often made by insurance companies but, as stated before, in my view they are not such contracts as can be classed as insurance.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1338.

PROPER INVESTMENT FOR AN INSTITUTION HAVING COMMERCIAL AND SAVINGS BANK, SAFE DEPOSIT AND TRUST COMPANY POWERS.

The stock of a building company whose paid dividends for more than five consecutive years next prior to the investment, would be a proper investment for a savings bank and for an institution which has acquired through its charter commercial and savings bank, safe deposit and trust company powers.

COLUMBUS, OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under recent date you made the following request for my opinion:

> "I would be pleased to have you render to me an opinion as to whether or not the common stock of a building company would be a legal investment for an institution which has acquired, through its charter, commercial and savings bank, safe deposit and trust company powers. It is represented that this stock has paid dividends for more than five years past, and that the proposed purchase will carry with it the control of the building in question."

You state in your request that the corporation to which you refer has, among other powers, the powers of a savings bank. Section 9765, General Code, provides for investments which may be made by savings banks and seems to cover the question submitted by you. This section provides:

> "A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following: * * * * * *.
>
> "b. Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months. * * * * * *"

It would appear, therefore, that stock of a building company, which has paid dividends for more than five consecutive years next prior to the investment, would be a proper investment for a savings bank; and so for the corporation to which you refer.

The fact that the proposed purchase of stock would carry with it the control of the building would not affect the question, except that, in my opinion, the purchase of such stock should be made as an investment in the regular course of banking business, and should not be made for the purpose of obtaining control in another corporation.

The provision which gives the superintendent of banks authority to order any such securities which he deems undesirable to be sold within six months should be a sufficient safeguard on the exercise of the privilege granted by this section.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1339.

DEPOSITORY LAW — RULES GOVERNING THE DEPOSITING OF MONEY WHERE TWO BANKS FURNISH A BOND.

Where two banks join in signing a bond for county money, and the bid was made in the name of one bank, and that bank desires to turn over a certain amount of the money to the bank joining in the bond, the bank acting as a depository and furnishing the bond would be the only bank responsible to the political subdivision making the deposit.

COLUMBUS OHIO, December 28, 1914.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On September 28, 1914, you made the following request for my opinion:

> "Two banks joined in signing a bond for county money; the bid was made in the name of one bank and that bank desires to turn over a certain amount of the money to the bank joining in the bond. The question arises —how will the bank which received the money carry this? Should they carry it as 'public deposit,' as 'due another bank' or as 'borrowed money?'"

Under the depository laws the bank which was selected as a depositary, and furnished the bond or surety or securities, to secure the deposit of the public funds, would be the only bank responsible to the political subdivision making the deposit. If it in turn redeposited a certain amount of the money so received in another bank, no matter whether the other bank had joined with it in the bond or not, that bank should carry the deposit as a deposit due to another bank; or, if it had borrowed the money from the bank which had been chosen as the depositary, it should be carried, of course, as borrowed money.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1340.

RIGHT OF THE CITY AUDITOR TO SUBSCRIBE FOR THE PUBLICATION OF THE NEMAR PUBLISHING COMPANY, TO WIT, THE DEPARTMENT REPORTS.

It is within the discretion of the city auditor to subscribe for the publication of the Nemar Publishing Company, to wit, the department reports, and pay for the same out of its incidental appropriation in the same manner as in the purchase of supplies generally, and the same would be legal.

COLUMBUS OHIO, December 28, 1914.

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

GENTLEMEN:—I have your letter of November 19, 1914, in which you inquire:

> "May a city auditor legally pay from his 'incidental' appropriation for service rendered by the Nemar Publishing Company? Said company furnishes special information as to the official actions of state departments, and also issues a weekly publication of official interest to the city auditor, at a cost of $10 per annum.
>
> "May any or all public officials, city, village, school and township, subscribe and pay from their appropriations for such publication and service?"

After careful consideration and consultation with counsel in this department, I am of the opinion that I should go no further than to answer your first inquiry.

As to what a city auditor may legally purchase and pay for under his appropriation is largely a question of good common sense and economic consideration. I am told that the city, through the auditor and solicitor, purchases publications appropriate to the departments, and that the same are paid for out of the incidental funds. To illustrate: Legal publications are bought through the city solicitor's department for the use of that department, remaining the property of the department. This is entirely appropriate, and of course such purchases should be limited to those publications that contain matter of direct benefit to the department. The city auditor, of course, may do likewise.

I just inquired of the city auditor of Columbus, who advises me that his department has been purchasing an engineering publication, that after he is through with it he passes it on to the city engineer. This seems to be proper and legal.

It is largely a question of situation and conditions as to how many publications may be purchased for a given municipality. Certainly for the smaller cities one issue of a publication would be sufficient and could be passed around; larger cities might need more. Your bureau should determine each situation upon its own facts and conditions.

I have examined several copies of the Nemar Publishing Company's Bulletin and, in my judgment, as at present published it contains information very useful to a city auditor and city solicitor, as well as to the county auditor and the prosecuting attorney. The city solicitor advises all city officials and city boards of education and the prosecuting attorney advises all county officials as well as township officials and boards of education in counties outside of cities. So long as the prosecutors and city solicitors have the publication, the general public in their respective jurisdictions have the means of procuring the benefit of them, but inasmuch as much of the matter contained in this publication is more directly beneficial to

the auditor and is not legal in its nature, I think it not altogether inappropriate that the city auditor have the same benefit as the solicitor and the county auditor the same as the county prosecutor. The village clerk might also be permitted to purchase the same without criticism.

It is difficult to lay down a hard and fast rule. The chief suggestion I would make to your department is to see that no abuses are permitted and no purchases made simply to favor the publishing company. The same rule would apply in this as in the purchase of necessaries and supplies generally.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1341.

SCHOOLS—DEFINITION OF THE TERM "SUPERVISOR" AS EMPLOYED IN SECTION 7811, GENERAL CODE.

The term "Supervisor" as employed in section 7811, 104 *O. L.*, 102, *is intended to apply to teachers who have had experience in overseeing or have had charge of schools with authority to direct or regulate matters in connection with the schools, either as an actual superintendent or in a supervisory capacity. The term "exempted village school district" as employed in said section* 7811, *applies to village school districts which are exempt from county school districts by virtue of sections* 4688 *and* 4688-1, *General Code, as amended in* 104 *O. L.*, 134.

COLUMBUS, OHIO, December 29, 1914.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—On November 6, 1914, you requested an official opinion as follows:

> "There is a young man in this county who would like to be appointed school examiner. He has had several years' experience as a teacher in a special school district. He is now superintendent in a village school district, which is in this county. He spends one-half of his time superintending and the other half in teaching.
>
> "Section 7811, of the School Laws, as found in O. L., 104, at page 102, reads as follows:
>
> "Sec. 7811. 'There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. The teacher so appointed must have had at least two years' experience as teacher or superintendent, and be a teacher or supervisor in the public schools of the county school district or of an exempted village school district. Should he remove from the county during his term, his office thereby shall be vacated and his successor appointed.'

"You will note that said above quoted section says in part:

"'The teacher so appointed must have had at least two years' experience as teacher or superintendent, and be a teacher or *supervisor* in the public schools of the county school district or of an exempted village school district.' What does the word 'supervisor' in this section mean? What does the term 'exempted village school district' mean?

"Now, I would like to have your written opinion at your very earliest convenience, as to whether or not the county board of education would have any right to appoint this young man, and also your opinion as to the meaning of these words that I have indicated."

The term "supervisor" as employed in section 7811, which you quote in your inquiry, relates to supervisory or supervision work on the part of teachers who are or have been teaching in the public schools.

Section 4744-4, 104 O. L., page 143, specifies qualifications of persons who shall be eligible as county superintendents, and among other qualifications mentions experience in supervision, as follows:

"Only such persons shall be eligible as county superintendents who shall have:

"(1.) Five years' experience as superintendent and a high school life certificate; or

"(2.) Six years' experience in teaching, two years' additional experience in supervision, and at least a three-year county high school certificate; or

"(3.) * * * * * * * * * * * * * * * * *

"(4.) Five years' teaching experience with one year's professional training in school administration and supervision in a recognized school of college or university rank, and a high school life certificate; or

"(5.) Five years' teaching experience with one year's professional training in school administration and supervision in a recognized school of college or university rank, and a county high school certificate, and be a graduate from a recognized institution of college or university rank."

Section 4744-5 specifies the qualifications of persons who shall be eligible as district superintendents, as follows:

"Only such persons shall be eligible as district superintendents who shall have:

"(1.) Three years' experience in school supervision, and at least a county high school certificate; or

"(2.) Four years' experience in teaching, one year's additional experience in supervision or one year's training in supervision in an institution of college or university rank and at least a county high school certificate; or

"(3.) * * * * * * * * * * * * * * * * *"

I take it that the term supervision as employed in the last two quoted sections, does not mean that such persons in order to be qualified as either county or district superintendents, must have experience in supervision as actual superintendents, but that on the contrary they may acquire such experience in supervision by doing supervisory work in fact. That is to say, if a teacher has had experience in supervision work in the schools, even though not acting in the capacity of an actual super-

intendent of the schools, nevertheless they can qualify as eligible candidates for county or district superintendents under said section 4744-4 and section 4744-5, provided they have had a sufficient amount of work in supervision and also meet the other requirements set forth and specified in said sections. It would seem to follow, therefore, that the term "supervisor" as employed to section 7811, is intended to apply to teachers who have had experience in overseeing or have had charge of schools with authority to direct or regulate matters in connection with the schools, either as an actual superintendent or in a supervisory capacity. The term "exempted" village school district applies to village school districts which are exempted from the county school districts by virtue of sections 4688 and 4688-1 of the General Code, as amended 104 O. L., page 134. Section 4688 provides what village districts may become exempt from supervision of county boards, as follows:

> "The board of education of any village school district containing a village which, according to the last federal census, had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

Section 4688-1 provides that when a census of the population of a village district is taken, if such census shows a population of three thousand or more in the village school district, then such district shall be exempt from the supervision of the county board of education, as follows:

> "The board of education of a village school district shall upon the petition of one hundred or more electors of such district, or upon its own motion may at any time order a census to be taken of the population of such district. One or more persons may be appointed by the board to take such census. Each person so appointed shall take an oath or affirmation to take such census accurately and to the best of his ability. He shall make his return under oath to the clerk of the board, and certified copies of such return shall be sent to the county auditor and superintendent of public instruction. If the census shows a population of three thousand or more in the village school district, and such census is approved by the superintendent of public instruction, such district shall, upon notification by the board of education of such village school district, be exempt from the supervision of the county board of education. "

You state that the party about whom you inquire is now superintendent of a village school district. You do not state whether this school district is now in the county school district or whether it is an exempted school district by virtue of the last two sections just quoted. However, if such village school district is in the county school district, or is an exempted school district by virtue of said sections, nevertheless the party in question would be eligible to be appointed by the county board of education as a member of the county board of school examiners, for the reason that he is a supervisor, either in the public schools of the county school district or of an exempted village school district, provided, of course, that the party in question meets the other requirements of said section, to wit, that he has had at least two years' experience as teacher or superintendent, which you say he has had for the reason that for several years past he has been a teacher in the village school district mentioned.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1342.

THE COUNTY AUDITOR SHALL ISSUE A WARRANT UPON THE COUNTY TREASURER FOR THE PAYMENT OF MOTHERS' PENSIONS, AS PROVIDED IN SECTION 1683-9, GENERAL CODE.

Section 1683-9, *General Code* (103 *O. L.*, 879), *is the only provision for the disbursement of the mothers' pension fund and provides that the county auditor shall issue a warrant upon the county treasurer for the payment of the allowance and any other method of disbursement would be illegal.*

COLUMBUS, OHIO, December 30, 1914.

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

GENTLEMEN:—I am in receipt of your communication of December 21st, 1914, wherein you state:

> "We are sending you herewith letter received by this department from Hon. O'Brien O'Donnell, judge of the juvenile court of Lucas county, Ohio, setting forth his ideas as to the proper disbursement of pensions allowed to mothers, and we would like your written opinion as to the legality of Judge O'Donnell's method of handling said funds."

Judge O'Donnell's letter is, in part, as follows:

> "The law providing for mothers' pension, as now enacted, among other matters provides:
>
> "'*The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge.*' (Sec. 1683-9, 103 O. L., 879.)
>
> "This is the only provision in the law referring to the paying of the allowance so made by the court. A few judges in Ohio, who have been interested in the passage of the mothers' pension act and who are anxious to see the best results obtained therefrom, find that we can carry out the intents and purposes of the law by having the court certify to the county auditor the names, together with the amounts awarded the widows, that thereupon the county auditor shall issue his check direct to the juvenile judge for the entire sum so certified, who in turn shall cause the money to be paid to the widows or the persons through whom the court shall direct it to be expended and take their receipts therefor.
>
> "The reasons for asking that it be done this way are, briefly:
>
> "First, all papers, including the receipts from each of the individual parties are preserved in the office of the court that issues the order where a complete record from the filing of the application to the granting and paying of the pensions should be kept and thereby expedite matters.
>
> "Second, it frequently happens that widows having children to support and entitled to a pension, have no conception whatever of the manner of expending the money; in other words, some are unfortunately like a great many men who, as heads of families buy for cash what is not necessary and have to go in debt for the actual necessities of life, and at the same time they may be very good people. Consequently, when we find a

case of that kind we propose that the money shall be ordered expended through some person in whom the court has confidence and who is aiding in looking after the case. * *

"The plan to bring the best results will be for the court to certify to the county auditor the names of the widows and the amounts awarded each, for which the county auditor can remit a check for the total amount and the court in turn to pay to the widows who are capable of handling the same in the most economical manner, or pay it to some person who may be selected by the court to expend it for them. * * *

"Bear in mind, I am asking permission to do it in this way to the end that the mothers' pension law may be best administered, and I know we can accomplish what we are after. * *"

I have examined the mothers' pension law and I find that the only provision contained therein in reference to the disbursement of the pension is found in section 1683-9, 103 O. L., page 879, and is as follows:

"The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

I have incorporated this statutory provision at the expense of repetition because it is the only provision of its nature in the act, and too much stress cannot be put on its plain and unambiguous terms which can leave no doubt in the mind as to the intention of the legislature. It is clear that it was intended that the county auditor should issue a warrant upon the county treasurer for the payment of the allowance ordered by the juvenile judge directly to the beneficiary and not to the juvenile judge or to any one designated by him as custodian.

I agree with you that in some cases that have come to your attention that the law can be better carried out as to all intents and purposes by having the court certify to the county auditor the names of and the amounts awarded to the widows, that thereupon the county auditor shall issue his check direct to the juvenile judge for the entire sum so certified, who in turn shall cause the money to be paid to the widows or the persons through whom the court shall direct it to be expended and take their receipts therefor; that by this arrangement all papers, including the receipts are preserved in the office of the court that issues the orders where the complete report should be kept: and also that the expenditure of the award for the benefit of the widow and her children can be made more judiciously by the juvenile judge as a sort of financial guardian, but in the face of this statutory mandate so plain and concise and simple I cannot advise you to follow any procedure that would not be in strict conformity to this legislative command.

In our previous correspondence I expressed a willingness that the procedure which is outlined above be followed temporarily, with the advice and consent of your department, until the general assembly meets again, when the law might be amended to conform with the said procedure; that I was in hearty sympathy with the mothers' pension law and would be pleased to co-operate with any court to the end that its beneficient operation be not thwarted by anything short of illegal procedure, but the language of the statute is so plain as to entirely disable me from advising or approving a plan other than that the auditor shall issue a warrant upon the county treasurer and the allowance be paid direct to the beneficiary and not to the juvenile judge or any person designated by him.

I am therefore of the opinion that the method of handling the mothers' pension fund as outlined above is contrary to the wording of the statute and therefore illegal.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1343.

CIVIL SERVICE ACT—AN OFFICER WHO IS APPOINTED FOR A DEFINITE PERIOD FIXED BY THE APPOINTING POWER, IF IN THE CLASSIFIED SERVICE, HIS EMPLOYMENT DOES NOT TERMINATE AT THE EXPIRATION OF HIS APPOINTED TERM OF OFFICE.

A provision of statute fixing a definite term for a position in the classified service is not repealed by implication by the civil service act.

Where an employe or officer is appointed for a definite period fixed by the appointing power and not by statute, such employe or officer, if in the classified service, continues in his employment or office for an indefinite period by the civil service act; his employment or office does not terminate at the expiration of his appointed term of office.

PREFACE.

It is with reluctance that I come to the conclusion that a statute fixing a definite term for a position in the classified service is not repealed by implication by the civil service act. I feel constrained to follow the path blazed out by Judge Pugh, of the superior court of Cincinnati, in reference to those holding office. This holding by Judge Pugh, in my judgment, is clearly not necessary to determine the result in the Schneller case.

Schneller's term of office expired on December 31, 1913, and the civil service act did not take effect until January 1, 1914. It was, therefore, apparent that Schneller was not entitled to hold over after December 31, 1913, but, nevertheless, Judge Pugh planted his conclusion on two grounds—one of which is, that where the statute fixes the term of an officer or employe, his term ends by operation of law at the conclusion of the statutory period.

This department is required to follow the decision of the supreme court whether we think them right or wrong; and as to courts of appeals and reviewing courts, there would have to be a conflict of such courts or manifest error before this department would be free to disregard the holding; and as to common pleas courts we must be satisfied that such decision is erroneous before advising an administrative body to proceed contrary to such holding.

It being admitted that the appointee must come from the eligible list when the term of the officer or employe whose term is fixed by statute expires, it is absurd to make any difference in the application of civil service between the person whose term of office is fixed by the appointing officer and one whose term of office is fixed by the general assembly.

The rationale of the civil service would suggest that the same rule should be applied to all kinds of appointive officers and employes, and the Ohio act, in my judgment, goes further than the acts of the other states looking to the spirit of continuance of persons in office. But, as stated, I must yield to the decisions of the courts.

TIMOTHY S. HOGAN,
Attorney General.

COLUMBUS, OHIO, December 30, 1914.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of April 2, 1914, you submit the following inquiry:

"Our board desires your instructions as to whether or not a superintendent of a county infirmary or a superintendent of a children's home, hav-

ing been chosen by contract or election for a definite term expiring after January 1, 1914, is continued in position by virtue of the civil service law, or, is his position vacant at the expiration of his contractual term?

"If his position does become vacant at the end of his contractual term, must his successor be selected from an eligible list prepared by the state civil service commission, and is the term for which the person selected may serve to be determined by mutual agreement between the person so selected and the appointing board or officer?

"We desire your further instructions as to our duty where the law fixes a statutory term for a position or employment and that term expires after January 1, 1914. The point we desire your instruction upon is that if a given position is in the classified service and the term of the incumbent is fixed by law, does the civil service act take precedence over previous statutes fixing the terms and the officer or employe continued in the service, or, must the position, at the expiration of the term be filled from eligible lists for the statutory term?"

By an arrangement with you an opinion upon these questions has been deferred awaiting a decision by the court of appeals of Hamilton county, Ohio. It now appears that the case in question was not taken to the court of appeals.

Your inquiry involves two classes of positions.

First—Those for which the statutes fix a definite term;

Second—Those where the appointing power has fixed a definite period of service by contract or appointment.

Only positions in the classified service under the civil service act are involved.

The following are the provisions of the civil service act to be considered:

Section 2 of the civil service act, section 486-2, General Code, provides in part:

"* * * and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Section 10 of the civil service act, section 486-10, General Code, reads in part:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. * * *"

Section 17 of the civil service act, section 486-17, General Code, provides in part:

"No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the

subordinate discharged, laid off, reduced, or suspended with a copy of the order of discharge, lay off, reduction, or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. * * *''

In case of State ex rel. vs. Schneller, 15 Nisi Prius, N. S., 438, it is held:

''The civil service act of May 10, 1913 (103 Ohio Laws, 698), in so far as it relates to incumbents of offices and places mentioned in the third paragraph of section 10 thereof, went into effect January 1, 1914.

''The terms of such public offices and positions as are fixed by statute, remain unchanged by the civil service act of May 10, 1913, and an incumbent on January 1, 1914, of such office or position, while protected from removal, suspension, reduction or transfer except for cause as therein provided, is not thereby given a new term of office, nor is his existing term thereby lengthened or extended.

''Incumbents of offices and positions whose statutory terms expired December 31, 1913, are not continued in office or position thereafter by the civil service act aforesaid.''

This case involved the employes of the council of the city of Cincinnati, whose terms expired December 31, 1913, and whose successors were elected on the morning of January 1, 1914. Judge Pugh in his opinion holds that these employes were not incumbents on January 1, 1914, and did not, therefore, come within the terms of section 10 of the civil service act. This conclusion was sufficient to decide the case and it was not necessary to consider the effect of the civil service law upon terms of office as fixed by statute.

On page 446 of the opinion, Judge Pugh, says:

''The two year terms for which they were elected on January 1, 1912, expired at midnight, December 31, 1913, and when the new law took effect January 1, 1914, they were not incumbents of any public office or position at all and the section (10) invoked could be of no assistance to them.''

This view of Judge Pugh is supported by the opinion of the court of appeals of Franklin county, Ohio, in case of Sullivan vs. Commissioners of Clark county. This case involved the position of superintendent of the county infirmary. The court found that Sullivan had been appointed for a term fixed by the commissioners at one year, which expired December 31, 1913. The court held that he was not an incumbent on January 1, 1914. Sullivan's successor, however, was appointed prior to January 1, 1914, to take effect on said date.

The case of State ex rel. vs. Schneller, supra, did not involve employes whose terms had been fixed by the appointing power.

Judge Wright of the common pleas court of Hocking county, Ohio, in a case which involved an employe whose term, as fixed by the appointing power, expired after January 1, 1914, has held that under the civil service act such employe was continued in the service for an indefinite period. The opinion in this case is not now available.

Judge Pugh in his opinion, supra, cites a number of authorities from other states. These cases will be reviewed, but in considering them the provisions of the civil service acts of such state must also be considered.

In Rodigue vs. Boyer, 4 Cal. App. 257, the provisions of the charter of San Francisco were under consideration. The charter provided for appointment under

civil service regulations and it also authorized the appointing board to "designate the service to be rendered by such assistants and the time for which they shall be employed." These provisions and the civil service provisions were in the same act of the legislature and it was properly held that a regular appointee was protected only during his term.

In McNeil vs. Chicago, 93 Ill. App. 124, the court relies upon Mather vs. Kerfoot et al., in Chicago Law Journal of June 8, 1900, p. 130, as to term and it is therein held that the civil service act does not change the term. The patrolman in this case was a "hold-over," and in State vs. City of Chicago, 98 Ill. App. 105, nothing is said about a term, but Justice Sears reviews McNeil vs. Chicago, supra, and says at page 107:

> "Relator as a 'hold-over' was not within the protection afforded by section 12 of the civil service act, which regulates the manner of discharge of persons holding as appointees under the act."

There is no provision in the Illinois civil service act about continuance in office or position.

In Robertson vs. Coughlin, 196 Mass., 539, it is held that the appointing power has the right to fix a reasonably definite term where the statute does not fix the same. In this case it is held:

> "St. 1904, p. 266 c. 314, which protects persons holding office in the classified service of the commonwealth or in any municipality thereof from arbitrary removal during their term does not apply to an officer whose term of office has expired."

This case involved an employe whose term was fixed by the appointing power. Massachusetts is the only state in which I have found any authority upon the question where the appointing power has fixed the term. The civil service law of Massachusetts is so radically different from that of Ohio that these cases cannot be considered as authority in this state. In Massachusetts the civil service commission determines the positions which shall be subject to civil service regulations. This is not fixed by statute as in Ohio. (See section 6 of chapter 19 of Revised Laws of Massachusetts of 1902.)

In case of Attorney General vs. Trehy, 178 Mass., 186, it is held:

> "The civil service commissioners have power to require offices involving confidential relations between the incumbent and his superior, which are not by statute exempted from their rules, to be filled under the rules, or so may classify them that they will be free."

In Matter of Tiffany, 179 N. Y., 455, it is held:

> "The civil service act (L. 1899, ch. 370) does not prevent an office from becoming vacant by operation of law through the expiration of the term fixed by statute, and when his term expires an incumbent is not 'removed,' within the meaning of section 21; that provision, therefore, of the charter of the city of Jamestown (L. 1886, ch. 84, tit. 2, sec. 2) providing that the term of a policeman 'shall be one year,' is not so inconsistent with the later act that a policeman whose term of office had expired and who was not reappointed, is entitled to a mandamus compelling his reinstatement upon the ground that he was a veteran and had been 'removed' from such office in violation of the civil service act."

In a per curiam opinion the court say:

> "The aim of the statute was to protect the incumbents of those positions which previously had been of indefinite tenure, and, hence, subject to arbitrary removal by the appointing power. * * * Its primary object was to make merit and fitness, as ascertained by competitive examination, the basis of appointment to office and to protect the appointee to an office, with no fixed term, from removal without cause shown after an opportunity to be heard."

This decision is limited to terms fixed by statute. The civil service act of New York has a provision as to removal but not as to continuance in office.

Cases from Texas are also cited. But in these the constitution fixes the term.

The civil service act of New Jersey upon the matter of continuance in the service is more nearly like that of Ohio than the law of any other state.

Section 2 of the New Jersey act, page 3795 of volume 3 of Compiled Statutes of New Jersey of 1910, provides:

> "All officers, clerks and employes now in the employ of the state or any municipality adopting this act, coming within the competitive or non-competitive class of the civil service, shall continue to hold their offices or employments, and shall not be removed therefrom except in accordance with the provisions of section 24 hereof, it being the intention hereby to include any and all such officers, clerks, employes and laborers within the classified service of the state or municipality, as the case may be, and to be subject in all respects to the provisions of this act."

Section 24 herein referred to is like section 17 of the Ohio act, except that it does not contain the clause "whether appointed for a definite term or otherwise."

The New Jersey act divides the civil service act into classified and unclassified service, but the civil service commission is authorized to arrange the classified service into four classes, "to be designated as the exempt class, the competitive class, the non-competitive class and the labor class, which classification may be changed from time to time as the commission shall deem proper." The exempt class does not depend upon the practicability of competitive examinations.

This power of classification granted to the civil service commission distinguishes the civil service act of New Jersey from that of Ohio, and it is upon this power of classification that certain conclusions reached in the New Jersey cases are based.

In case of Hisp vs. Civil Service Commission, 84 Atl. 614 (Sup. Ct. of N. J., 1912), Grimmer, C. J., says at page 614:

> "Under the civil service act (3 Comp. St. 1910, p. 3795, et seq.) all officers, clerks and employes in the service of the state, or of any municipality in which the statute is in force, who are properly placed in the classified service by the civil service commission, *are entitled to hold their offices and employments indefinitely,* and are not subject to removal therefrom except for cause; * * *
>
> "It follows, therefore, that, as the office of warden of the county penitentiary in a county of the first-class is one the term of which is fixed and established by law, the incumbent thereof is not affected by the provisions of the civil service law, and cannot, by any action of the civil service commission, be retained in his office after the expiration of his fixed term."

In Attorney General ex rel. vs. Elliott, 77 N. J. L. 43, it is held:

"Section 2 of the civil service act of 1908 (Pamp. L., p. 235) refers only to officers whose term was not previously fixed by law.

"The classified service under the civil service act of 1908 (Pamp. L., p. 235) does not include officials with a fixed statutory term who are appointed by the board of chosen freeholders of a county."

Justice Swayze says at page 44:

"By section 12 the civil service commission is directed to arrange offices, positions and employments in the classified service in four classes, one of which is called the exempt class, in which appointments may be made without examination. Two other classes are called, respectively, competitive and non-competitive. In these classes appointments can only be made after an examination and section 2 enacts that officers, clerks and employes now in the employ of the state or any municipality adopting the act, shall continue to hold their offices or employments and shall not be removed therefrom except after a written statement of the reasons for removal and an opportunity to make a written answer, from which it may fairly be inferred that a hearing upon the charges is contemplated. The right of an officer to continue in his place indefinitely depends therefore upon whether he comes within the competitive or non-competitive class of the classified service, or whether he comes within the exempt class, and since the commission is authorized to change the classification from time to time as it deems proper the necessary result that the indefinite continuance in office of one, whose term has been definitely fixed by act of the legislature, is committed to the decision of the commission, which may vary it as it sees fit. * * * I have quoted section 2, which relates to removals, I think this section refers only to officers whose term was not previously fixed by law. It was this class which needed the protection of the act in order to secure them against removal for political causes. The word 'removal' naturally applies to one whose term is indefinite; it does not naturally connote the case of an officer whose statutory term has actually expired."

The act of New Jersey and that of Ohio are the only civil service laws which have provisions as to continuance in office. In the New Jersey act it is provided that,

"All officers * * * now in the employ of the state * * * coming within the competitive or non-competitive class of the civil service shall continue to hold their offices and shall not be removed therefrom except in accordance with section 24 hereof."

Section 24 is the same as section 17 of the Ohio act, except as above stated. Section 10 of the Ohio act provides that,

"The incumbents of all offices and places in the competitive classified service * * * shall * * * be subject to non-competitive examinations as a condition of continuing in the service."

And by virtue of section 2 of the Ohio act,

"No person shall be * * * removed * * * in any manner or by any means other than those prescribed in this act."

The manner of removal is fixed in section 17 which is the same as section 24 of the New Jersey act.

These provisions from the New Jersey act and the Ohio act are substantially the same. In New Jersey these provisions are construed to mean an indefinite term and they should have the same meaning in Ohio, as the Ohio act follows that of New Jersey.

It does not follow that in Ohio, as in New Jersey, where the statute fixes a definite term the position is taken out of the competitive class. The Ohio act does not follow New Jersey in this regard and this probably explains the phrase in section 17 of the Ohio act, "whether appointed for a definite term or otherwise."

In New Jersey the commission takes employes from the exempt class to the competitive and non-competitive class and by placing them in the latter class an indefinite term is fixed. And where the statute fixed a definite term there was a conflict between a statute and a rule of the commission. The statute, of course, in such case, controls, and the rule of the commission falls. That is the New Jersey ruling.

In Ohio the statute itself places the employes in the competitive classified service, and the only power of the commission is to determine whether or not it is practicable to determine merit and fitness of applicants by competitive examinations.

Therefore, if there is a conflict between the civil service act as to tenure, and a statute fixing a definite term, it is a conflict between two statutes and not a conflict between a rule of the civil service commission and a statute, as in New Jersey.

The principle upon which civil service is based is to take the appointment of employes from the "spoils system" and to secure for the public the benefits of experience and efficiency which comes from permanency in position and certainty of tenure. Whether or not these have been carried into law must be determined by the provisions of the civil service act.

In an early opinion in New York, Justice Peckham says at page 180 of Rogers vs. Common Council of Buffalo, 123 N. Y., 173:

"The full benefits of such a system have not yet, it is said, been given by the legislation in question because it does not go far enough. But it is claimed that even such as has been enacted tends to give permanency of tenure to the appointee, and thus to relieve him from constant anxieties as to his future means of livelihood, and to give him on that account more inclination and ambition to discharge his duties well and efficiently. As to the appointing power, it is also said that its tendency is to leave him at leisure to attend to the important duties of his own office without a constant drain upon his time and his temper in attending to the claims of office seekers."

And in People vs. McCullough, 254 Ill., 9, Justice Dunn says at page 25:

"The act provides for the classification of all offices and places of employment in the public service except those mentioned in section 11, the standardizing of employment in each grade, and the keeping of a record of the relative efficiency of each officer and employe in the classified service. It is based on the principle that positions in the public service are not the personal or political perquisites of any officer or party, and ought not to

be divided, after a political campaign, as so much loot of actual warfare, but that competency, merit and fitness ought to be the standard for all appointments or promotions in the public service."

The civil service act of Ohio contains the idea of securing the benefit of experience obtained in the public service when it provides for promotions in section 15 of the act. Also in section 16 wherein provisions are made for reinstatement where an employe becomes separated from the service without fault, or when the number of positions is reduced.

However, repeals by implication are not favored, and both the civil service act and the statute fixing a definite term should stand if possible. Judge Pugh has held that the two may stand together and that the civil service act does not change a term when fixed by statute.

Therefore, where the statute fixes a definite term, that is controlling and the civil service act does not continue the term of an officer or employe after the expiration of his term as fixed by statute. The vacancy created by the expiration of the term must be filled from the eligible list, if the position is in the classified service.

The right of an appointing power to fix the time of service, when the statute does not fix it, is based upon the principle that the appointee serves at the will of the appointing power. Under the civil service act the appointee does not hold at the will of the appointing power, but he is protected in his tenure by the civil service act, and he cannot be removed, except as therein provided.

Where an appointing power appoints for a definite term the conflict is between a statute, the civil service act, and the rule of an executive officer. In such case the statute must prevail.

If the civil service act does not make an indefinite term for all incumbents who were appointed prior to January 1, 1914, and whose terms were not fixed by statute, then it does not fix an indefinite term for those appointed after January 1, 1914, and the appointing power may still appoint for a definite term.

Such a ruling would nullify the provisions of the civil service act as to removals, as to promotions and as to reinstatements.

Therefore, where an employe has been appointed for a definite term fixed by contract or by the appointing power, and not by statute, such employe, if in the classified service, is continued in his employment for an indefinite term by the civil service act. His position is not vacant at the expiration of his term as fixed by contract or the appointing power.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1344.

RIGHT OF THE STATE LIQUOR LICENSING BOARD TO DESIGNATE ONE OF THE COUNTY LICENSING COMMISSIONERS AS SECRETARY OF THE COUNTY LIQUOR LICENSING BOARD.

The state liquor licensing board has the right to designate one of the county licensing commissioners as secretary of the county liquor licensing board in case the latter fails to appoint a secretary, and if such action be taken by the state board, it has the right to allow the commissioner who acts as secretary additional compensation for his services in the latter capacity.

A member of the county liquor licensing board, who has been designated by the state board as secretary of the county board, should give a separate bond as such secretary, in addition to that required of him as a member of such board.

COLUMBUS, OHIO, December 30, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of October 19, 1914, you write at follows:

> "In the event a county liquor licensing board does not deem it necessary to appoint a secretary for its board, and, in fact, does not make such appointment and the state liquor licensing board designates one of the members of said county board to act as its secretary, may such acting secretary draw a salary in addition to his compensation as a member of said board?
>
> "Must a member of a county board thus designated as secretary give a bond as such, in addition to the bond required of him as a member of said board?"

Your question is too vague definitely to answer without the assumption of certain facts which I have learned are correct, and to which I shall refer in this opinion. You have failed to state whether either the state board or the local licensing board has fixed any additional compensation, and consequently I do not see how the question of paying such compensation without its being fixed could arise. Therefore, I am assuming that the state board did provide extra compensation for the secretary of the local board.

Section 12 of the act to provide for license to traffic in intoxicating liquors, 103 O. L., 216, provides that the county board may appoint a secretary and fix his compensation, such appointment and compensation to be first approved by the state board. It is then said:

> "In the event no secretary is appointed, as herein proved, the state board shall designate one of the members of said county board to serve as secretary thereof.
>
> "Before entering upon his duties the secretary shall give a bond, payable to the state of Ohio, in the sum of twenty-five hundred dollars, with surety to the approval of the state board, the premium for which, if the same is a surety bond, shall be paid as other expenses of the board are paid."

Section 8 of the act requires the state liquor licensing board to fix the salary

of the county licensing commissioners subject to the approval of the governor, but in no case to exceed $5,000 per annum for each commissioner.

It is apparent from the foregoing that there is no statutory objection to the secretary being a member of the county board, but the statute seems to contemplate that when the county board appoints a secretary it must also fix his compensation; therefore, one would infer that when the appointment is not made by the county board it would not be authorized to fix compensation for an appointment made by the state board, which is to act in case the county board fails to appoint. As the state board has authority to fix the compensation of the members of the county board it would seem to follow that if it places upon one of those members the additional duties of secretary, it should also have the power to provide for additional compensation for the extra services performed. If the salary of the county licensing commissioners were definitely fixed by statute the result might be otherwise, but viewing the statute as a whole, and considering the broad powers vested in the members of the state board with reference to the fixing of this compensation it would seem that if the state board in its discretion decided that it was proper to fix additional compensation for the member who acted as secretary, such action on the part of the state board would be proper, and the person for whom extra compensation had been provided is entitled to receive the same.

As the duties of the licensing commissioners are separate and distinct from the work performed by the secretary, and as the secretary is required, under the quoted statute, to give bond, it seems that the member who is designated to act as secretary should give a separate bond as such, which is to be in addition to the bond required of him as a member of the board.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1345.

POWER OF JUVENILE COURT TO RECALL CHILDREN PREVIOUSLY COMMITTED BY IT TO A CHILDREN'S HOME—POWER OF TRUSTEES OF CHILDREN'S HOME TO REMOVE A CHILD FROM A FOSTER HOME.

The juvenile court can, at its pleasure, recall a child previously committed by it to a children's home, without any specific instructions as to future disposition of such child.

The juvenile court which has committed a child to the children's home, can recall such child after it has been placed in a foster home by the trustees, under section 3100, *General Code.*

The trustees of county children's homes may remove a child from a foster home without giving any cause for such removal to the foster parents.

COLUMBUS, OHIO, December 30, 1914.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 16, 1914, as follows:

"1. Can the juvenile court at its pleasure, recall a child which was

previously committed by that court to a children's home without any specific instructions as to the future disposition and who is still an inmate of such home? (See Sec. 1643.)

"2. Can the juvenile court which has committed a child as above recall the child after it has been placed in a foster home, as permitted by Sec. 3100 of the General Code?

"3. Have the trustees of a county children's home the legal right to remove a child from a foster home without giving any cause whatever for the removal to the foster parents?" (See Sec. 3096 and 3103.)

Section 1643, General Code, as amended, 103 O. L., page 869, reads:

"When a child under the age of seventeen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attains the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Section 1653, as amended, 103 O. L., 872, provides in part:

"Section 1653—When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held, * * *"

Section 3093, of the General Code, provides in part:

"Section 3093. All inmates of such home (the county children's home) who by reason of abandonment, neglect or dependence, have been admitted * * * shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home, until they are eighteen years of age, and if such child is placed out, indentured or adopted, such control shall continue until such child becomes of lawful age."

At first glance it might seem that section 3093, General Code, relates only to those children in the children's home who have been *admitted* by the trustees themselves and not to those children committed by the juvenile court. This theory, however, is dissipated by section 3090, General Code, as amended in 103 O. L., page 890, and reads in part:

"Section 3090. They shall be *admitted* by the superintendent on the order of the juvenile court or by a majority of such trustees, * * * *"

This section just quoted, clearly shows that in using the word "admitted" in section 3093 and in other sections of the county children's home chapter, as amended in 103 O. L., page 889 to 893, the legislature meant to include those children committed to the children's home by order of the juvenile court, as well as those admitted by order of the trustees.

It will be noted that section 3093, General Code, vests in the trustees of the county children's home the sole and exclusive guardianship of children "during their stay in such home" only. The juvenile court in committing children to the county children's home does not fix any definite time for them to remain there, and

inasmuch as section 1643, of the General Code, provides that "the power of the court, over such child, shall continue until the child attains such age," it is clear that if the court decides it is for the best interest of the child to terminate its confinement in such home, it may do so without invading in any manner the powers conferred upon the trustees with reference to such child.

I am, therefore, of the opinion, in answer to your first question, that the juvenile court can, at its pleasure, recall a child from the children's home which had previously been committed by it to such institution.

Answering your second question, section 3095 of the General Code, authorizes the trustees of the county children's home to place children in private families, and section 3096 provides in part "for the purpose of securing the well being and progress of such children in enforcement of the agreement, the trustees shall have control and guardianship of such children until they become of age." It is clear that the trustees of the home cannot grant to private individuals any greater authority over children so placed out than they themselves have acquired, and in view of my answer to your first question, it is my opinion in reply to your second question, that the juvenile court can recall a child from a private home in which it was placed by the trustees of the children's home.

In reply to your third question, I beg leave to call your attention to section 3098, General Code, which reads as follows:

> "The trustees shall visit, or cause to be visited, each child placed out by them, at least once in each year and as much oftener as the welfare of the child requires, until it is evident that it is permanently and happily established in such home, and thereafter such visits may be discontinued. The trustees may at any time vacate any agreement or indenture when the welfare of the child may demand it, and replace in another family home or return it to the institution."

From this section it is evident when the trustees deem it for the best interest of the child, they may withdraw such child from any private home without giving any reason to the foster parents for such action. If such foster parents or any other persons have reasons to believe that such transfer will militate against the child's best interests, the matter can be presented to the juvenile court if the child was committed by juvenile court. And that court can, if it sees fit, withdraw the child from the children's home and return it to the private home from which it was taken by the trustees. This by virtue of its power over such child, until it becomes of age, for the purpose of discipline and protection, and the authority of section 1653, General Code, which authorizes the juvenile court to place dependent and neglected children in "the care of some reputable citizen of good moral character."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1346.

VILLAGE AND TOWNSHIP TREASURERS CONTINUED TO ACT AS TREASURERS OF SCHOOL FUNDS UNTIL THEY ARE SUPERSEDED BY THE COUNTY TREASURER BY VIRTUE OF SECTION 4763, GENERAL CODE, MAY DRAW COMPENSATION FOR THEIR SERVICES.

Village and township treasurers continued to act as treasurers of the school funds of their respective village and township school districts until they were superseded by the county treasurer by virtue of section 4763, *General Code, as amended,* 104 *O. L.,* 159, *and such treasurers continued to draw whatever salary they were entitled to until so superseded by the county treasurers at the time said section became effective.*

The clerk of the school district, however, would continue to act as the treasurer of such village and township school districts if a depository had been previously provided and the treasurer dispensed with by the respective boards of education. Under said section 4763, *supra, the county treasurers continue to act as the treasurers of the respective village and rural school district funds until such time as a depository is established for such funds, in accordance with section* 4782, *General Code,* 104 *O. L.,* 159.

COLUMBUS, OHIO, December 30, 1914.

HON. JOHN J. WOOLLEY, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Under date of September 28, 1914, you submitted to this department for an opinion thereon, the following request:

> "I am in receipt of your copy of opinion rendered to Hon. Clare Caldwell, city solicitor of Niles, Ohio, in answer to his inquiry as to whether inserting the word 'shall' instead of 'may' in section No. 4782, leaves it optional with the board as to whether or not it shall dispense with the office of treasurer of village and rural boards of education.
>
> "My inquiry is if such boards have not by resolution dispensed with the treasurer, should present treasurers act and receive pay between the time that amended section 4782 (104 O. L., p. 159) became effective and the time the board passed its resolution as provided by amended section 4782 of the General Code of Ohio."

In reply thereto section 4763, General Code, as amended in 104 O. L., page 159, provides as follows:

> "In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Section 4782, of the General Code, as amended, 104 O. L., page 159, provides as follows:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members shall dispense with a

treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

By the provisions of the above sections, it appears that in all rural or village school districts which do not provide depositories in accordance with sections 7604 to 7608, inclusive, the county treasurer shall be the treasurer of the school funds of of such districts, and when a depository has been provided for the school money of the district, as provided by law, then the board of education by adopting a resolution to that effect, shall dispense with the treasurer of the school moneys belonging to said school district and in that case the clerk of the board of education shall perform the services required by law of the treasurer of such school districts.

Section 4763 prior to its amendments, provided that in each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. Where depositories had been established before the amendment of said section 4763 and 4782, then the clerk of the board of education would continue as such treasurer without any interruption, because of the enactment or passage of said sections. However, if no school depository had been established, then by virtue of the amendment of section 4763, in village or rural school districts, the county treasurer becomes the treasurer of the school funds and succeeds the village or township treasurer of such funds, as the case may be. It is still optional with a board of education as to whether or not it shall provide for a depository, and in such case, until a depository is provided for, then in such school district the city treasurer shall act as the treasurer of the school funds; and in village and rural school districts the county treasurer shall act as the treasurer of the school funds of such district. The act amending sections 4763 and 4782 was passed February 6, 1914, and filed in the office of the secretary of state February 19, 1914, and became effective ninety days after being so filed in the office of the secretary of state. Therefore, in all village and rural school districts which had not theretofore provided for a depository, the county treasurer became the treasurer of the school funds when said act became effective and would continue to act as such treasurer until such time as depositories are established for the school moneys of the respective village and rural school districts of the state.

In answer to your question, it is my opinion that village and township treasurers continued to act as treasurers of the school funds of their respective village and township school districts until they were superseded by county treasurers as hereinbefore pointed out, and they would continue to draw whatever salary they were entitled to until so superseded by the county treasurers. This applies, however, only to districts which had not previously provided a depository. Such county treasurers continue to act as the treasurers of the respective village and rural school district funds until such time as a depository is established for such funds, as herebefore stated.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1347.

THE WORD "TOBACCO" DEFINED.

The word "tobacco" as used in section 12965, General Code, includes chewing tobacco.

HON. W. G. PALMER, *City Attorney, Middletown, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of December 15th, wherein you request my opinion as to whether or not the word "tobacco" used in section 12965, General Code, includes chewing tobacco.

Section 12965, General Code, is as follows:

> "Whoever sells, gives or furnishes to a person under eighteen years of age a cigarette, cigarette wrapper or substitute for either, or a cigar or tobacco, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than two days nor more than thirty days, or both, and for each subsequent offense, shall be fined not less than fifty dollars nor more than three hundred dollars and imprisoned not less than five days nor more than sixty days."

The New Standard Dictionary defines tobacco as:

> "The leaves of the tobacco plant prepared in various ways for smoking, chewing, snuffing and for medical use."

The rule governing the interpretation of statutes is laid down in Black on interpretation of laws, page 45, as follows:

> "If the language of the statute is plain and free from ambiguity and expresses a single definite and sensible meaning, that meaning is conclusively presumed by the meaning which the legislature intended to convey, in other words, the statute must be interpreted literally. * * *"

I do not believe that section 12965 is ambiguous, consequently the word "tobacco" used therein should be given its ordinary meaning; giving it that meaning, it would include not only chewing tobacco but every form of tobacco not otherwise enumerated in the statute.

I am, therefore, of the opinion that the word "tobacco" used in section 12965, General Code, includes chewing tobacco.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1348.

ARTICLES OF INCORPORATION—THE AUTO INSURANCE COMPANY, NORWALK, OHIO.

The proposed articles of incorporation of The Auto Insurance Company, Norwalk, Ohio, not approved.

COLUMBUS, OHIO, December 31, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am unable to approve the proposed articles of incorporation of The Auto Insurance Company, of Norwalk, Ohio, enclosed herewith for the following reasons:

The company being not for profit, and having no capital stock, must be organized, if at all, under the provisions of sections 9593 and 9594, of the General Code. These sections do not authorize insurance against theft, insurance against loss by fire is authorized, but it is provided that the articles of incorporation of such a company shall specifically state that one of its objects shall be "to enforce any contract * * entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and the payment of losses which occur to its members."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1349.

AN APPLICATION BY OR ON BEHALF OF THE HUMANE SOCIETY FOR APPOINTING GUARDIAN UNDER SECTIONS 10081, ET SEQ., GENERAL CODE, IS A CIVIL AND NOT A CRIMINAL PROCEEDING —WITNESS FEES.

An application by or on behalf of a humane society for the appointment of a guardian under sections 10081, *et seq., General Code, is a civil and not a criminal proceeding, and witnesses subpoenaed to appear before the probate court in such proceeding, may demand their fees as in civil cases. If not demanded, or demanded and not paid, and no order is made by the probate court as to payment of costs, the witness is liable to lose his costs as in other civil cases.*

COLUMBUS, OHIO, December 31, 1914.

HON. H. C. WILCOX, *Probate Judge, Elyria, Ohio.*

DEAR SIR:—I have your letter of November 25, 1914, in which you inquire:

> "Will you kindly advise whether upon application by an officer of the humane society to the probate court for guardianship of a child, under sections 10081 et seq., of the General Code, there is any provision for the payment of fees of witnesses subpoenaed upon the hearing of such application?"

Sections 10081 and 10084 of the General Code, inclusive, to which you refer,

deal with the taking of a child from its parents by an officer or agent of a humane society and the appointment of a guardian for such child by the probate court.

Section 10081 reads:

> "When an officer or agent of a society organized under this chapter deems it for the best interest of a child, because of cruelty, inflicted upon it, or of its surroundings, that it be removed from the possession and control of the parents, or persons having charge thereof, such officer or agent may take possession of the child summarily."

Section 10076, reads:

> "For this service and for all services rendered in carrying out the provisions of this chapter, such officers, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs, and reimbursed to the society by the person convicted."

It will be observed that no provision is made for witness fees in the sections to which you refer, neither is there any general provision as to costs incurred in such cases.

Section 11204 provides that witnesses before the probate court shall have the same fees as witnesses in the court of common pleas.

Section 3012 fixes the fees of witnesses in civil cases and provides that they shall be paid on demand by the party who summons the witnesses.

Proceedings under sections 10081 to 10084 are not criminal actions but civil proceedings, and therefore the witnesses when called before the probate court under those sections, are entitled to the fees prescribed by section 3012. If the witnesses fail to demand their fees and there is no other made as to costs in the case, the witnesses lose their fees, just as in other civil cases.

I am of the opinion, therefore, that witness fees under the sections mentioned in your letter, are payable on demand by the person who asks the attendance of the witness, and if the witness fails to make a demand for payment in advance, there is no provision of law under which he can enforce payment.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1350.

ORDINANCE PROVIDING FOR A BOND ISSUE FOR INSTALLATION OF PURE WATER SYSTEM ORDERED BY STATE BOARD OF HEALTH, NOT SUBJECT TO REFERENDUM WHEN BOND ISSUE IS TO CARRY OUT AN ORDER OF THE STATE BOARD OF HEALTH.

When a city has been ordered by the state board of health to install a pure water supply, and the council, under the approval of the state board, determines to install a filtration plant, bonds may be issued for the purpose without submitting the question to a vote of the people.

An ordinance for such purpose would be subject to a referendum if the action of council was with respect to a matter as to whether council could make a choice of means; but if council's action was limited to carrying out a specific order of the board of health, without making a choice of means, the referendum would apply.

COLUMBUS, OHIO, December 31, 1914.

HON. E. W. NEWKIRK, *City Solicitor, Wooster, Ohio.*

DEAR SIR:—In your letter of November 25th, you request an early opinion on the following questions:

> "When a city has been ordered by the state board of health, under sections 1249 and 1261, General Code, to install a pure water supply, and the city council, under approval of the state board of health determines to install a filtration plant, has the city the right under section 1259, of the General Code to sell bonds for the purpose without submitting the question of issuing bonds to a vote of the people?
>
> "Also, would the ordinance therefor be subject to referendum vote on petition signed by the requisite number of voters?"

I regret that I was unable to give you an answer by return mail as you requested, but in view of your evident desire for haste I shall state my conclusions very briefly.

I am clearly of the opinion that under section 1259, General Code, a city may issue bonds for the purpose of constructing a filtration plant under an order of the state board of health and install a pure water supply without submitting the question to a vote of the people. Indeed the section expressly so states.

I am also of the opinion, on the facts stated by you that the ordinance in question would be subject to referendum vote. It is true that section 1259 states that "the question of the issuance of such bonds shall not be required to be submitted to a vote." However, this section was passed before the municipal initiative and referendum provisions were enacted. At that time the intention was to do away with the necessity of submission to a vote of the people arising out of the existence of certain debt limitations. The legislature did not have it in mind to exempt such questions from the operation of requirements like those which have been embodied in the municipal initiative and referendum statutes, because at that time such requirements were unknown. So that when the purpose and intent of the earlier provision is understood, it becomes clear that it is by no means inconsistent with the municipal initiative and referendum law, so that the effect of such inconsistencies need not be considered. Indeed, legislation which is subject to the

referendum is not *required* to be submitted to a vote of the people in the sense in which the term is used in section 1259, because it may be passed and become fully effective without such vote unless a referendum is ordered.

But I do not believe in every case the financial legislation necessary to carry out an order of the state board of health is subject to the referendum. It is only where, as in the case you submit, the state board of health has merely ordered the installation of a pure water supply without specifying the means that shall be used to this end; so that some choice in the matter is left to the legislative power of the municipality, that the power to order a referendum exists. In such case the people in my judgment, have the same right that the council has, viz., to choose either by initiative or referendum the appropriate agency for securing a pure water supply and complying with the order of the state board of health. Indeed, were the bonds to be issued merely for the general purpose of constructing a waterworks, I would hold that the ordinance issuing them would not be subject to a referendum at all, but inasmuch as the ordinance goes further and stipulates that the proceeds of the bonds shall be used in the construction of a *filtration plant,* thus making a choice of means, I would be of the opinion, as already stated, that the right to a referendum exists.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1351.

REGISTRAR OF VITAL STATISTICS SUBJECT TO PROVISIONS OF CIVIL SERVICE ACT—IN CLASSIFIED SERVICE—VILLAGE REGISTRARS NOT IN CIVIL SERVICE.

Local registrars of vital statistics in cities are in the employ of the state and are subject to the provisions of the civil service act. They are in the classified service and are under the jurisdiction of the state civil service commission.

Local registrars in village and townships are not subject to the civil service act for the reason that the statute makes the village clerks and township clerks the local registrars in their respective districts.

COLUMBUS, OHIO, December 31, 1914.

The State Civil Service Commission, Columbus, Ohio.

DEAR SIR:—Under date of December 22, 1914, you inquire:

> "Each city has a registrar of vital statistics who is primarily an employe of the city. We are informed that this registrar of vital statistics furnishes statistical information to the state of Ohio, for which information the county in which the city is located pays. Is he in the classified service?"

It appears from the letter of Mr. Keegan, attached, that in many cases the secretary of the city board of health, who is in the unclassified service of the city, is the local registrar of vital statistics. In other cases an employe of the city board of health, who is in the classified service of the city, is the local registrar by appointment.

Section 197, General Code, provides:

"A state system of registration of births and deaths is hereby established, which shall consist of a central bureau of vital statistics and primary registration districts. The central bureau shall be maintained at the capitol of the state. Each city, village and township shall constitute a primary registration district. The secretary of state shall have charge of such system, and general supervision of the central bureau."

Section 201, General Code, provides:

"In villages the village clerk and in townships the township clerk shall be the local registrar, and in cities the city board of health shall appoint a local registrar of vital statistics, and each shall be subject to the rules and regulations of the state registrar, the provisions of this chapter and to the penalties provided by law. With the approval of the state registrar, each local registrar shall appoint a deputy who, in case of absence, illness or disability of the local registrar, shall act in his stead. Acceptance of such appointment shall be in writing and such deputy shall be subject to the rules, regulations and provisions governing local registrars."

Section 230, General Code, provides in part:

"Each local registrar shall be entitled to be paid the sum of twenty-five cents for each birth and each death certificate properly and completely made out and registered with him, and correctly copied, and duly returned by him to the state registrar; provided, in cities, in which the local registrar receives a fixed salary, in lieu of fees, he shall be entitled to fees based upon a sliding scale, according to the population of the last federal census, and said local registrar shall be entitled to be paid the following fee for each birth and death certificate properly and completely made out and registered with him, and correctly copied and duly returned by him to the state registrar. * * * * * All amounts payable to registrars under provisions of this section shall be paid by the treasurer of the county in which the registration districts are located, upon certification by the state registrar. * * * * *"

By virtue of these sections the state is divided into registration districts, and a local registrar provided for each district. These local registrars, as such, are in the employ of the state and not of the city, village or township. The bureau of vital statistics is in charge of the secretary of state who is a state officer. These local registrars are not deputies, assistants, clerks or secretaries of principal executive officers or boards within the meaning of section 8 of the civil service act.

The statute makes the village clerks and the township clerks the local registrars for their respective districts. These clerks hold elective offices and are not therefore subject to civil service regulations.

In cities the city board of health is authorized to appoint the local registrars. The statute does not determine who shall be appointed but leaves the appointment to the discretion of the board. The board may appoint its secretary, or other employe, or it may appoint an outside person.

The fact that the present holders of these positions of local registrars are also holding positions in the classified or unclassified service of the city, does not alter

their status as state employes. They are in fact holding two positions and must secure a separate appointment to each.

As the local registrars of vital statistics in cities are in the employ of the state, they are subject to the provisions of the civil service act. They are in the classified service and are under the jurisdiction of the state civil service commission.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

1352.

BOARD OF TRUSTEES OF MIAMI UNIVERSITY—LEGAL TRANSACTION OF BUSINESS BY SUCH TRUSTEES.

But seven members of the board of trustees of Miami university are required to transact business legally.

Trustees of Miami university are not entitled to a per diem compensation, but are entitled to actual expenses incurred as trustees.

COLUMBUS, OHIO, December 31, 1914.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of January 19, 1914, you submitted to this office for a written opinion, the following request:

> "1st. How many members of the board of trustees of the Miami university are required to transact business legally? (See section 4, page 184, O. L., Vol. 7, and section 4, page 94, O. L., Vol. 8.)
>
> "2nd. Are the trustees of Miami university entitled to per diem compensation and expenses? (See O. L., 7, page 184, and Vol. 66, page 73.)
>
> "3rd. In the absence of statutory law or appropriations by the legislature, are they entitled to either compensation or expense actually incurred?"

The original act providing for the establishment of the Miami university, was passed by the state legislature on February 17, 1809, and is found in the seventh volume of Ohio Laws, 184. Said original act has been amended several times and the said amendments are found in the following volumes of the Ohio laws:

8 Ohio Laws, at page 94;
12 Ohio Laws, at page 83;
19 Ohio Laws, at page 140;
20 Ohio Laws, at page 51;
22 Ohio Laws, at page 68;
66 Ohio Laws, at page 73.

In the original enactment, 7 O. L., page 184, section 4 thereof provides as follows:

"Be it further enacted, That the said trustees shall have power and

authority to elect a president, who shall preside in the said university; and also to appoint a secretary, treasurer, collector, professors, tutors, instructors, and all such officers and servants in the university, as they shall deem necessary for carrying into effect the design of the institution, and shall have authority, from time to time, to establish the name and number, and prescribe the duties of all the officers and servants to be employed in the university, except herein otherwise provided, and may empower the president or some other member of the corporation, to administer such oaths as they shall authorize, for the good government and well ordering of the said university: Provided, *That no business of the corporation shall be transacted at any meeting, unless seven of the said trustees shall be present.*"

Said act was first amended on February 6, 1810, 8 O. L., page 94, and section 4 of said act so amending the original act to establish the Miami university, provides as follows:

"Be it further enacted, That the trustees shall meet at the town of Hamilton, in the county of Butler, on the first Monday of March next, for the purpose of carrying the provisions of this act into operation; *any five of whom shall have power to transact business, and any less number to adjourn from time to time.*"

The three subsequent amendatory acts do not contain any statutory provisions which in any wise affect section 4 of the original act, or section 4 of the first amendatory act which appears at page 94 of 8 O. L. In other words, these three amendatory acts contain provisions which concerned subjects other than those contained in the sections just mentioned.

The last act entitled an act "to amend the act establishing the Miami university, passed February 17, 1809, and of the several acts amendatory thereto," appears in the sixty-sixth volume of the Ohio Laws, at page 73. It is well at this point to note the title of this act in that it specifically says that it is an act to amend not only the original act establishing the Miami university, passed February 17, 1809, but also the several acts amendatory thereto. The last act changes the number of trustees constituting the board of trustees of the Miami university, and changes the method of their appointment by providing that such trustees shall be appointed by the governor rather than by the legislature. Section 1 of said act provides as follows:

"*Be it enacted by the General Assembly of the state of Ohio,* That there shall be hereafter twenty-seven trustees of Miami university. Immediately after the passage of this act, it shall be the duty of the governor, by and with the advice and consent of the senate, to appoint three trustees of said university to serve for three years, three trustees to serve for six years, and nine trustees to serve for nine years from the first day of March, 1869; who, with the twelve trustees whose terms of service have not yet expired, shall constitute the board of trustees of said university. As the terms of service of said trustees expire, the persons appointed in their place shall hold their offices for the term of nine years, and until their successors are appointed and qualified. In all other cases of vacancy, the person appointed to fill the same shall hold his seat until the term of the former trustee would have expired, and no longer."

It is to be noted that section 4 of said act specifically repeals the act passed

February 7, 1814, and so much of the act passed February 10, 1824, as regulates the appointment of trustees of said university. Nothing is said in the last act concerning the number of trustees that shall constitute a quorum.

Section 1 of said act quoted is carried into the General Code as section 7939 in the following language:

> "The government of Miami university shall be vested in twenty-seven trustees, to be appointed by the governor by and with the advice and consent of the senate. Nine trustees shall be apopinted every third year, for a term of nine years, beginning on the first day of March in the year of their appointment. Vacancies in the board of trustees shall be filled for the unexpired term in the same manner."

It is to be noted that section 4 of the original act (7 O. L., page 184) contains the specific provision "that no business of the corporation shall be transacted at any meeting unless seven of the said trustees shall be present."

The first act amending the original act (8 O. L., p. 94) was enacted by the legislature for the purpose of authorizing the trustees to lay off a town to be called Oxford. Such purpose is expressed in section 1 of said act in the following language:

> *"Be it enacted by the General Assembly of the State of Ohio,* That the trustees of the Miami university shall cause a town to be laid off, on such part of the land described in said act, as they may think proper, to be known by the name of Oxford; etc."

Again reverting to section 4 of said last mentioned act, which section is above quoted, it is to be noted that said section provides that the trustees shall meet at the town of Hamilton, county of Butler, on the first Monday of March next, *for the purpose of carrying the provisions of this act into operation,* and closes with the specific proviso that any five of such trustees shall have power to transact business and any less number to adjourn from time to time. By reason of the phraseology contained in the last mentioned section, it is apparent that the quorum therein fixed of five members applies only to the specific provision as expressed therein in section 1 of said act, to wit, for the purpose of establishing a town to be laid off and to be known as the town of Oxford. A quorum of seven members for the transaction of business of the corporation, as provided in the original act (7 O. L., p. 184) is for the transaction of the general business of the corporation. The provision for the transaction of business by five members as provided in section 4 of the first amendatory act (8 O. L., page 94) is for a specific purpose as above stated. Inasmuch as section 4 of the original act, supra, has never been changed, amended or repealed, I am therefore of the opinion, in answer to your first question, that seven members of the board of trustees of the Miami university are required to transact business legally.

I find no statutory provision that warrants the payment of a per diem compensation to the trustees of said Miami university. As to actual expenses, however, I am of the opinion that such trustees are entitled to such expenses incurred in performing the duties imposed upon them by the trusteeship.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1353.

COUNTY BOARD OF EDUCATION WITHOUT AUTHORITY TO DIRECTLY DISSOLVE RURAL TOWNSHIP SCHOOL DISTRICT AND ATTACH TERRITORY TO VILLAGE DISTRICT.

County boards of education do not have the power under section 4736, General Code, as amended, 104 O. L., 138, to directly dissolve a rural township school district and attach the territory of the same to a village district lying within such rural township school district.

A rural school district, or a portion of the same, may be detached and attached to an adjacent district or adjacent districts in the manner discussed in the answer to the second question.

County boards of education are not empowered to transfer territory from an established rural township school district to an established village district, and thereby leaving the township school district of an area materially less than fifteen square miles, but such board must add territory to such township rural district so that its area will be at least not less than fifteen square miles.

COLUMBUS, OHIO, December 31, 1914.

HON. IRVING CARPENTER, *Attorney at Law, Norwalk, Ohio.*

DEAR SIR:—Under date of August 31, 1914, you submitted a communication to this department containing three requests for an opinion thereon, as follows:

> "1. Has a county board of education power to dissolve a rural township school district and attach the territory of such district to a village district lying within such rural township school district?
>
> "2. If so, what procedure should be followed to effect such transfer?
>
> "3. Does section 4736 empower a county board of education to transfer territory from an established rural township school district to an established village district, leaving the township district of an area materially less than fifteen square miles?"

Section 4735 of the General Code, as amended 104 O. L., at page 138 thereof, provides as follows:

> "The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

I assume at the outset that the village school district referred to in your inquiry relates to a village district which constitutes part of the county school district and is under the control of the county board of education.

Analyzing said section, it is to be noted that its provision is clear that present existing township and special school districts shall constitute rural school districts until *changed* by the county board of education. The word "change" as employed therein, does not necessarily mean to abrogate or dissolve such districts, but merely means that such districts may be changed only. This view is strengthened by the language employed that such existing township or special school districts shall constitute rural school districts; that is to say, they shall continue as rural

school districts as they existed at the time of the adoption of said section, and shall so continue to exist until such time as the county board of education sees fit to change them. It does not seem that the language so employed in said section is sufficient to authorize the board of education to dissolve or abrogate such districts.

Section 4736 of the General Code, as amended 104 O. L., page 138, provides as follows:

> "The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

It is to be noted that this section concerns only the right to change school district lines and transfer territory from one rural or village school district to another. Such county board can so change the district lines and transfer territory from one rural or village school district to another for the purpose of arranging school districts according to topography and population, in order that they may be most easily accessible to pupils. There is absolutely no mention of the power or authority to entirely dissolve or abrogate a school district in said section 4736, supra. The methods provided for dissolving rural districts and joining same to other contiguous districts, are provided for in section 4735-1 and 4735-2 of the General Code, respectively, as amended in 104 O. L., page 138. Said sections respectively provide as follows:

> "Section 4735-1. When a petition signed by not less than one-fourth of the electors residing within the territory constituting a rural school district, praying that the rural district be dissolved and joined to a contiguous rural or village district, is presented to the board of education of such district; or when such board, by a majority vote of the full membership thereof, shall decide to submit the question to dissolve and join a contiguous rural or village district, the board shall fix the time of holding such election at a special or general election. The clerk of the board of such district shall notify the deputy state supervisors of elections, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in given public places within the district. The result shall be determined by a majority vote of such electors.
>
> "Section 4735-2. The legal title of the property of the rural school district, in case such rural district is dissolved and joined to a rural or village district as provided in section 4735-1, shall become vested in the board of education of the rural or village school district to which such district is joined. The school fund of such dissolved rural district shall become a part

of the fund of the rural or village school district which it voted to join. The dissolution of such district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

Therefore, in answer to your question, I am of the opinion that a county board of education has not the power to dissolve a rural township school district and attach the territory of the same to a village district lying within such rural township school district, but that such dissolution must be accomplished in the manner provided for in sections 4735-1 and 4735-2. This answer to your first question, also answers your second. However, a rural school district, or a portion of the same may be detached and attached to an adjacent district or adjacent districts in the manner hereinafter discussed.

Now answering specifically your third question, it is not necessary to further analyze said section 4736, supra. All the powers vested in and that may be exercised by a county board of education, are subject to the limitation that in no case shall any rural district be created containing less than fifteen square miles.

As heretofore pointed out, the county board of education can make a survey of its district, arrange the schools according to topography and population in order that they may be most easily accessible to pupils, change school district lines and transfer territory from one rural or village school district to another; may proceed without regard to township lines, shall provide that adjoining rural disticts are as nearly equal as possible in property valuation, and may ask the assistance of the county surveyor by formal request, in doing same.

It is clear under section 4735, supra, that present existing township and special school districts shall constitute rural school districts until changed by the county board of education. It is also clear under section 4736 that a county board of education can take territory from an existing district of less than fifteen square miles, and attach it to an adjacent district, thereby making the district to which such territory is attached, of larger area than fifteen square miles; but in order to avoid leaving the other remaining district less than fifteen square miles, it then seems to devolve upon such county board to add to the latter district sufficient territory from one or more adjacent rural districts so as not to leave the latter less than fifteen square miles. Or, if this is not done, to add such latter or remaining district to an adjacent rural district or adjacent rural districts, so as to avoid said limitation contained in said section 4736, supra. However, if such county board has the power to take part of a district in changing rural district lines, why, therefore, cannot it take all of the territory so long as such heretofore mentioned limitation is avoided? In fact, the only way in most instances that a county board can exercise its powers as enumerated in said section 4736, supra, and also avoid the limitation as therein enumerated, it is absolutely necessary to work out the readjustment of rural district lines in some such manner as hereby pointed out.

Therefore, in direct answer to your third question, it is my judgment that a county board of education cannot transfer territory from an established rural township school district to an established village district, thereby leaving the township district of an area materially less than fifteen square miles, but that such county board must further readjust rural district lines and add territory to the resulting township district so as to make this district of an area of not less than fifteen square miles, when territory is so transferred from such township rural district to an established village district.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1354.

COUNTY COMMISSIONERS MUST PROVIDE SUITABLE CASES FOR SAFE KEEPING AND PRESERVATION OF BOOKS—ALSO FURNISH NECESSARY STATIONERY TO PROBATE JUDGE.

Under section 1583, *General Code, it is incumbent upon the county commissioners to provide suitable cases for the safe keeping and preservation of the books and also to furnish such blank books, blanks and stationery as the probate judge requires in the discharge of his official duties.*

Under section 1595, *General Code, it is the duty of the county commissioners to furnish blank books for keeping the records enumerated in section* 1594, *General Code.*

COLUMBUS, OHIO, December 31, 1914.

HON. WILLIAM MOFFETT, *Probate Judge, Carrollton, Ohio.*

DEAR SIR:—Under date of December 10, 1914, you submitted a request to this department as follows:

> "The commissioners of Carroll county passed a resolution and placed same upon their journal, requiring any county official before purchasing any stationery or blanks for his particular office to first obtain a requisition from them in writing, signed by at least two of their number so to do.
>
> "What I want to know is, if such a resolution is binding on me as probate judge, or can I proceed and purchase the necessary stationery, blanks, etc., for my office without obtaining such requisition and bind the county for payments?"

Replying thereto, section 1583 of the General Code, provides as follows:

> "A probate court is established in each county which shall be held at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners shall provide suitable cases for the safe keeping and preservation of the books and papers of the court, and furnish such blank books, blanks and stationery as the probate judge requires in the discharge of official duties."

Section 1594 provides what books shall be kept by the probate court. Section 1595 of the General Code provides that county commissioners shall furnish certain blank books, etc., as follows:

> "To each record required by the preceding section, an index shall be attached securely bound in the volume. Each index shall be kept up with the entries therein and refer to such entries alphabetically by the names of the parties or persons in which originally entered, indexing the page of the book where the entry is made. On the order of the probate judge, blank books for such records and indexes shall be furnished by the county commissioners at the expense of the county."

By virtue of section 1583, supra, it is incumbent upon the county commissioners to provide suitable cases for the safe keeping and preservation of the books and

also to furnish such blank books, blanks and stationery as the probate judge requires in the discharge of his official duties.

Under section 1595, supra, it is clearly the duty of the county commissioners to furnish blank books for keeping the records enumerated in section 1594, together with proper indexes. While it is the mandatory duty of the commissioners to furnish such books, papers, blanks, stationery, etc., as specified in said sections, nevertheless the method or manner of furnishing the same, I take it, is left to the discretion of the county commissioners. The commissioners may desire to maintain a check upon expenditures, as a matter of business policy, and inasmuch as it is their duty to furnish such books, blanks and papers, I can see no objection to their adopting such methods as will enable them to better maintain such check as a matter of business.

Therefore, in direct answer to your inquiry, I am of the opinion that the county commissioners can legally adopt such resolution as stated in your letter of inquiry, and that the same is binding on you as the probate judge of your county.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1355.

WHEN A SCHOOL MAY BE SUSPENDED BECAUSE THE AVERAGE DAILY ATTENDANCE DURING THE PRECEDING YEAR WAS LESS THAN TWELVE.

When a school has been suspended because the average daily attendance during the preceding year was less than twelve, in accordance with section 7730, General Code, as amended, 104 O. L., 139, and the territory comprising said district has been annexed to a contiguous district, then the board of education would be compelled to furnish conveyance or transportation to such pupils in accordance with the provisions of section 7731, and such board will be required to transport or furnish conveyance only to those pupils residing in such suspended district who live more than two miles from the school to which they are assigned.

COLUMBUS, OHIO, December 31, 1914.

HON. ALLEN THURMAN WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Under date of December 23, 1914, you request of me an official opinion, as follows:

> "1. Under section 7730 and 7731, General Code, where a school has been suspended because the average daily attendance during the preceding school year was less than twelve, and the territory comprising said district has been annexed to contiguous districts, is the board of education compelled to transport all pupils within the suspended district regardless of the distance they may reside from the school to which they are assigned, or is the board required to transport only those pupils residing in such suspended district where they live more than two miles from the school to which they are assigned?"

Replying thereto, section 7730, of the General Code, as amended, 104 O. L., page 139, provides as follows:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide and in such rural school districts shall provide for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district."

Section 7731, of the General Code, as amended, 104 O. L., page 140, provides as follows:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residence of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

Analyzing said sections, I find in the first part of section 7730 that the board of education of any rural or village school district may suspend any or all schools, in such village or rural school district. Immediately following said provision, I find the further provision that upon such *suspension* the board in such village school district may provide and such rural school district shall provide for the conveyance of pupils attending such schools to a public school in the rural or village district, or to a public school in another district. Following these provisions, there then follows a further provision to the effect that when the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the board may direct.

There is no reference in said section relating to or requiring conveyance when a school is suspended, because the average daily attendance of any school for the preceding year has been below twelve. The provisions as to conveyance in said section relates only to the occasion when the schools are suspended by the board of education.

Said section 7731 provides in effect that in all rural or village school districts, where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such schools, and that transportation for pupils living less than two miles from the school house by the most direct public highway, shall be optional with the board of education. It would seem to follow, therefore, that when a school has been suspended because the average daily attendance during the preceding year was less than twelve, and the territory comprising said district has been annexed to a contiguous district, then

the board of education would be compelled to furnish conveyance or transportation to such pupils in accordance with the provision laid down in section 7731, supra. That is to say, such board would be required to transport or furnish conveyance only to those pupils residing in such suspended district who live more than two miles from the school to which they are assigned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1356.

REPEAL OF SPECIAL ASSESSMENT LEGISLATION FOR IMPROVEMENT OF STREETS—UNLAWFUL TO USE MONEYS DERIVED FROM SALE OF BONDS FOR SUCH IMPROVEMENT.

The repeal of the special assessment legislation for the improvement of a street makes it unlawful to use moneys derived from the sale of bonds for the city's share of such improvement, if the same have been issued under section 3821, *General Code, and not if the same have been issued under section* 3939, *General Code.*

COLUMBUS, OHIO, December 31, 1914.

HON. C. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under date of December 18th, you requested my opinion upon the following question:

> "In August, 1912, a resolution, based on plans and specifications on file and approved, was offered in council, to pave Simpson street with concrete. Notice was given the property owners that this street was so to be constructed of concrete, and resolution was published. No objections were filed or claims made for damages. After the proper time had elapsed an ordinance was passed to proceed with the improvement, and bonds sold to pay the *city's share* of the cost, and those funds deposited to the credit of this fund.
>
> "For several reasons the construction of the street has been delayed to this time and now a new council has been elected.
>
> "It is now proposed to repeal all the legislation for the construction of this street; start in with new resolution and new ordinance, and pave the street with another material. There is no doubt of the right to repeal all the legislation of the former council, but the question now comes up, can the director of public service give an order, and can the city auditor issue warrant for the payment of the construction of pavement on the same street, but of different material than that which the bonds were sold to build?
>
> "The bond ordinance recites, among other things, the purpose of the issue and sale of the bonds, and the proceeds shall be used for no other purpose. Does the repeal of the legislation to build a concrete street, by implication, repeal and annul the right to use this fund for the construction of pavement on the same street but of a different material?"

I am afraid I cannot give you a very positive answer to this question. Had the outstanding bonds been issued in anticipation of the collection of special as-

sessments, the answer would be clear. In that event, I would be of the opinion that the repeal of all of the legislation looking toward the improvement would make it unlawful to use the proceeds of the bonds for the purpose of another improvement of the same street, and the only thing which could be done with such proceeds would be to pay them into the sinking fund where they should be made to accumulate in order to retire the bonds as they might fall due.

But the power of a municipal corporation to issue bonds to pay its proportion of the total cost of a given improvement is not so intimately connected with the legislation made necessary by the intention to assess the remainder upon the abutting property. A city may, if it desires, pay the entire cost of paving a street by general tax levy, and issue bonds therefor. In that event, various measures and ordinances necessary to complete a valid assessment need not be enacted at all. The bond ordinance in such a case may be the initial one. (Trust Company vs. Cleveland, 1 N. P. n. s., 493.)

Even when the improvement of a street by special assessments is contemplated, provision for the payment of the proportion of the cost of the expense thereof, which the city intends to assume, may be made by the issuance of bonds under section 3939, General Code, by a separate and independent proceeding. It was held in the sixth paragraph of the syllabus in Heffner vs. The City of Toledo, 75 O. S., 413, that under section 2835, Revised Statutes (now section 3939, General Code), the council of the city may by a resolution or ordinance, passed by the affirmative vote of not less than two-thirds of the members elected or appointed thereto, provide for the issuing of bonds to pay the city's part of the cost of a specific improvement before the passage of a resolution declaring the necessity for the improvement. The court, in the syllabus and in the opinion in the case cited, seems to distinguish between the nature of the power granted under section 3821, General Code, to "issue and sell bonds * * * to pay the corporation's part of any such * * special assessment and improvement," and the general power of borrowing money, possessed under the Longworth act, section 3939, et seq., General Code. In fact, the distinction seems to be drawn so as to be directly in point in determining the answer to your question. As stated by Summers, J., at page 430:

> "If this (referring to what is now section 3821, General Code,) was the only authority to issue bonds for this purpose, it might be that there was power only to meet the city's part of the cost * * and, as the latter could not be made until an ordinance to proceed with the improvement had been passed, that counsel's contention is sound that is a prerequisite to the issuing of the bonds. But, as has been shown, the authority already existed in the Longworth law, and the provision in section 53 is not to be construed as limiting the power conferred by the Longworth law, but as a grant of additional power. Attention to the provisions of the Longworth law will disclose that, as there conferred, the power was not limited to the issuing of bonds to pay the city's part of the cost of improvements that had been provided for by ordinance, but might be exercised when they were merely contemplated. It was not necessary that a resolution should have been passed declaring the intention to make the improvement, but the statement in the ordinance providing for the bonds, that they were to be issued for a specific purpose, was sufficient evidence of the intention."

Accordingly, I am of the opinion that if the bonds, of which you speak, were issued under section 3821, General Code, the power to issue them depends upon the existence of legislation looking toward an assessment, so that the repeal of such legislation would impliedly work a repeal of the ordinance issuing the bonds, in so far

as the same constitutes authority to use the bonds for the purpose for which issued; and that in such event the proceeds of the bonds would have to be paid into the sinking fund, in the manner already described; but if the bonds were issued under section 3939, General Code, the repeal of the assessment legislation would in nowise affect the status of the proceeds of the bonds issued and sold thereunder, and the fund could be maintained intact until subsequent legislation looking toward an assessment had been perfected and the proceeds applied to the payment of the city's portion of the total cost of the improvement when made.

The proceedings of the council will readily show, I think, whether or not the bonds were issued under section 3821 or under section 3939, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1357.

AMENDMENT TO ARTICLES OF INCORPORATION OF ABSTRACTING COMPANIES IN ORDER TO FORM TITLE GUARANTEEING AND TRUST COMPANIES—SUCH AMENDMENT NOT PERMISSIBLE—RULE.

Inasmuch as many title guarantee and trust companies have become such by amendment to the articles of incorporation of abstracting companies, the same rule should be followed in the future although technically such an amendment is not permissible.

COLUMBUS, OHIO, December 31, 1914.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have verbally resubmitted to me the question considered by me in my opinion to you under date of June 26, 1914. The question is as follows:

> "May a corporation organized with original power to promote the purpose 'of searching land titles and land and other records; preparing, procuring and furnishing abstracts and certificates of title to real property; preparing, procuring and furnishing abstracts and certificates of title to bonds, mortgages and other evidences of indebtedness and affecting investments in the same; purchasing and owning real estate as a place for carrying on its business, and doing any and all things necessary or incidental to such business' by amendment to its articles of incorporation acquired power to guarantee titles?"

In the former opinion referred to I gave a negative answer to this question. As the opinion itself discloses I then considered and still consider the question to be a very doubtful one. Nevertheless, upon a careful reconsideration of the question as an abstract proposition of law, I incline to the same view which I expressed in the other opinion.

However, other considerations have been suggested to me which make the ultimate question to be decided somewhat different from the one which was then considered. It appears that section 9850, of the General Code, which was interpreted in the former opinion, and which defines the powers of a title guarantee and trust

company, was passed in 1902, prior to which date, of course, there were no companies of this class in Ohio. At that time there were in existence companies organized as abstracting corporations under charters similar to that considered by me in the former opinion. These companies, of which there were not many in the state, were permitted, without question, to acquire the newly created franchise by amendment to their several articles of incorporation. In this way, a majority, if not all of the title guarantee and trust companies now doing business in this state acquired their present charter powers.

It is true, as a general rule, that when the law is plain, an erroneous official interpretation thereof by administrative officers whose duty it is to apply it will not be binding upon the courts nor even upon the successors of such administrative officers; but where the question is doubtful, as it is in this case, facts like those which I have stated are entitled to some weight even in a court, and in my judgment should be given great and determining weight from the administrative point of view. To deny to the particular company which now seeks to amend its articles of incorporation in the manner referred to, the privilege of doing what other companies in a similar situation have been permitted to do, would be to impose a hardship upon that company which could scarcely be justified unless the former administrative rulings had been clearly and palpably erroneous. Moreover, while it is quite proper from the viewpoint of the state, which would have the right to question the exercise of ultra vires powers, for the secretary of state to decline to file articles of incorporation or an amendment therto which attempted to confer powers greater than those authorized by statute to be conferred upon a given corporation, yet it must be admitted that the issuance by the secretary of state of a certificate of incorporaion or amendment confers but the color of authority upon the corporation; so that if the exercise of a given franchise is properly questioned either by action brought in the interest of the dissenting stockholders or on the relation of the attorney general in proceedings in quo warranto, the validity of the charter as a whole or the amendment thereto may be determined by the courts notwithstanding the issuance of your certificate.

These considerations then bring me to the conclusion that in a case like this where other corporations have been permitted without question to do that which the particular corporation now desires to do, and the question is doubtful, the ultimate decision should be left to the courts or to the legislature; and while courts might be called upon to act by proceedings in mandamus to compel the secretary of state to issue a certificate as well as by proceedings in quo warranto or by action of dissenting stockholders, yet the administrative officers of the state would be justified morally and legally in following the procedure laid down by the previous action of the state officers in similar cases.

I am, therefore, of the opinion that the certificate of amendment presented to you, and upon which my opinion of June 26, 1914, was rendered, should be filed in your office notwithstanding that I incline, as already stated, to adhere to the technical view of the law expressed in that opinion. The case affords an instance wherein substantial justice is to be preferred to the observance of the technicalities.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1358.

WHEN A CORPORATION GOING OUT OF BUSINESS IS NOT LIABLE FOR EXCISE TAX.

An express company, which goes out of business on midnight of June 30th in a given year is not liable for excise taxes on the basis of its report of gross receipts for the year ending on that date.

COLUMBUS, OHIO, December 31, 1914.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 14th requesting my opinion upon the following facts:

"The United States Express Company within the time limited by section 5449, General Code, filed with the commission a statement of its property and business in this state and elsewhere, setting forth various items specified in section 5450, General Code. That is to say, among other things the statement filed by the company exhibited the value of the property in Ohio as of the thirtieth day of June, 1914, and the company's gross receipts from intrastate business in Ohio for the year ending on said date.

"The company's report, however, (or else an informal statement made by the company to the commission) advised the commission that the company went out of business at midnight on the thirtieth of June, and that since that date up to the time of filing the report, the company had done no business in Ohio or elsewhere, and did not intend to carry on the express business in the future at all.

"Thereupon in September the commission assessed the value of the property of the company on the basis of the statement above referred to, and about the same date ascertained and determined from said statement the gross intrastate receipts of the company for business done for the year ending on the thirtieth day of June as authorized and required seemingly by section 5477, General Code. Thereupon on or about the first Monday of October the commission certified its determination to the auditor of state, and in due course of events the auditor of state computed 2% taxes upon the amount so determined and certified the same for collection to the treasurer of state.

"The company admits the propriety of assessing its property as that of an express company on the basis of the statement above referred to, and its obligation to make the report which it did make for the purpose of such assessment, but claims that it is not liable for any excise taxes for this year because it ceased to do business at midnight on the thirtieth of June, 1914, has not done business in the state since that date, and has gone out of business altogether.

"Is the excise tax properly charged against the company on the facts stated and what should be the commission's course in the matter?"

I may say by way of preface to the discussion of the main question that the company was, as it concedes, certainly under obligation to make the report in question; and that the commission certainly had the right, and it was its duty to assess its property as that of an express company for simple taxation upon the various duplicates for the year 1914-1915.

Express companies, together with telephone and telegraph companies are placed in a class by themselves for the purpose of making reports to the tax commission. Other public utilities, except sleeping car, freight line and equipment companies are required to make two reports to the commission, one relating to property and the other relating to receipts or earnings; the property report being used as the basis of the property assessment and the receipts or earnings report being used as the basis of the determination of the excise tax. Express, telephone and telegraph companies, however, are authorized and required by law to combine these two reports in one, and with respect to express companies at least some of the facts which are used by the commission in ascertaining property valuations are also used in determining the basis of the excise tax, for section 5450, prescribing the form of the report, requires express companies to report not only an inventory of their real and personal property within and outside of Ohio, a statement of the market value of their shares of stock and the amount of their bonded indebtedness, but also the gross intrastate receipts in Ohio and the gross receipts from whatever source of each office in the state. The receipts are used in making the apportionment of the property valuation in the following manner: The value of all the property of the company is divided between Ohio and the rest of the world, so to speak, upon the basis of the length of lines of rail and water routes over which the company did business on the thirtieth day of June, in Ohio as compared with the total length of such routes everywhere; but the basis of apportionment of this value *in Ohio* among the various taxing districts therein is the relative amounts of the receipts of the offices of the company in Ohio. (Section 5457, General Code.)

It is true that no use in arriving at property valuations or apportionment can be made of the gross *intrastate* receipts as such. So that the company might, to be perfectly consistent, have insisted upon the right to omit from its statement a report of such receipts as are required generally by paragraph 15 of section 5450, General Code. But this consideration is immaterial and the fact that the company actually reported its gross intrastate receipts does not in the view which I take of the case estop it from disclaiming liability for excise taxation; while on the other hand the fact that there was but a single report or statement to be made, and that statement was required of all companies subject to the obligation to report for any purpose whatever, affords, to my mind, a sufficient reason for the company's action in including in its report or statement the amount of its gross intrastate receipts.

The report then being properly made and before the commission, together with the information therein, or otherwise conveyed to the commission, that the company went out of business at midnight on the thirtieth day of June, what were the powers and duties of the commission in the first instance with respect to the ascertainment of the gross receipts of the company for the year ending on that date, and the certification thereof to the auditor of state?

This inquiry requires consideration of the fundamental nature of the excise tax and the identification of the exact subject of that tax.

On their face the sections providing for the exaction of the excise tax bear evidence which is material in the solution of these questions.

Section 5485 describes the tax which is to be charged for collection upon the basis of the gross receipts of an express company for a year ending on the thirtieth day of June as "an excise tax for the privilege of carrying on its intrastate business."

So that it is apparent that the receipts themselves are not taxed as property, but are merely used as the basis of the tax upon a privilege. The privilege is that of carrying on a certain kind of business in the state. Now at this point a sharp distinction must be made I think between occupation income taxes on the one hand and privilege taxes on the other hand. An occupation income tax is laid upon re-

ceipts of persons pursuing the occupation as such, and upon the theory that the conduct of the occupation is a natural right and is not controlled as such by the legislative power; privilege taxes are essentially license taxes. (Cooley on Taxation, Vol. 1, p. 31.)

As said in Bank vs. Apthorp, 12 Mass., 252, when a tax is laid upon a privilege the legislature has in effect "assumed a right to sell" the privilege at a reasonable price. (See Southern Gum Co. vs. Laylin, 66 O. S., 576.)

The fact that a privilege tax assumes the form of an excise rather than a license does not change its fundamental nature. The effect is the same. Ordinarily a license fee is exacted as a condition precedent to the doing of the thing in the future, but this is not necessarily the case. It may be conceded that the privilege may be taxed after its exercise if the law will bear that interpretation, or that the privilege may be valued and taxed as a thing in being on a certain day, subject to indefinite prolongation rather than as the privilege of doing the thing contemplated for any definite period of time, as a year.

But when the privilege tax assumes the form of an excise it is manifest that it must be based upon *past* receipts, income or other ascertainable facts. So that the mere fact that such is the case does not establish the conclusion that the privilege is taxed after its exercise rather than as a condition precedent to its continued exercise.

There are other sections of the related statutes which seem to indicate that the subject of taxation in this case is the privilege of doing business in the future rather than the already exercised privilege of doing business in the past. I refer generally, without quoting them, to sections 5509 and 5512, General Code, which provide for the cancellation of articles of incorporation of incorporated public utilities, and for injunction to restrain doing business on the part either of incorporated or unincorporated public utilities, as means for enforcing compliance with the taxation laws. But these sections to my mind are not conclusive because they afford remedies for the violation of other provisions of the act which relate to property taxation as well as for the enforcement of those provisions which relate to excise taxation.

The most satisfying test, I think, for determining whether the privilege taxed, is that of continuing in business or that of connecting business already transacted, is afforded by the legislative history of the act rather than by anything fully apparent on the face thereof. If when the law went into effect it required a report of gross receipts for the past year on the basis of which a tax was then immediately to be laid, a strong presumption would be afforded to the effect that the subject of the tax was intended to be the privilege of conducting the business for the succeeding year. If, on the other hand, when the law was enacted its effect was postponed so as not to require the making of a report and the payment of taxes, based upon the receipts reported, until after the expiration of a year from the date when the act became effective, then a contrary presumption would be suggested. For it is at least not reasonable to assume that the legislature would in the first instance declare that to have been a privilege and tax it as such, which had been exercised without any idea of privilege. That is to say, if at a given time an express company had been doing business in this state for a period of one year, say, and if prior to the expiration of that year the legislature declared that the express business in this state constituted a privilege, and imposed a tax upon it as such, based upon receipts for the past year, a constitutional question would be suggested as to whether or not that could be taxed as a privilege which has been exercised as a matter of common right.

The present tax upon the privilege of carrying on intrastate express business in Ohio was enacted in 1911, 102 O. L., 224. It became effective on or about the

first of June, 1911, and required, as has been stated, reports to be made on the first of August "annually" of the business done for the year ending on the thirtieth day of June next preceding. That is to say, standing by itself, this law was passed and became effective near the end of the "year ending on the thirtieth day of June" and required that in that year there be reported gross receipts upon the basis of which a tax for the privilege of doing business was to be assessed. If this law, standing by itself, were to be interpreted as declaring that the express business done during the year then about to end was a privilege, and if there had been no prior law of a similar nature, then the fundamental and constitutional question above referred to would immediately arise.

But the law of 1911 was a mere revision of the preceding law of 1910, 101 O. L., 399, known as the "Langdon law." This act was passed May 10, 1910, and went into effect by its own terms on July 1st, 1910.

Section 47 of that act, 101 O. L., 409, provides that

> "Each public utility except railroad companies doing business in this state shall, annually, on or before the first day of August * * * make and file with the commission a statement * * *."

Section 49 of the same act provided as follows:

> "In the case of express companies, such statement shall also contain the entire receipts, including all sums earned or charged, whether actually received or not, for business done within this state, giving the name of the office, for the year then next preceding the first day of May, for and on account of such company including its proportion of gross receipts for business done by such company within this state in connection with other companies, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. * *"

The sections of the act of 1910 corresponding to those of the General Code with respect to the determination by the commission in the month of September, the certification by it of its determination to the auditor of state, the computation by that official of the amount of the tax, etc., were substantially the same as those of the present law, and section 63 of the act of 1910 characterizes the nature of the tax in the same words as are now used in section 5485, General Code.

Without going into a detailed statement of the legislative history it may be sufficient at this time to state that the act of 1910 may be regarded as the first tax ever imposed upon the particular privilege in question. Prior to that time there had been an excise tax on express companies, but the same was based upon the entire receipts from business done in Ohio without any deductions, and presumably the privilege, whether anticipatory or not, was that of doing business in Ohio generally as distinguished from doing an intrastate business in this state.

The interesting point which is disclosed by comparison of the law of 1910 with that of 1911 is that under the former the year in question began on the first of May, while in the latter the year ended on the thirtieth of June. While this point may be material, I do not rely on it in support of the conclusion at which I have arrived.

It is clear that the law of 1910, considered as an initial act, so to speak, required that about a month after it should take effect, viz., July 1st, 1910, a report should be made by each express company of its business done during the year ending on the *preceding* thirtieth of April, and that on the basis of such a report a tax should be assessed upon a privilege. If the privilege thus referred to was the privi-

lege of doing business during the year ending on April 30, 1910, then the effect of the law was to declare that to be a privilege which presumably had not been so regarded in the eye of the law at the time it was exercised, and to tax it as such. If, however, the opposite interpretation of the nature of the privilege be followed, then the receipts for the previous year were merely used to determine the value, so to speak, of the privilege of doing a like business during the following year, so that in such event the tax would not be laid on a privilege which was not in existence at the time it was exercised.

These facts make applicable the decision of the supreme court of this state in the case of Express Co. vs. State, 55 O. S., 69. This case is interesting for more than one reason. In the first place it shows the history of excise taxes upon express companies which preceded that of 1910; so that even if the act of 1910 be not regarded as initial legislation on the ground that the privilege of doing an intrastate business had been previously included in the wider privilege of doing business generally, yet when the legislative history is traced a step further back, the same situation is encountered, and it is discovered that it became the subject of a claim of right under the constitution.

The case in question involved the constitutionality of the act of May 14, 1894, 91 O. L., 237, imposing an excise tax on the privilege of carrying on the express business in Ohio. It directed that between the first and thirty-first days of May in each year (which would include the year 1894) every express company doing business in the state should make a report to the auditor of state of its business "for the preceding year." It then became the duty of the auditor of state "to charge and collect from each express company * * a sum in the nature of an excise tax to be computed by taking two per cent. of the * * gross receipts of such company for business done within the state of Ohio for the year next preceding the first day of May."

The express company resisted an action brought by the state against it to recover the excise tax and penalty assessed in the year 1894, principally upon constitutional grounds, but also on the following ground stated in the brief of counsel for the company in the supreme court (page 72):

> "The act (which was passed May 14, 1894,) should not be construed, and cannot constitutionally be construed, as authorizing an assessment on the gross receipts for the year ending May 1, 1894; any year which had only expired before the act was passed. Bermier vs. Becker, 37 O. S., 72. Brexel vs. Commonwealth, 46 Pa. St., 31."

In answer to this contention, Burket, J., says in his opinion at page 81:

> "The tax is not laid on the gross receipts for the year 1894, but those receipts are taken as the standard by which to determine the amount of the excise tax to be paid for the privilege of doing business in the state for the year 1895."

While this part of the opinion was not carried into the syllabus it was necessary to a decision of the case, and constitutes, in my mind, an authority directly in point on the question which you submit.

Answering generally, then, I am of the opinion that the privilege of doing an intrastate express business in Ohio, which is subject to taxation under the statutes above referred to, is the privilege of doing business in the future and not the privilege of having done the business during the year for which the receipts are reported.

Applied to the facts stated by you, this conclusion makes necessary the further conclusion that the United States Express Company is not liable for any tax based upon the gross receipts reported by it. I do not find it necessary, in answering the specific question, to determine when or as of what date the privilege starts, save to hold that it must be exercised after June 30th of a given year. That is to say, I do not find it necessary to determine whether, if the company had done business for a few days after June 30th, but had gone out of business on the date on which the report was required to be filed, viz., the first of August, it would have been liable for the tax. I incline, however, to the view, without officially stating it as such, that the division point is the thirtieth day of June; so that if a company continues in business after the thirtieth day of June it is exercising the privilege and is liable for the tax. In such a case the mere fact that after a few days have elapsed the company may go out of business does not change the result if the company had the privilege of doing business for a year or indefinitely in the future, and asserted that privilege by doing some business after the division date; so that if of its own volition it abandoned the exercise of the privilege before the year elapsed, this would not detract from the value of the privilege.

The date, June 30th, is to be regarded, I think, as the last day of the preceding year, and not as the first day of the succeeding year. So much is apparent on the face of the statute.

The commission being advised that the company had gone out of business at midnight of June 30th, 1914, should have withheld any action in the premises with respect to excise taxes. The commission having determined, however, the amount of the excise tax, and the tax now standing charged upon the duplicate of the treasurer of state, the proper way in which it may be discharged would be for the claim of the state against the company, which now is technically delinquent, to be transmitted to this department for collection, and in that event I should advise, of course, that the claim is uncollectible in law. I see no reason, however, why these formalities may not be dispensed with in the interest of expedition, and suggest that upon receipt of this opinion the treasurer of state and the auditor of state be advised of my decision to the end that they may make proper notations on their records to show that the charge against the United States Express Company for excise taxes for the year 1914 is not legally collectible.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1359.

APPORTIONMENT OF TOTAL COST AND EXPENSES OF SPECIAL ASSESSMENT IMPROVEMENT—DEPARTMENT OF PUBLIC SERVICE.

The ascertainment of the estimated total cost of a special assessment improvement devolves upon the service department. In the absence of special legislation by council it is not the duty of any particular administrative department or office of the municipality to make computations necessary to apportion such total cost and expense among the lots and lands to be assessed. Such apportionment must be made in the assessing ordinance and it is incumbent upon council to see that either the city engineer or director of public service or the clerk of council shall assist council in making the assessment. When assessments are payable in installments and what is termed interest is charged on the deferred installments, such interest, which is really a part of the total cost and expense of the improvement, should be computed by council or under its direction by the department of public service or the clerk of council, and the amounts of the various installments carried into the assessment ordinance. The interest which the assessment bears, if not paid when due, should be calculated by the county auditor and by him placed on the duplicate.

COLUMBUS, OHIO, December 31, 1914.

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

GENTLEMEN:—I acknowledge receipt of your letter of October 21st requesting my opinion upon the following questions:

> "1. Is it the duty of the city engineer, clerk of council or city auditor to compute the assessments against abutting property in special assessment improvements?
>
> "2. Whose duty is it to compute the interest of the installments of assessments if the same are to extend over a period of years?"

The assessments against abutting property in case of special assessment improvements are made by the council itself, as a general rule, as is evinced by section 3812, General Code, and other sections in *pari materia*. Exceptions to this rule are found in cases of assessments according to the proportion of benefits in which event council may appoint three disinterested freeholders to report the estimated assessments; and in case of objections to the assessments, council must appoint an equalizing board. (See sections 3847 and 3850, General Code.)

The general rule above laid down is further emphasized by section 3851, which provides that,

> "Every such assessment shall be a lien on the lands charged from the time *council determines* the amount assessed against each parcel of land."

Primarily, then, the determination of what amount shall be assessed against each parcel of land liable for assessment for an improvement is a matter for the council. The computations necessary to apply any of the three rules according to which assessments may be levied upon particular tracts are, generally speaking, two in number: First, the ascertainment of the total cost and expense of the improvement, which, without passing upon the question, I may say is a function which ap-

parently devolves upon the department of public service or the city engineer in that department. Second, the division or apportionment of such total cost and expense among the specially benefited tracts of land.

I take it that your inquiry is directed to the second process and not to the first and shall write this opinion accordingly.

Inasmuch as council is the assessing body, and inasmuch as the ordinance assessing the different lots and apportioning the cost among them is a legislative act, I am of the opinion that in the absence of special provision by the council itself, it is not the duty of any executive or administrative officer to compute the apportionment of an assessment among the several lots and tracts to be assessed. It is incumbent upon the council itself to do this. Practically speaking, this means that the member of council who introduces the assessment ordinance must make the computations himself in the first instance; if not satisfactory or correct council may change them either in committee or by action of the whole council.

But what I have said relates to the situation in the event that council by a permanent ordinance or by special provision in the course of legislation with reference to a particular improvement has not otherwise provided. I am of the opinion that the legislative power of council is such as to enable it to require services of this character from the clerk of council or city engineer or director of service. Certainly this is true of the clerk of council whose duty it is to perform any and all services of a clerical nature which the council may require to assist it in performing its legislative functions. It is also true, in my opinion, of the city engineer where such a position exists. That is to say, council may require the engineer (or the director of public service) to assist its committees in the formulation and consideration of assessment ordinances. Section 4326, relating to the department of public service clearly vests in council the authority to provide for "matters * * * in connection with the public service of the city" (of which the director shall have the management); so that in this instance the authority to exact services of this character from an executive officer is founded upon specific statutory authority other than that implied from the grant of all legislative power.

The case of the city auditor affords, perhaps, the most doubtful question. Council by virtue of the general grant of powers implied in section 4211, General Code, has general legislative power and as such may require specific administrative duties of the administrative officers of the city not inconsistent with the frame work of government outlined in the General Code. Thus in McCormick vs. City of Niles, 81 O. S., 246, it was held in the language of the syllabus that:

> "When the statute has not prescribed the person who shall execute such a contract in behalf of a municipal corporation, it is consistent with section 1536-653, Revised Statutes, for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

In the opinion, per Price, J., at page 254, appears the following:

> "By virtue of the latter section (referring to the section of the General Code above cited) the powers of the city or village council are legislative only, and it shall perform no administrative duties whatever. * * *
>
> "It would seem that council may authorize, by resolution or ordinance, the board or department of public service to contract for the public printing, and we see no objection to giving the clerk of council the authority to make such contracts. The council appears to be the source of authority to contract, and it is the authority to make the necessary appropriations."

In Akron vs. Dobson, 81 O. S., 66, Summers, J., discussing the authority of council with respect to the approval of an expenditure authorized by it, and holding, generally, that it is a sufficient compliance with the law if council merely authorizes the department of public service or safety to enter into the contract without approving the contract and expenditure when made, says:

> "If the directors do not have or retain the confidence of the council, it is in the power of council to be more specific."

This case, however, held merely that where a given function is one which may be appropriately performed by one or more officers, council may so legislate as to designate the particular officer which shall perform it. With respect to the city auditor, however, I do not believe that it could be said that the function of assisting council in doing its legislative work is appropriate to his position. The question is not free from doubt and I am aware of arguments which might be made to the contrary. I think, however, that the better reasoning supports the view that the auditor may not be charged with this duty, and I so hold.

Of course I do not mean to hold as to the clerk or engineer that council's legislation may adopt a rule only, and may delegate to any of these officers the power to apportion an assessment. I do not suppose that your question requires me to consider such a case; but I am of the opinion that the assessment must at all events be made finally by the council, and that the computations which are necessary must precede council's legislation.

Answering your first question in full, then, I am of the opinion that in the absence of action on the part of council, it is not the duty of any of the officers which you name to make the computations of which you speak; but that council clearly had the power to require its clerk to assist its committees or itself in making such computations; and that there seems to be specific provision of law upon which the authority of council to require such services of the engineer may be based; and that upon general principles, though the question is doubtful, council may not require such services of the city auditor.

In answering your second question I shall assume that the same relates to assessments made when bonds have been or are to be issued in anticipation thereof, because in the first place it is now almost the universal practice to issue bonds in anticipation of the collection of assessments, and in the second place the very statement of your question suggests that such is the case in the instance which you have in mind, because the assessments would not be payable in deferred installments unless the fund to pay the total cost and expense of the improvement had been provided by the issuance of bonds.

Certain statutes make specific and peculiar provision with respect to assessments when bonds have been issued in anticipation of the collection thereof. Section 3817, General Code, requires that in such cases the interest on the bonds shall be treated as a part of the total cost and expense of the improvement. Pausing to consider the effect of this provision as it is worked out in practice, I beg leave to point out that so-called interest on deferred installments of assessments when the same are made payable in this manner is in reality not interest on the assessments as such but interest on the bonds. In other words this interest is computed on the total bond issue, and the sum thus ascertained is apportioned among the property owners just as is any other item entering into the total cost and expense of the improvement. I am of the opinion, as already hinted, that it is incumbent upon the engineering department in the department of public service to compute and ascertain the total cost of the improvement. That being the case it is the duty of the city engineer or the director of public service to compute the interest on the bonds

as such. When it comes to dividing the total cost of the improvement among the assessed properties the answer to the first question which you ask governs the division of the interest just as it governs the division of all other items entering into the cost of the improvement.

Another special provision relative to assessments when bonds have been issued in anticipation thereof is section 3892, General Code, which provides that:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other person. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

It is apparent that when the assessment is certified under this statute to the county officials for collection on the tax duplicate it has passed out of the control of the city authorities. (See State vs. Carter, 8 N. P. 482; 67 O. S. 422.) That being the case, when the time arrives for the annual certification, the assessments, whether "due" or not, must be certified to the county officials, and it is then too late for the property owner to discharge the same by the payment of anything less than the amount so certified.

As has been stated, the interest on the bonds must be treated as a part of the total cost and expense of the improvement and, therefore, enters into the amount certified for collection to the county officials. Hence it follows that it becomes a part of the principal of the assessment and cannot be treated as interest thereon.

The proper and usual practice is for council, in order to afford to the property owners an inducement to pay the assessment in cash, to provide in the assessing ordinance that if the same is paid within a certain period of time, say thirty days (which must elapse before the second Monday in September), the amount of the assessment shall be less than the aggregate of the deferred installments by such amount as will represent the interest on the bonds. In other words, in order to legalize cash payments for anything less than the sum of the deferred installments the assessment should be made in the alternative. Payment in cash for a less sum is perhaps technically a discount rather than payment of principal without interest; for the reason that the assessment as such did not bear interest until due, as I shall hereinafter point out, and if not due until the date of the deferred installment, no interest, of course, accrues; so that if a cash payment is allowed the same is really a discount, though spoken of as payment without interest. The authority of council to exclude, by means of the acceptance of a cash payment, from any assessment any proportionate part of the total cost and expense of the improvement might be doubted on technical grounds; but the long established practice is to the contrary and your question does not require me to pass upon this point.

With these observations as to the nature of the proceeding, the answer to your question, properly interpreted, becomes clear. The so-called interest on deferred installments, which is really not interest on such installments at all, is a thing which consists really of a difference between the amount of a cash payment and the ag-

gregate amount of the deferred installments and must be fixed by council itself, as must the installments themselves. The general principle laid down in answering your first question being that whatever things must be determined by council must be done by that body in the first instance or under its delegation and direction by the clerk of council or by the director of public service or city engineer as council may choose, it follows that this principle applies to the computation of the "interest on deferred installments" if by your question you mean the interest on the bonds which is apportioned to each assessment as a part of the total cost and expense of the improvement, but which is excluded from the optional cash payment. Accordingly, my answer to your second question thus interpreted is the same as my answer to your first question with the qualification only that the aggregate amount of interest which the bonds are to bear, and which is to be apportioned as a part of the total cost and expense of the improvement is in the first instance ascertainable as a matter of law by the department of public service.

But your second question may bear another interpretation as referring to the real interest on assessments if not paid when due. When assessments are payable in deferred installments they are not due until the several installments are due.

Section 3817, General Code, provides explicitly for this interest in the following language:

> "* * * If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

This statute is unambiguous and forces the conclusion that in the event that the installments of assessments are not paid when due to the county treasurer, the county auditor must make the computations necessary to charge on the duplicate, in addition to the assessment itself and likewise in addition to the statutory penalty, which presumably is the same as that upon delinquent taxes generally, interest at the rate stipulated in the assessing ordinance, which, must, under the statute, be the same as that which is borne by the bonds. That is to say, the duty to make this computation of interest, which is quite a different thing from the computation just discussed, devolves by law upon the county auditor and not upon the city officials.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1360.

CITY AND VILLAGE BOARDS OF HEALTH NOT AUTHORIZED TO ESTABLISH CHILDREN'S WELFARE DEPARTMENT.

The statutes do not authorize city and village boards of health to establish a child's welfare department for the care and instruction of mothers in the event of childbirth.

COLUMBUS, OHIO, December 31, 1914.

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

GENTLEMEN:—Under date of December 11th you request my opinion as follows:

"We would respectfully request your written opinion upon the following questions:

"May a child's welfare department be established by a city board of health through which care and instruction may be given by visiting nurses in such cases as may be determined necessary by rule of the board of health?

"If such department may be organized by said board, may they furnish the necessary supplies and provisions to families in need of same, or should the medical and other supplies, provisions, etc., be furnished to said indigent families through the outdoor relief department?"

I am informed further that the plan to which you refer contemplates the employment of a staff of nurses and assistants, under a departmental head, with the chief object of extending instruction to female residents of the community expecting to become mothers; and also, wherever possible, to administer the necessary care and attention in all cases of childbirth where it is deemed that such care and attention is necessary.

The provisions of statute which alone appear to be material are as follows:

"Sec. 4408. The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary.

"Sec. 4409. The clerk of the board shall keep a full and accurate record of proceedings of the board, together with a record of cases of contagious diseases, reported to the health officer * * *. Among the books to be procured and kept shall be a suitable book or books for the registration of cases of infectious or contagious diseases.

"Sec. 4410. Each ward or district physician shall care for the *sick poor* and each person quarantined in his ward or district when such person is *unable to pay* for medical attendance, and for all persons sent from his ward or district to the municipal pest house when such persons are *unable to pay* for medical attendance.

"Sec. 4411. The board may also appoint * * * as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed.

"Sec. 4411-1. The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician.

"Sec. 4413. The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances * * *."

These statutes endow the board of health with an unquestionably broad power. Its object is manifestly the protection of the *public health.* This power, though permitting to the officials in question the exercise of a broad discretion, must nevertheless be strictly confined to its correct sphere; it must be confined to the object which the statutes have in view, to wit: the public welfare as opposed to individual welfare.

Thus, in 21 Cyc. 387, it is said:

"The powers of boards of health or other sanitary authorities are generally regulated and prescribed by the legislature, either by direct statute or indirectly through municipal ordinance. While boards of health are frequently given authority over things which are not injurious to the *public health* but merely offensive to the senses or injurious to property, yet, in the absence of such statutory authority, they cannot take cognizance of matters not affecting the public health. * * * Boards of health cannot by the operation of their rules and regulations enlarge or vary powers conferred upon them by the legislature, and any rule or regulation which is inconsistent with the statute creating the board and defining its powers, or which is antagonistic to the general laws of the state, is invalid. So the power to make rules and regulations must be exercised reasonably and without discrimination."

It is fundamental that powers conferred upon officers by statute must be confined strictly to the clear authorizations of the legislature, and ambiguities must be resolved against the grant of the power.

The distinction between a public benefit or protection which affects the public as such only by being brought to bear upon individuals singly and a public benefit or protection which is general in its effects is too essential a difference to require comment or elaboration. To adopt a rule that a board of health might use all the means of benefiting the public health in caring for its distinct individual citizens would authorize a breadth of power the scope of which would be infinite and palpably illogical. The statutes when viewed as a whole clearly bear out this principle.

The organization of the board of health authorized by the statute is confined to a health officer, district physicians, a clerk and such persons for sanitary duty as in the board's opinion the public health and the sanitary condition of the corporation require. No mention is made of nurses in the statute, nor does the statute in any way authorize the employment of persons whose special functions would be the assistance of individuals suffering from disease or impairment of health, except those provisions which authorize ward or district physicians; and ward or district physicians are clearly confined in their duties to attendance upon *sick poor,* or persons afflicted with a contagious disease. Two public functions, and two only are recognized by the statute, to wit: prevention of contagious disease and care of the sick poor.

A review of the sections relating to boards of health, in their entirety, bears out the object of the statute to confine the offices authorized to measures of health which affect the public generally, as in the case of contagious diseases or nuisances which are liable to breed unhealthy conditions.

The Ohio statutes, however, extend to the board of health the further duty of caring for the sick poor, through the ward or district physicians. It is well settled that the proper municipal authorities in charge of "poor relief" have concurrent power in this connection, but there can be no question, under the statutes cited, that the board of health has the requisite authority to attend to cases of destitute patients.

Thus the board is only authorized to make orders and regulations for the *public health,* for the prevention or restriction of disease and for the prevention or suppression of nuisances. Applying the doctrine *noscitur a sociis* and reviewing the statutes which set out in detail what the board of health may do with reference to these specific subjects, the legislative intent is clearly outlined. However beneficial may be the object of the "child's welfare department" which is contemplated, or however worthy and meritorious the motives of its instigators may be, the question, nevertheless, must be met as to whether the people, through their repre-

sentatives, have expressed in law the desire to shift the responsibility of obtaining these benefits from the shoulders of the individual, where it belongs, to the community. To permit such would manifest an example of that excessive governmental regulation of the private affairs and interests of the people and that undue solicitude on the part of the central government for the protection of the people and their interests which tends to obscure the distinction between proper governmental activity and paternalism.

Construing the language of the statutes, therefore, guided by principles of fundamental law, as well as the legal rules of construction above set forth, I am of the opinion that the statutes do not authorize a board of health to establish a child's welfare department after the manner suggested by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1361.

UNDER THE PROVISIONS OF SECTION 6257, GENERAL CODE, CHARITABLE ORGANIZATIONS, SOCIETIES OR INSTITUTIONS FOR THE CARING OF CHILDREN UNDER THEIR CARE OR CONTROL ARE EXEMPT FROM LICENSE.

The provisions of section 6257, General Code, exempting charitable organizations, societies or institutions for the caring of children under their control, duly incorporated under the laws of Ohio, from the provisions requiring maternity boarding houses or lying-in hospitals to be licensed, apply only to institutions which but for the exemption would be subject to the provisions of the act solely by reason of their receiving into custody or control infants under the age of two years in the manner defined by section 6257, General Code.

COLUMBUS, OHIO, January 4, 1915.

The Board of State Charities, 1010 *Hartman Bldg., Columbus, Ohio.*

GENTLEMEN:—I have your favor of August 21, 1914, in which you refer to my opinion to Hon. E. F. McCampbell, secretary of the Ohio state board of health, of the date of August 18, 1914, and submitting for my opinion certain questions calling for a construction of certain provisions of section 6257, General Code, in their application to concrete situations presented, as to which you say:

> "1. A certain Cleveland institution, incorporated in 1912 for profit with a capital stock of $40,000 for the 'purpose of erecting, maintaining and operating and conducting a sanatorium and lying-in hospital for receiving and caring for patients and their medical treatment and the instruction of nurses.'
>
> "This institution has never been licensed by the state board of health under the provisions of section 6259, et seq., yet it is doing a large maternity work and has been violating section 6272 of this statute, by engaging in the finding of homes for children, without the knowledge or approval of any reputable child-caring agency. The question arises, must this institution be licensed under the maternity hospital law or is it possible that being 'duly incorporated under the laws of Ohio' it falls in the class of institutions which are

made exempt from its provisions, as stated above, in the latter part of section 6257? Being an institution incorporated, not as a charitable organization, society or institution, but for profit and having nothing in its articles of incorporation to indicate that one of its incorporate purposes is the care of children, does it, in your opinion, come within the group of institutions intended to be controlled by the provisions of this law?

"2. What, in your opinion, is the exact meaning of the words 'charitable organization, society or institution having the care of children under its control duly incorporated under the laws of Ohio or under the care of a juvenile court,' i. e., do all organizations, societies and institutions incorporated for charitable purposes, fall within the class of exempted institutions or does the exemption refer only to charitable organizations, societies and institutions incorporated for the express purpose of caring for children or whose purpose embraces incidentally the care of children? For example, is it the intent of this law to control the work of the Florence Crittendon homes, rescue missions, etc., incorporated mainly as maternity hospitals, for the care of unfortunate girls during parturition, and for their reformation, and only incidentally planned to care for children, the offspring of these girls?

"3. Must the articles of incorporation, stating the purpose of the institution, determine whether or not such an institution falls in the class of institutions regulated by the maternity hospital law or in the group of those exempted?"

Section 6257, General Code, provides as follows:

> "Whoever receives for care or treatment 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 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. The provisions of this section shall not apply to any county, or district children's home, charitable organization, society or institution having the care of children under its control duly incorporated under the laws of Ohio or under the care of a juvenile court."

It will be noted that the provisions of this section except from the definition and meaning of the terms "maternity boarding house or lying-in hospitals," certain public and private institutions, organizations and societies.

Section 6258 makes further exceptions therefrom, as follows:

> "Nothing in this chapter shall prevent a nurse from practicing her profession under the direction of a physician in the home of a patient, or in a regular hospital other than a lying-in hospital."

Section 6259 provides for the granting of licenses by the state board of health to such maternity boarding houses and lying-in hospitals, as follows:

> "The state board of health may grant licenses to maintain maternity boarding houses and lying-in hospitals. An application therefor shall first be approved by the board of health of the city, village or township in which

such maternity boarding house or lying-in hospital is to be maintained. A record of the license so issued shall be kept by the state board of health, which shall forthwith give notice to the board of health of the city, village or township, in which the licensee resides, of the granting of such license and of the terms thereof."

The remainder of the particular chapter of the General Code, of which the sections above quoted are a part, makes provisions of a regulatory nature with respect to the conduct of persons or institutions who are within the definition and meaning of the terms "maternity boarding house or lying-in hospitals," while section 12789 of the General Code provides the penal sanction for the observance of the above noted provisions with respect to the licensing and regulation of such persons or institutions, as follows:

"Whoever violates any provisions of law relating to the establishment, maintenance and inspection of maternity boarding houses and lying-in hospitals, shall be fined not more than three hundred dollars."

It is clear from the above statutory provisions, as noted in my opinion to Hon. E. F. McCampbell, above referred to, that all persons and all institutions, whether incorporated or not, coming within the definition of a maternity boarding house or lying-in hospital, as defined in section 5267 of the General Code, are required to obtain from the state board of health the license provided for in section 5269, except only such persons and institutions as are made exempt by the provisions of sections 6257 and 6258.

The questions presented by you arise and are to be determined upon the construction of the language contained in section 6257, General Code, as follows:

"The provisions of this section shall not apply to any county or district children's home, charitable organization, society or institution, having the care of children under its control, duly incorporated under the laws of Ohio or under the care of the juvenile court."

With respect to the Cleveland institution mentioned in the statement of your first question, it is noted that it is not a county or district children's home; and inasmuch as it is a corporation organized for profit, it is not a charitable organization, society or institution, although it may be incorporated under the laws of Ohio, and although as incident to the transaction of its business, it may have to some extent, the care of children under its control. Being a corporation organized for profit and operated as such, it retains this essential character, notwithstanding it may do a certain amount of charitable work incidental to and in keeping with its corporate purpose. Inasmuch as the institution in question is not a charitable organization, society or institution, it is obvious that it is not within the exempting provisions of section 6257, General Code, but on the contrary is an institution subject to the license and regulatory provisions of the section above noted, provided of course (as I infer from your communication to be the fact) that this institution comes within the definition of a maternity boarding house or lying-in hospital, as these terms are defined by section 5267.

With respect to the Cleveland institution in question, the above conclusion follows without reference to the other questions presented by you with reference to the proper construction of the provisions of section 6257 here under consideration. As pertinent, however, to each and all of the several questions presented by you, I note that section 6257 was originally enacted as section one of an act passed Feb-

ruary 17, 1908 (99 O. L., p. 13). As originally enacted, this section did not contain the particular provisions here under consideration, exempting the institutions therein named from the license and regulatory requirements of the section above noted. These particular provisions of what is now section 6257, were incorporated therein by the amendatory provisions of an act passed April 13, 1910 (101 O. L., p. 121). As throwing some light on the questions at hand, I note that sections 9 and 10 of the original act (99 O. L., p. 15) provided as follows:

> "Sec. 9. No child under two years of ago, whether inmate of such house or hospital, or born therein or brought thereto, or otherwise, shall be given out for adoption, except by and with the consent of a charitable organization, society or institution having the care of children under its control duly incorporated under the laws of the state of Ohio, or juvenile court.
>
> "Sec. 10. No parent or guardian shall give to any person an infant under two years of age for the purpose of placing it for hire, gain or reward under the permanent care and control of another person, and no person for hire, gain or reward, shall receive such infant for the purpose of placing it under the permanent care and control of another. The provisions of this section shall not apply to any charitable organization, society or institution, incorporated under the laws of the state of Ohio, or any of the officers or agents thereof."

Said section 9 of the original act remains as it is now found in the provisions of section 6272, General Code, while section 10 of the original enactment was amended by the act of 1910 above referred to, to read as it is now found in the provisions of section 6273. With respect to the questions at hand, it will be noted that the language of section 6272, General Code, defining the institutions whose consent was necessary to the giving out for adoption of certain children born in or brought to the maternity boarding houses or lying-in hospitals, regulated by the act, is quite the same as the language of section 6257 under consideration; while the language of section 6273, exempting said institutions from the provisions of said sections, is as follows:

> "The provisions of this section shall not apply to any county or district children's home, charitable organization, society or institution *for the care of children,* incorporated under the laws of Ohio, or to the officers or agents thereof."

Looking to the provisions of section 6257, it will be noted that a person, natural or artificial, may come within the definition of said section, as a person conducting a maternity boarding house or lying-in hospital, in two ways: First, by receiving women during parturition in the manner defined by the section, and second, by receiving into custody or control infants under the age of two years, in the manner therein defined. On consideration of all of the statutory provisions above noted, I am of the opinion that the particular language of section 6257 here under consideration, exempting certain institutions from the provisions of the act as to license and regulation, expends its force in exempting from the provisions of the act as to such license and regulation, institutions which but for the language in question, would be subject to the provisions of the act solely by reason of their receiving into custody or control infants under the age of two years, in the manner defined by section 6257, and that the particular provision of section 6257 here brought in question, has no reference to institutions, whether incorporated under

the laws of Ohio or otherwise, or whether charitable or not, whose main purpose and principal business is that of receiving for attention, women during parturition and whose care of children is such only as is or may be incidental to the care of the mothers of such children while in such institutions. This conclusion follows from the obvious consideration that the "care of children under its control" which exempts a charitable organization, society or institution incorporated under the laws of Ohio from the requirement of a license, means such independent care of children as that offered and given in county or district children's homes.

This conclusion disposes of the specific question suggested by you with reference to the Florence Crittendon homes and necessitates the holding that such institutions, though organized for charitable purposes, are not exempt from the provisions as to license. The conclusion here reached as to these institutions, follows from the consideration that it is not their primary purpose to exercise control and care of either children generally or those born in said institutions, but on the contrary, their purpose and aim is to take care of unfortunate women who are received in such institutions for purposes of parturition.

With reference to the third question presented by you, it is to be observed that inasmuch as it is a general rule applicable both to corporations for profit and those incorporated for charitable purposes, that their business must be such as is expressly declared in its articles of incorporation or incidental thereto. Only such charitable institutions are to be considered in the exempting provisions of section 6257 above considered, as are able to show that the care and control of children are within the authorized purposes of their organization.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1362.

WHEN TAXABLE BONDS DEPOSITED BY FOREIGN INSURANCE COMPANY WITH SUPERINTENDENT OF INSURANCE ARE TAXABLE IN FRANKLIN COUNTY, OHIO.

Taxable bonds deposited by a foreign insurance company with the superintendent of insurance are taxable in Franklin county, unless the insurance company has a principal office elsewhere in the state, in which event they are taxable there. It is the duty of the insurance company to list the same for taxation, section 5437, General Code, being unconstitutional.

COLUMBUS, OHIO, January 4, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of September 3d you request me to furnish to the commission my opinion as to,

> "whether or not bonds deposited by foreign insurance companies with the state commissioner of insurance of this state are taxable in Franklin county or in any other county of the state in which such insurance company may have its principal office."

The general assembly has apparently sought to exempt such property from

taxation in this state, as property, at least indirectly. I refer the commission to section 5437, General Code, which provides as follows:

> "Neither insurance companies and associations, incorporated by the authority of another state or government, nor the superintendent of insurance, shall be required to make returns for taxation of the deposits of such companies or associations, made as required by law, with the superintendent of insurance, for the benefit and security of policy holders; nor be governed with respect to such deposits by the provisions of law relating to the listing of personal property or to the making of tax returns by corporations."

This section was formerly a part of section 2745, Revised Statutes, imposing a gross premium tax "upon the business done by it (a foreign insurance company) within said state for the period as shown by (its) * * * annual statement." (See section 5433, General Code.) The proceeds of such franchise or occupation tax when collected by the superintendent of insurance were and are to be paid by him into the treasury of the state to the credit of the general revenue fund thereof, and no part of said tax was or is distributed to local subdivisions. The rate of said tax was 2½% upon the basis thereof (consisting of gross premiums on Ohio business after certain deductions were made), and the same rate was applicable throughout the state.

The legislative history of said section 2745, Revised Statutes, is material to the present inquiry and I shall briefly outline the same:

Section 16 of the taxation act of 1859, which is the basis, so to speak, of all our property taxation laws, was the section which from its inception provided for the taxation of the *property* of incorporated companies. The main part of this section was that which subsequently became section 2744, Revised Statutes, and is now found in sections 5404 to 5406 inclusive of the General Code.

Going back to the original act it will be found that it was entitled "An act for the assessment and taxation of all property within this state, and for levying taxes thereon according to its true value in money." (56 O. L., 175). Section 1 of the act which corresponds to present section 5328 provided that:

> "All property, whether real or personal, in this state, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, of persons residing therein, the property of corporations now existing or hereafter created, and the property of all banks or banking companies * * * except such as are hereinafter expressly exempt, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise or the value thereof, shall be entered on the list of taxable property for that purpose in the manner prescribed by this act."

Section 16 of the act above referred to provided in effect that:

> "The president, secretary, or principal accounting officer of every canal or slack water navigation company, railroad company * * * *insurance company,* * * * or other joint stock company, except banking or other corporations whose taxation is specifically provided for in this act, for whatever purpose they may have been created, *whether incorporated by any law of this state or not,* shall list for taxation * * * all the personal property * * * moneys and credits of such company or corporation within this state at the actual value in money, in the manner following: * * *"

Return was to be made to the several auditors of the respective counties in which the property was situated, otherwise the procedure was the same as that found in present sections 5404, et seq., General Code, with certain immaterial differences. At the end of the section was found the following:

> "Provided, that every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of the county in which the office or agency of such company may be kept, in the month of May annually, the amount of the gross receipts of such agency, which shall be entered upon the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located."

The same act provided the definition of the term "personal property" which is now found in section 5325, General Code (section 2).

Without attempting at this time to interpret the act of 1859 as it then stood I may venture to express the belief that all the property of foreign insurance companies located in this state was made subject to taxation thereby, and that the gross receipts tax provided by the last clause of section 16 of the act was additional to the ordinary or simple property tax. In the revision of 1880 the last clause of section 16 of the act of 1859 became section 2745 of the Revised Statutes. Intermediate amendments had been made but they do not affect the present question.

The first material amendment of section 2745 occurred in 1888, 85 O. L., 183. The amended section provided that the return by the agency of its gross receipts should be made in February instead of in May and that the whole of the locally levied tax thereon should be payable on the twentieth of December next ensuing. Then the section provided that the county auditor in the month of March should certify to the superintendent of insurance (an officer whose functions had been created in the meantime) the amount of receipts returned under the act in each county with the rate charged against the same. Then it was provided that the superintendent of insurance, in the month of April annually, should charge and collect from all foreign insurance companies such a sum as added to the sum payable to the county treasurer would produce an amount equal to 2½% of the gross premium receipts of such company as shown by its annual statement under oath to the insurance department. This act contained a retaliatory provision similar to that which is now found in section 5436, General Code. It did not, however, contain any provision with reference to the duty to list for taxation the deposits made by such companies as required by law similar to that now found in section 5437, General Code, and which forms the principal subject of this discussion.

This remained substantially the state of the law, despite amendments not material to the present question, until 1902, when in an act found in 95 O. L., 290, the section was so amended as to dispense with the return of gross premiums for property taxation by the agencies to the several county auditors and to substitute the substance of the present law exacting a state revenue tax upon the doing of business in this state, and based upon the gross premium receipts with deductions at the rate of 2½%. It was in this act that the substance of the present section 5437, General Code, was first enacted as a part of section 2745, Revised Statutes.

Meanwhile section 2744, Revised Statutes, providing for the taxation of property of insurance companies, whether domestic or foreign, by the same rules applicable to the taxation of property of other companies, remained unchanged substantially. In fact, this section was not substantially amended between the date of its original enactment in 1859 and the year 1911 (102 O. L., 60).

At all times during the legislative history of section 2745, Revised Statutes, as above outlined, section 2744, Revised Statutes, applied to insurance companies the same rules of property taxation as it applied to other incorporated companies. So that if section 2744, Revised Statutes, was in 1902 effective to tax the deposits required to be made with the superintendent of insurance by foreign insurance companies then the proviso of amended section 2745, as then enacted, and which is now section 5437, General Code, seemingly constituted an exception to its provisions and resulted practically in returning with one hand, so to speak, what was taken with the other.

I mention these facts to show that if the general corporation tax law, which was section 2744, Revised Statutes, had the effect of taxing the securities deposited by foreign insurance companies with the superintendent of insurance, it could not be held that there was any exemption of such securities from taxation by reason of mere failure to pass laws submitting them to taxation. It is well known, of course, that under a constitution like ours, requiring all property to be taxed at its true value in money by uniform rule, what may be called "accidental exemptions" are of necessity sustained. The theory is that the constitutional mandate is, after all, in a sense directory in that it is not self-executing; and that if the legislature, in attempting to execute the constitution, so frames its laws as seemingly to omit some kind of property which the constitution would permit or require to be taxed, such omission does not have the effect either of invalidating the whole body of the property assessment laws of the state or of impliedly subjecting to taxation the kind or class of property, provision for the taxation of which has been omitted.

But if section 2745, as amended in 1902, and particularly that provision of it which is found in present section 5437, General Code, be regarded as effecting practically the exemption from taxation of securities deposited by a foreign insurance company with the superintendent of insurance, it cannot be claimed in the face of the legislative history which I have outlined that it constituted or that it now constitutes an exemption by mere accident or omission; because as already stated section 2744, Revised Statutes, being now section 5404, General Code, if sufficient to tax such property in Ohio was itself a provision for such taxation, so that the latter part of section 2745, Revised Statutes, now section 5437, General Code, must be regarded as a direct exemption (if it is an exemption at all), and not as having the effect of an exemption by accident or omission.

This discussion opens the way for two inquiries, first, as to whether or not section 5437, General Code, and its predecessor in the Revised Statutes does amount to an attempt to exempt the property of which it speaks from property taxation; and, second, as to whether or not section 5404, General Code, and its predecessor, section 2744, Revised Statutes, did have the effect of subjecting such property to taxation. If both these questions are answered in the affirmative, the constitutionality of section 5437 becomes involved. If either of them are answered in the negative, then the constitutional question is not reached.

The first of these two suggested questions may be resolved into two subordinate inquiries, viz.:

1. Does the section standing by itself have the effect of exempting property of which it speaks from ordinary property taxation in the usual manner; and

2. If so, is the tax upon such securities, that would have been collectible in the ordinary way, merged into some other tax which may be regarded as a commutation of such property tax or as a substitute for it?

The present form of section 5437, General Code, has been quoted. In the Revised Statutes it reads as follows:

> "Insurance companies and associations, incorporated by the authority of another state or government or the superintendent of insurance, shall not

be required to make returns of deposits of such companies or associations, made as required by law with such superintendent of insurance for the benefit and security of policy holders, and shall not be governed, in respect to such deposits, by the provisions of section 2744, or of section 2734 of the Revised Statutes of Ohio."

I cannot escape the conclusion that these very explicit provisions have the effect, practically, of exempting or attempting to exempt the securities to which they refer from property taxation in Ohio.

Section 2744, referred to in the original form of the provision, has already been discussed. Section 2734 of the Revised Statutes was the provision requiring every person to list all moneys in his possession or invested, loaned or otherwise controlled by him as agent or attorney on account of any person or persons, company or corporation whatsoever, and requiring the property of every person for whose benefit property is held in trust to be listed by the trustees, and requiring the property of every company, firm or corporation to be listed by the principal accounting officer, partner or agent thereof.

Securities deposited by a foreign insurance company with the superintendent of insurance would have to be regarded either as property of the corporation to be listed by it or as its property in the hands of the superintendent of insurance as agent or trustee for such company; so that the effect of withdrawing the listing of such securities from the provisions of the sections of the Revised Statutes named in the amended section 2745, Revised Statutes, and referred to in section 5437, General Code, seems to be to make doubly sure, so to speak, the positive provisions of the first part of the same clause and effectively to withdraw such securities from the reach of the taxation laws of the state.

Of course, your question is at once answered in the affirmative if it appears that section 5437 does not have the effect which I have just stated. For in that event the property should be listed for taxation in some other way than through the agency of the corporation itself or that of its agents or through the superintendent of insurance; and its taxability would not be impaired by the fact that listing by them is dispensed with. However, I am unable to reach the conclusion that this is the effect of the statute and am forced to the consideration of the other questions which I have suggested.

Does then, a provision that all the persons whose duty it would otherwise be under the law to list property for taxation, shall not be required to do so, amount to an exemption of that property from taxation?

It must be admitted that the conventional way in which to exempt property from taxation is to enact a statute providing that the property shall not be subject to taxation or shall be exempt from taxation, *in hoc verba*. It is true also that the general rule is that exemptions from taxation are not favored and must be granted by explicit statutory authority.

From these considerations it would seem to follow that section 5437 is not to be considered as an exemption from taxation, and that the property of which it speaks should be regarded as subject to taxation; but I am constrained to adopt the other view, at least for the purpose of the argument. The dilemma is presented, which may be phrased thus: either section 5437, General Code, is not an exemption of the deposits of a foreign insurance company with the superintendent of insurance, in which event the assessors would be authorized and required to list such deposits for taxation, even though it is not the duty of any individual or corporation to return them for taxation; or the statute does amount to an exemption, in which event the other questions which I have suggested must be discussed.

Coming now to the second of the two questions last above stated, I beg to state

that in my opinion section 5437 is neither a provision, which read in connection with other provisions of law, shows that another tax is accepted by the state in commutation of the tax on securities; nor is it a provision regulatory of the methods of assessment for the purpose of avoiding double taxation. It is not part of a commutation tax scheme, because as I have pointed out, for several years prior to 1902, when it first appeared in the statutes, foreign insurance companies were liable to the same property tax as other incorporated companies, and in addition thereto were liable for a tax on gross premium receipts from business done in Ohio, with certain deductions. There was an element of commutation in the tax as it formerly existed, in that the amount levied on the receipts of the agencies were deducted from the gross premium taxes payable to the superintendent of insurance, so that the former were accepted by the state in substantial commutation of the latter. But there was never any commutation either way, so to speak, of general property taxes as such for the gross premium taxes. The latter was imposed upon a separate and distinct subject of taxation and was in addition to property taxes as such. This will more fully appear from consideration of decisions which I shall hereinafter cite.

The laws of the state having provided at one time, then, for a gross premium tax in addition to all property taxes, the intent to receive the former in lieu of the latter or any part of them, cannot be imputed to the legislature because of the provisions of present section 5437, General Code. Indeed there is grave question as to whether or not a commutation tax of this character could be sustained as against constitutional objection. Article XII, section 2 of the constitution of 1851, declares that the taxation of property shall be by uniform rule at its true value in money. Other property in the state is taxed as property on the duplicates of the various counties and subject thereto to local rates of levy. Whether or not particular classes of property may be taxed at a flat rate throughout the state, either directly or by acceptance of some such flat rate taxes in lieu of the simple tax is a question which has not been decided under our constitution, and as to which I express no opinion, save the suggestion that I entertain grave doubt as to the constitutionality of a statute so construed. We have no such statute in the state, viz., the so-called excise tax on sleeping car, freight line and equipment companies, which is accepted by the state in lieu of all property taxes; but this class of property has no situs in any particular place in the state, and the peculiar difficulties in listing and valuing such property may be said perhaps to justify an apparent deviation from the constitutional rule for the taxation of property.

For all these reasons, and others which might be suggested, I am of the opinion that the gross premium tax is laid upon a separate and distinct subject of taxation which is now expressed very clearly in section 5433, General Code, and that no element of property tax is or ever has been embodied therein. See on this point, however, Insurance Co. vs. Bowland, *Post.*

Nor is the provision under discussion an effort on the part of the state so to regulate its methods of assessment as to avoid double taxation. This may be done, as pointed out in Lee vs. Sturgess, 46 O. S. 153, Lander vs. Burk, 65 O. S., 532, and other important cases with which the commission is familiar.

But the legislation now under discussion bears no evidence of embodying such an intention, nor is it appropriate to the accomplishment of such a purpose. The exemption (if it be an exemption) extended to foreign insurance companies under section 5437 is offered to them whether their stock is owned in Ohio or not; therefore it cannot be said that the legislature intended to exempt (practically) a certain class of the personal property of such corporations on the ground that the taxation of their shares of stock is substituted therefor. Nor can it be held, upon the reasoning above stated in discussing this question of exemption, and the authorities

therein referred to, that this assumed partial exemption of the personal property of foreign insurance companies is an effort to avoid double property taxation resulting from the imposition of the gross premium tax; for that tax is in no respect a property tax.

For all the foregoing reasons, then, I am of the opinion in answer to the first of the two general questions which I have myself suggested, that section 5407, General Code, considered as an exemption from taxation, is effective as such, if it is valid at all, and cannot be considered as a part of a commutation scheme or as a regulation for the avoidance of double taxation.

The second of the two general questions which I have suggested is now encountered. For in answering the first of them I have assumed, but not decided, that section 5404, General Code, and the other general property taxation provisions of our statutes are effective to tax deposits of foreign insurance companies with the superintendent of insurance. It now devolves upon me to decide this question.

The suggested question is not even doubtful, in view of the decisions of the state and federal courts in Sims vs. Best, 1 C. C. n. s. 41; Assurance Co. vs. Halliday, 110 Fed. 259; Same vs. Same, 156 Fed., 257; Same vs. Same, 126 Fed., 830, and Insurance Co. vs. Bowland, 196 U. S., 611.

As stated by me in an opinion to the superintendent of banks, a copy of which is enclosed herewith, these decisions dispose of practically every question which might be raised in connection with the main question now under discussion. Some of these questions have already been suggested, such as that respecting whether or not foreign insurance companies are within the purview of section 2744, Revised Statutes, now section 5404, General Code; whether or not the gross premium tax is a substitute for or commutation of the property tax; and whether or not a foreign corporation is required to return its "investments" for taxation in Ohio under the sections referred to.

The first two of these questions are answered by the decisions in the negative, and the third in the affirmative. Indeed, the case in 110 Fed., which was decided under the statutes as they existed before the amendment of 1902, held that the gross premium tax then in effect which, as has been stated, was levied particularly in the counties upon the premiums themselves as property, was not inconsistent with the taxation of the bonds or securities required to be deposited by foreign insurance companies, or a substitute for that taxation. It is interesting to note in this connection that the case in 110 Fed., was decided on June 4, 1901; Sims vs. Best, supra, was decided in April, 1903; the case in 126 Fed. was an affirmance of that in 110 Fed., and was decided November 3, 1905, by the circuit court of appeals of the United States; the case in 127 Fed., seems to be the same case as that in 110 Fed., but the opinion covers a point not material in the present connection and not passed upon in the first case. So it appears that the question was in the courts when the legislature acted in 1902 and doubtless the initial decision in the 110 Fed. persuaded the legislature to take the action which it did take in 1902, viz., the enactment of the substance of what is now section 5437, General Code.

So it is, that I regard as practically settled the question respecting the application of section 5404 and the other general taxation sections of the laws of the state to property like that concerning which you inquire. Were it not for the provision of section 5437 it is clear that such property would be taxable in Ohio and should be returned for taxation either by the superintendent of insurance or by the company itself.

The settlement of these two preliminary questions leaves the matter in this condition; the laws of the state, but for the positive provision of section 5437, General Code, would subject the property of which you speak to taxation. Therefore

if section 5437 has the effect of an exemption it is a direct exemption and not a mere accidental omission. Assuming that such is its effect, is it constitutional?

While this is the most fundamental question involved in your inquiry, it is, after all, the simplest one. Under article XII, section 2 of the constitution, the legislature of Ohio does not have the general power to exempt property from property taxation. Its power is limited by necessary implication to the subjects which it is authorized by that section of the constitution to exempt. The constitutional provision is that laws shall be passed taxing *all* property, real and personal, and all moneys, credits and investments but that the legislature, by general law, may exempt certain kinds of property or the property of certain designated owners from taxation. Property of the kind and character mentioned by you does not fall within any of the classes which the legislature is authorized to exempt from taxation; therefore it is perfectly plain that if section 5437 constitutes an exemption from taxation it is unconstitutional and void, and the assistance of authorities is not necessary to support this conclusion.

Ordinarily I decline to express an opinion upon the constitutionality of a statute. Every intendment supports the validity of a legislative act when the same is assailed in the courts. Our own constitution now limits the power of the supreme court of the state to declare statutes unconstitutional by requiring that save in cases of affirmance of the lower court all but one of the members of the supreme court shall concur in such a judgment. Therefore, as I have said, in an ordinary case in which there is any element of doubt whatsoever I have felt constrained, upon considerations of propriety, not only to decline to express an opinion as to the constitutionality of a statute, but also to defend, to the best of my ability, enactments of the legislature when questioned on constitutional grounds, regardless of my personal opinion.

The case presented by you, however, is not an ordinary one. It is a species of special legislation for the benefit of a single class of business enterprises. This legislation if given the effect assumed, is so plainly and palpably repugnant to the constitution that it would be doing violence to one's conscience to express the view that its invalidity was even doubtful. Moreover, the question involves the revenues of the state and the exercise of her taxing power for the benefit of local subdivisions and the state itself; and where a statute has the effect of depriving the public of a right which would otherwise exist, and is passed solely for the benefit of private interests, I do not think the same proprieties should be observed in considering its validity and expressing views thereon as would ordinarily be adhered to.

For these reasons I freely express my opinion that if section 5437 be given the effect of an exemption statute it is unconstitutional. This conclusion reduces your question to a mere matter of procedure. As I have stated the dilemma which is developed by the situation is such that if section 5437 is not an exemption statute, the property is taxable at any rate; and if it is an exemption statute then it is unconstitutional. Let the first horn of the dilemma be taken. The effect of the statute then would be merely to relieve the superintendent of insurance and the companies themselves from returning these deposits, but the property being taxable it would simply devolve upon the district assessor, exercising the powers formerly exercised by the county auditor, or the board of equalization or review, to place the property on the duplicate, and for this purpose to call before him the treasurer of state and examine him under oath as to the amount of such deposits in taxable bonds which he might have on hand on the day on which the property is required to be listed.

If the statute is unconstitutional, it is wholly void, and despite its plain provisions it would be the duty of the corporation (not the superintendent of insurance) to list the property for taxation, either in Franklin county, Ohio, where the assets are held, or in some other county in Ohio if the company has its principal defacto managerial office in Ohio. On this point it was held in the case in 110

Federal, supra, that it was the duty of the superintendent of insurance as trustee to return the securities for taxation. The United States circuit court of appeals expressed no opinion on this point, observing that when the county auditor had placed the property on the duplicate as omitted, the question as to whose duty it was to list it in the first instance was immaterial, provided it should have been listed by some one.

In Insurance Co. vs. Bowland, supra, however, Mr. Justice Day expressed a positive opinion to the effect that it is the duty of the company under section 2744, Revised Statutes, now section 5404, General Code, to make the return, and this opinion seems to be sustained by the better reasoning and emanates from the highest authority.

In Sims vs. Best, supra, however, an exception is made as to a foreign insurance company actually having a business domicile in Ohio. In that case the insurance company, though organized under the laws of the state of West Virginia, in point of fact and under its articles of incorporation had its principal place of business in Cincinnati, Ohio, and the bonds deposited with the treasurer of state in Columbus were held taxable in Cincinnati. This case is authority, then, for the proposition that where a foreign insurance company has a business domicile in Ohio, the situs of the taxable securities deposited with the treasurer of state is at that domicile, and not necessarily in Franklin county.

The only practical difference, then, between the two possible theories applicable to the answer to your question is that if section 5437 is constitutional, then a foreign insurance company cannot be penalized for failing to list the securities deposited by it with the treasurer of state. There could be no proceedings for previous years, under sections 5398 and 5399, General Code, to place such property on the tax duplicate, for the reason that under both of these statutes the authority of the auditor (now the district assessor) to act depends upon a finding to the effect that some person or corporation required by law to list property for taxation has failed to do so. Proceedings for the correction of the duplicate for the current year under section 5401 could, however, undoubtedly be sustained, but these proceedings involve no penalty of any kind.

On the other hand, if it is the duty of the insurance company to list the securities for taxation, notwithstanding section 5437, General Code, then in the event of the company's failure to do so all the remedies provided for by statute, in case of failure of a taxpayer to list all of his or its taxable property, would be available.

I think your question requires me, however, to choose between the two theories which I have mentioned. In fact, I have already done so. In spite of all that has been said relative to the possibility of working out a means of getting such property on the duplicate, if the insurance company and the superintendent of insurance are absolved from the duty to list it, I entertain after all grave doubt as to whether or not this view could be sustained. That is to say, I believe that section 5437, General Code was intended by the legislature to be, and is an effective exemption, if it is valid at all. Looking through the mere form to the substance this convention is forced. I am satisfied, therefore, that the statute is to be regarded as an attempt at an exemption, and being so, it is clearly unconstitutional.

Therefore, it is my opinion that it is the duty of a foreign insurance company (but not that of the superintendent of insurance) to list for taxation all *taxable* bonds deposited by it with the superintendent of insurance as required by law, and that said bonds should be listed and taxed in ordinary cases in Franklin county, Ohio, but in cases in which the foreign insurance company has a business domicile elsewhere in the state, then in the county and taxing district in which such domicile is located.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1363.

LEASE GRANTED BY BOARD OF PUBLIC WORKS FOR WATER RIGHTS RENEWAL CLAUSE.

A lease granted by the board of public works for water rights contains a renewal clause which is valid and is authorized by section 14009, *General Code, section* 20 *of act of March* 23, 1840, 38 *O. L.*, 87, *and authorizes the grant of leases "either in perpetuity or for a limited number of years."*

COLUMBUS, OHIO, January 4, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of June 12, 1914, you inquire as follows:

"Herewith I transmit a copy of a water power lease which is similar to a great many others which were made years ago. The T. & H. Co., have two leases for water power, one of which expired May 1st, 1914, and the lessees have applied for a renewal. This department finds itself handicapped in its efforts to secure an adequate rental for these and other water powers along the canal, by reason of the provisions in the lease which I have noted with an asterisk on the second page thereof.

"This paragraph provides 'That at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.'

"This to all intents and purposes gives the lessee perpetual rights to such water powers without any regard to the interests of the state and is certainly against public policy, since the state must furnish the water, even at an actual loss to the state.

"The original leases for most of these powers were granted between 1830 and 1840, and have been renewed from time to time, upon precisely the same terms as the originals, and the result is that the state is only receiving about one-third as much rental for its water powers as it should.

"In all of these leases, no rental is mentioned for the use of the land upon which the water power is used, and in some cases 6% upon the value of the land would exceed the rental now received for both land and water power.

"The question that we would like to have solved is, whether or not we can ignore the clause in these old leases that provides for a renewal for a like term of years, for such annual rental as may be offered by the highest responsible bidder, who is willing to purchase the buildings, equipment, etc., of the lessees at a price to be fixed by disinterested freeholders."

The delay in giving you this opinion was by arrangement with you.

In addition to the part quoted by you the lease submitted contains the following statement which must be considered in this opinion:

> "This lease is given in renewal of a lease given to Gates and Gregory on July the first, 1864, for thirty years with an additional quantity of water of 950 cubic feet per minute as was ascertained to be necessary for the business of manufacturing, and which additional quantity has been used on the premises in the past."

As stated in your letter many of these leases have been renewed one and two times. Each renewed lease contains a further option for renewal. When a lease is renewed there is usually a statement therein that it is a renewal, similar to that above quoted. This is notice that it is a renewal of a former lease.

These leases also contain a provision that they cannot be assigned or transferred without the written consent of some authorized agent of the state.

Two questions will be considered in connection with this option.

First: The validity of the option.

Second: The right to successive renewals by having the renewal option inserted in the renewed lease.

These questions may be considered together as some of the authorities herein cited apply to both questions.

Options to renew leases are valid when founded upon sufficient consideration and are certain and mutual in their terms.

It is also the rule of law that unless words showing perpetuity are used, one renewal of a lease satisfies the option to renew.

At section 332 of Taylor on Landlord and Tenant (9th Ed.) it is said:

> "A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, *except the covenant to renew;* to include which would make the lease perpetual."

At section 338 he says further as to the option for renewal:

> "As every contract depends upon the consideration for its validity, it is necessary that there be a sufficient and reasonable consideration, on the part of the lessee, to support this covenant; and if an agreement for renewal be unequal, unjust, or inserted by mistake, specific performance will not be decreed."

Also at section 333:

> "A covenant 'to let' the premises to the lessee at the expiration of the term without mentioning the price for which they are to be let; or to renew the lease on such terms as may be agreed upon; or, as is held by some courts, for such further time as lessee shall elect; or to renew upon the basis of a valuation of the premises as at the end of the lease, without any provision for determining that valuation; does not amount to a covenant for renewal but is void for uncertainty. Nor will a general covenant 'for renewal' be construed to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only. A covenant to renew a lease 'under the same covenants contained in the original

lease' is satisfied by a renewal of the original lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words would naturally have been used indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction."

The option in question gives the right to renewal "for a like term of years," and if no higher bid is received as provided in said option the lessee "shall be entitled to such renewal on the terms of this lease."

These provisions make the terms of the renewed lease certain. But upon the happening of certain conditions the rental to be paid may be increased. That contingency is that such renewal shall be granted

"For such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers."

The conditions imposed upon a prospective bidder are such that it is almost certain that no one will meet the terms, and consequently there will be no bidder. The actual effect of this provision is that the renewal will be granted for the same rental and upon the same terms as the first lease. The lease submitted is for a term of thirty years. A renewed lease will be for a like term, making a period of sixty years at the same rental regardless of changed conditions.

As to the lease submitted the rental was fixed in 1864 and that rent will continue until 1924, and if the renewal clause therein is valid it will run for another period of thirty years, making a period of ninety years at a rental fixed when the original lease was granted.

Such a right is a valuable right and should be founded upon a sufficient consideration.

There is at least an inference in this optional clause that implies an increase in rent, but this is nullified by the conditions surrounding it.

In case of Gelston vs. Sigmund, 27 Md. 334, it is held:

"Every agreement to merit the interposition of a court of equity to enforce it, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, etc., and if any of these ingredients be wanting courts of equity will not decree a specific performance.

"An agreement by A to let B retain possession of certain property from the first of July, 1866, to the first of July, 1867, upon his giving the same rent that A 'might be able to obtain from other parties' is not such an agreement as a court of equity will enforce. It lacks certainty and mutuality."

On page 343, the court say:

"Now the alleged contract as it is stated in the bill seems to us to be wanting in two essential qualities, viz., certainty and mutuality.

"The rate of rent to be paid is not certain or definite. It was 'as much as any one else would pay.' That could not be certainly ascertained; it was not practicable to know how much another would give. In Bromley vs. Jefferies, 2 Vernon, 415, it was held that such a stipulation in an agreement rendered it void for uncertainty. See also Abell vs. Radcliff, 13 Johns, 297."

In Hayes vs. O'Brien, 149 Ill., 403, it is held:

"The earlier doctrine that the want of mutuality of obligation would render an optional contract incapable of specific enforcement, has been so modified that such agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced, in equity, if made upon sufficient and valuable consideration. And so, when the agreement to convey is a part of a lease or other contract between the parties, for which the agreement to convey forms the true consideration, the want of mutuality will not avoid the contract."

"A lease for a term of ten years reserved to the lessor the right to sell the demised premises at any time after date, and then provided: 'But no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms and at the same price per acre as any other person or purchaser might have offered therefor.' The lessor made sale of the premises without notice to the lessee, who, upon learning the fact, offered to pay the price at which the lessor sold the same, and demanded of the lessor and his purchaser a conveyance of the land. Held: That the lessee did all that the law required of him, and was entitled to the specific performance of the contract to sell and convey to him on his acceptance of the option."

It will be observed that in the Maryland case no method of fixing or determining the rent was provided for, while in the Illinois case a method of fixing the sale price was provided for. This distinguishes the two classes of cases.

In Pray vs. Clark, 113 Mass. 283, it is held:

"An agreement in a lease to renew at its expiration, the 'rent to be proportioned to the valuation of said premises at said time,' but with no provision made for determining that valuation, is too vague to be enforced in equity."

In Arnot vs. Alexander 44 Mo. 23, it is held:

"Leaving the amount of rent for the renewal term of a lease to be ascertained by what 'responsible parties would agree to give for the use of the premises' fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease; and a court of chancery may in either case hear evidence and determine for itself the rentable market value of the premises where the appraisement fails. What 'responsible parties will agree to give' for the use of the rentable business property is nothing more than its full or highest rentable value.

"Where by the covenant for renewal of a lease the lessee is entitled thereto, 'provided that parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give,' it is in every way reasonable and just that the lessee should elect his remedy and either take damages at law or have a specific performance in equity."

In Folsom vs. Harr, 218 Ill., 369, it is held:

"A provision in a lease that 'should the party of the first part conclude to sell this property, then the second party is to have the first chance to buy the same,' no price being stated nor any method provided for ascertaining the price, is too uncertain to be specifically enforced as an agreement to convey to the party of the second part."

In this case Hayes vs. O'Brien, supra, is distinguished.

In the optional clause under consideration the terms of the new lease are fixed and these are certain. Such renewed lease shall be "for a like term of years" and "on the terms of this lease" if no higher bid is received.

It is possible but not probable that a higher bid will be received. The conditions upon which such bid shall be made are specified and these conditions are certain.

The optional clause when inserted in the first lease would be founded upon a sufficient consideration, as this clause could not be separated from the other terms of the lease.

While the optional clause is not a good one for the state, yet it cannot be ignored for that reason only. The right to grant such an optional clause by the agents of the state will be considered in a later part of this opinion.

The optional clause in the original lease is satisfied by one renewal and the lessee is not entitled to a second renewal without additional consideration.

In Kollack vs. Scribner, 98 Wis., 104, it is held:

"A general covenant to extend or renew a lease does not imply a continuation or renewal of the special covenant, because that would have the effect, by construction, to make the lease perpetual, or to call for renewals in perpetuity. Such interests in land are not favored in the law, and are not, therefore, upheld by construction or deduction from general language."

Also in King vs. Wilson, 98 Va., 259:

"A general covenant for renewal of a lease binds the lessor to renew for one term only, and if the tenant holds over without renewal he becomes a tenant from year to year, * * *.

"If a contract of lease for a term of years provides that it shall be renewable, or that the lessor shall pay for the improvements, the renewal for one term satisfies the contract to pay for the improvements, and, at the expiration of the second term, the lessor is entitled to recover the premises and the improvements."

The same rule is stated in Taylor on Landlord and Tenant, supra.

The optional clause in question does not contain words of perpetuity. It does not give a continued right of renewal. The word "renewal" is used in the singular. This clause, therefore, calls for only one renewal. The original consideration was for one renewal, and when that was granted that consideration was satisfied.

The insertion, therefore, of the renewal option in the renewed lease was not in compliance with the original contract. Unless the renewal option contained in the renewed lease, was upon a further consideration, then such renewal option would be without consideration and would be void.

The proper remedy to enforce such an option would be by the equitable proceeding of specific performance. Equity will not enforce such an option unless founded upon sufficient consideration.

In volume 3 of Pomeroy Equity Juris. (3d Ed.) at section 1293, the rule is stated:

> "Equity will never enforce an executory agreement unless there was an actual valuable consideration; and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms, and looking at the reality, it requires an actual valuable consideration as essential in every such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements, and executory contracts of every description."

In Crandall vs. Willey, 166 Ill., 233, it is held:

> "To entitle a complainant to a decree for specific performance the contract sought to be enforced must be founded on a sufficiently fair consideration.
>
> "Equity will inquire into the real consideration of a contract, notwithstanding it bears a seal and recites a consideration."

In Davis vs. Pelty, 147 Mo., 374, it is held:

> "An agreement, in writing and under seal, by the owner of land, granting an option to purchase the same for a certain price, will not be enforced, where the agreement for such option is without any consideration to support it."

The granting, therefore, of a renewed lease by virtue of the option in question upon the same terms and conditions as the first lease, but without the optional clause, would be a satisfaction of such renewal option and would complete the contract between the parties thereto.

The insertion of a renewal clause in the renewed lease, merely because it was contained in the original lease would be without consideration and could not be enforced in equity. Such a clause would be invalid without an additional consideration to support it. The burden of showing such consideration would be upon the party seeking to enforce it.

These leases for water power are granted by agents of the state and their authority is fixed by statute. The authority to insert a renewal clause in a lease must be by virtue of the law as it existed at the time the original lease was granted. The original of the lease submitted was granted July 1, 1864.

The authority to grant such a lease was by section 20 of the act of March 23, 1840 (38 Ohio Law, 87), and now known as section 14009, General Code. This section is also found at page 206 of volume 1 of S. & C., Revised Statutes of 1860 and also of 1870.

This section reads:

> "Whenever, in the opinion of the board of public works, there shall be surplus water in either of the canals, or in the feeders, or at the dams

erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, *either in perpetuity or for a limited number of years,* for a certain annual rent, or otherwise, as they may deem most beneficial for the interests of the state."

By virtue of this section the board of public works could grant a lease for water power in perpetuity, or it could grant for a term certain, with an option for renewal for a like term. This would authorize the insertion of the option in question in the original lease.

It is my opinion, therefore, that the optional clause in question as inserted in the original lease is valid and is good for one renewal only. If the renewed lease contains a like optional clause and there is no further consideration for such option, then such optional clause as contained in the renewed lease is invalid and is not binding upon the state. It is without consideration.

As per your request enclosed find the lease submitted. Enclosure.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1364.

HUMANE AGENTS—POWERS AND DUTIES.

Humane agents may not make arrests unless their appointments have been approved under section 10071, *General Code. They can receive no other compensation than under section* 10072, *General Code, from any treasury.*

Humane agents, if they are also officers or members of the humane society, have such powers as are conferred upon other members and officers of such societies.

Attorneys employed by the humane society cannot be paid out of the county treasury for their services in prosecutions under section 12493, *General Code, but may be paid for services under section* 13012.

An auditor may not issue his warrant in payment of attorney's fees in such cases until they have been properly allowed by one of the tribunals authorized to make such allowances under section 13440, *General Code. There is nothing in the law to prevent the cases all being brought before the same justice.*

The authority to arrest, conferred upon an humane agent, seems to be only a power and not a duty and he cannot be compelled to make arrests, nor can he be reimbursed for expenses incurred.

Considered as a matter of policy and good business principles, at least, the prosecuting attorney should look after all such cases taken upon error, unless for good cause the humane society employs its own attorney.

A justice of the peace has no jurisdiction under sections 13008, 13009 *and* 13012, *General Code, as these sections authorize commitment to the penitentiary.*

COLUMBUS, OHIO, January 4, 1915.

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

GENTLEMEN:—Under date of December 5th you submitted for my investigation a list of questions relating to humane societies and their agents, together with your tentative answers to these questions, which answers you state I approved orally some time ago. In answer thereto I am pleased to agree with each and every answer submitted by you, as outlined in your letter to Examiner Bliss under date of July 15, 1913, except as follows:

> "The last three questions to which you refer are as follows:
>
> "1. Under section 13439, G. C., may the magistrate remit the costs and afterwards collect them from the county?
>
> "2. When the magistrate tries and convicts under sections 13008, 13009 and 13012, G. C., may he suspend sentence until the provisions of sections 13010 and 13013, G. C., have been complied with?
>
> "The practice is to sentence to jail or workhouse for a definite period and to remain until fine and costs are paid—then, upon the verbal promise of the defendant to pay a stipulated amount to the humane society as trustee (see sections 13016 and 13017) or live with and properly provide for his family, the magistrate *suspends sentence* and *remits the costs.*
>
> "Under this arrangement many of these delinquent husbands and fathers are brought into court the second and third time.
>
> "3. If it is not legal for the county to pay the costs which have been remitted, shall findings be made for recovery?"

All of these questions assume that the magistrate has jurisdiction to render judgment in prosecutions for violations of sections 13008, 13009 and 13012. This assumption I am convinced is unfounded. Each of these sections makes possible a sentence to the penitentiary for violation of its terms.

Section 12372, of the General Code provides:

> "Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors."

Under the clear terms of this statute it is impossible to conclude otherwise than that the offenses set out in sections 13008, 13009 and 13012 must be regarded as felonies. Therefore, with respect to offenses coming within the terms of these statutes, the magistrate has only such jurisdiction as that provided by section 13511 of the General Code. In short, the magistrate has no further power than to cause the arrest of a violator of these statutes, and to examine him for the purpose of binding him over to the grand jury in the event he is justified by the facts in assuming that there is probable cause to believe the accused guilty.

Since the magistrate has no jurisdiction over the offenses mentioned by you, an answer to these three questions is rendered impossible.

I assume that in the fourth question, wherein you ask whether an attorney may be compensated for prosecuting cases under section 12492, you mean section 12493. If I am wrong in this assumption, and some other section is intended, I would be pleased to take the matter up again.

I am returning herewith the correspondence submitted by you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1365.

DITCH PROCEEDINGS—COMPENSATION AND EXPENSES TO BE ALLOWED COMMISSIONERS IN SUCH PROCEEDINGS—ONE HUNDRED DAY LIMIT.

When acting under the ditch proceedings prescribed by sections 6763-1, et seq., General Code, county commissioners may be allowed their expenses and the sum of three dollars per day for every day they work in such proceedings. The limitation of three dollars per day for one hundred days, prescribed by section 3001, General Code, has no application when the commissioners are working under these special statutes.

If the commissioners decide not to go on with the improvement upon filing of the petition, the costs, in accordance with section 6563-10, General Code, are paid by the petitioners and they are liable for the same upon their bond. The compensation and expenses of the commissioners in such event will be so paid.

Under section 6563-14, General Code, when the commissioners determine to abandon the proceedings after the report of the surveyors, such costs and expenses will be paid out of the treasury of the county.

When the work is proceeded with and the improvement accomplished, under sections 6563-38 and 6563-35, General Code, the commissioners may make their compensation and expenses payable either out of the county treasury or out of assessments levied against the property holders.

COLUMBUS, OHIO, January 4, 1915.

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

GENTLEMEN:—Under date of November 14th, 1914, you request my opinion upon the following questions:

> "Can county commissioners charge their expenses while acting as members of boards in all joint county ditch proceedings, or can they only be paid their expenses when acting under the provisions of sections 6563-1 to 6563-48, inclusive, General Code, which are special sections relating to a particular kind of proceeding as definitely set forth in section 6563-1, General Code?
>
> "Section 6563-44 provides: '* * * * * and said commissioners shall receive the sum of three dollars a day and their expenses while employed under this bill.'
>
> "While acting on this particular kind of work, are the days so employed to be considered as coming within the limitation of one hundred days in any one year, as provided in section 3001, General Code, or is the per diem fixed by section 6563-44 to be regarded as being an additional allowance?
>
> "Section 6563-44 does not show how these per diems and expenses are to be paid. Do sections 6563-36, 6563-37 and 6563-38 solve this point and make such compensations and expenses a part of the cost of the improvement to be assesed against the benefited property?
>
> "Should these compensations and expenses be paid out of the treasury of the county when the sessions of the joint board are held, or out of each county treasury?"

Answering your first question, section 3001 is as follows:

"The annual compensation of each county commissioner shall be determined as follows:

"In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115% of the compensation paid to each county commissioner for the year 1911. *In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work; the total amount so received for such ditch work not to exceed three hundred dollars in any one year.* Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum. Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

Section 6563-44 of the General Code is as follows:

"Said surveyors named in section 8 (G. C., section 6563-8) shall meet with the joint board of county commissioners whenever required by said board and said surveyors and auditors shall be paid their necessary expenses while employed under this act and shall be allowed the same fees as are allowed in ditch work generally and said commissioner shall receive the sum of three dollars a day and their actual expenses while employed under this bill."

The provision of section 3001 with reference to compensation for ditch work is general in its character, and applies by its terms to all manner and form of ditch work undertaken by the county commissioners and is intended rather to reimburse the commissioners for expenses incurred than to operate as a compensation for duties performed.

Section 6563-44 of the General Code, however, is manifestly special in its application, being confined by its terms to ditch work done under the provisions of the act contemplated only. This section provides both the compensation and an additional reimbursement for actual expenses while employed under the act in question. Under the well established rule of construction, the latter statute must be regarded in its application as an exception to the general terms of section 3001. I am, therefore, of the opinion that the latter provision holds and that when acting under this statute the commissioners are not restricted by the three hundred dollars maximum of compensation provided by section 3001, and as a condition to such compensation they may when so acting under section 6563-44 receive their actual expenses incurred.

In your second question you ask whether such compensation and expenses are to be paid from the county treasury, or whether they are to be regarded as a part of the cost of the improvement to be assessed against the benefited property.

Of the provisions making part of this act, section 6563-10 provides that the petitioners shall be liable on their bond to pay costs incurred in the event that the commissioners decide not to go on with the improvement. In this event, of course,

the expenses and compensation of the commissioners will be paid neither from the county treasury, nor will it be deemed part of the costs of the improvement to be paid from the proceeds of the bond issue and assessed against the property.

Section 6563-14 provides that in the event the commissioners determine to abandon the proceedings after the report of the surveyors the expenses incurred shall be paid by each county equally out of the treasury of the county. This provision clearly answers your question as to source of payment of county commissioners' expenses and compensation incurred when the proceedings are abandoned at this stage. If the surveyors' report is accepted and the commissioners determine to go on with the work, section 6563-33 becomes material. This section provides for issuing the bonds of the county for the amount apportioned to it as provided by the preceding section.

Section 6563-35 provides that the commissioners of each county to which part of the cost is apportioned may pay such part of that amount as they deem fit from the general taxes, causing an annual levy to be made for the purpose of retiring such bonds as are made chargeable against the county, and leaving the balance to be paid by assessment against the benefited property.

Section 6563-38 is as follows:

> "All of the costs and expenses connected with ordering and granting said improvement shall be taken as a part of the cost thereof and shall be included in the amount ordered to be paid by each county, except their costs of aribtration as provided in section 29 (section 6563-29, G. C.)"

From this provision it is manifest that it is discretionary with the commissioners whether all or part of the costs of the improvement are to be made assessable against the benefited property, or chargeable against the county generally.

Section 6563-38 would seem on its face to be practically conclusive of the determination that the compensation and expenses of the commissioners are to be determined part of the costs of the improvement which are to be those provided for. This conclusion is strengthened by a reference to the special requirement of section 6535 of the chapter relating to single county ditches. The statute, of course, can have no reference to the sections under consideration, but the fact that in this case the legislature deem it necessary to specifically require that such costs should be paid from the county treasury enforces the conclusion that without such provision the costs would be considered in no wise different as regards their manner of payment from any other costs entailed by the proceedings.

In answer to your second question, therefore, I am of the opinion that the compensation and expenses of the commissioners provided by section 6563-44 may be paid either out of the treasury of the county or made assessable against the benefited property in accordance with the will of the county commissioners.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

1366.

NOT NECESSARY FOR ADMINISTRATOR TO FILE APPLICATION TO REGISTER TITLE TO REALTY WHEN PROCEEDINGS ARE INSTITUTED UNDER SECTION 11922, GENERAL CODE.

It is unnecessary for an administrator to file an application to register title to realty when he institutes proceedings under section 11922, General Code, to complete a contract entered into by his decedent during the life time of the latter for the sale of such real property.

COLUMBUS, OHIO, January 4, 1915.

HON. H. F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I have your letter of December 11, 1914, requesting my opinion upon the following questions:

> "1. Is it necessary for an administrator to have the title to real estate registered before he can complete a land contract, that is, in a case where the decedent owned the whole interest in real estate and had sold it upon land contract and the administrator has to bring an action to complete said land contract?
>
> "2. Is it necessary to record the whole case in a real estate? If so, would the probate court be entitled to fees for the whole record?"

1. No, if the proceeding is instituted under section 11922, General Code.

2. This question has been answered in an opinion addressed to the bureau of inspection and supervision of public offices, under date of December 14, 1914, a copy of which opinion I am enclosing you herewith.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1367.

MUNICIPALITY NOT LEGALLY BOUND TO PAY FOR SERVICES TO FAMILY PHYSICIAN WHO RENDERED SERVICES TO QUARANTINED PERSONS, WITHOUT CONTRACT WITH THE MUNICIPALITY.

A municipality is not legally bound to pay for the services of family physicians rendering medical attendance to quarantined persons without orders from the board of health, even though such family was unable to pay.

Although the city is not legally bound to pay, it may do so if no district physician has been appointed, or if one has been appointed and is paid for his services in each case, and not a specific salary, and the board believes the bills of the family physicians to be just and reasonable.

COLUMBUS, OHIO, January 4, 1915.

HON. C. E. RUBLE, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I have your letter of recent date, as follows:

"Where a family has been quarantined and the family physician continues to render medical attendance without consulting or having orders from the board of health, and afterwards puts in his bill to the health board for his services and the bill of a doctor called in consultation by said physician, is the health board liable? The family are not able to pay.

"The boy in this family took sick and the family doctor was called. Later the house was quarantined by the health officer. The family doctor still continued to make his calls until the boy died, which death occurred during the time of quarantine. The consultation took place also during the time of the quarantine, and the consulting physician was called in by this family doctor. After the death both physicians rendered their account to the board of health. The health board never requested the services of either physician.

Section 4408 of the General Code provides:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

Section 4410 of the General Code reads:

"Each ward or district physician shall care for the sick poor and each person quarantined in his ward or district when such person is unable to pay for medical attendance, and for all persons sent from his ward or district to the municipal pest house when such persons are unable to pay for medical attendance."

Section 4436 of the General Code provides:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

From these sections it is clear that when a district physician is appointed by the board of health, it is his duty to "care for the sick poor and each person quarantined in his ward or district when such person is unable to pay for medical attendance." It is also clear from these sections that it is the duty of the board of health to provide medical attendance and medicine for persons quarantined, and that it is the duty of the municipality, when the persons quarantined are unable to pay, to meet such expenses, also, that when the board of health must furnish such medical attendance and medicine, they do so through the district physician, whose duty it is under section 4410, to "care for the sick poor and each person quarantined in his ward or district, when such person is unable to pay for medical attendance.

In the case of Patrick vs. Town of Baldwin, 109 Wis., 342, 53 L. R. A., 613, it was held:

> "Where a law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants upon which such party can act and hold the municipality liable, as upon an implied contract."

In McQuillan on Municipal Corporations, Vol. 5, section 2453, the following doctrine is stated:

> "A municipal corporation will not be held liable on an *implied contract* to pay for relief furnished a pauper or indigent person, without solicitation on the part of a municipality, unless the statute so provides. 'Towns are liable for the support of paupers because the statute has imposed that duty on them. There was no such liability at common law. The duty of discharging this obligation is devolved by statute upon the overseers of the poor, and it is only through their action that the town can be made liable to a person who furnishes relief to a pauper.'"

Many cases are cited by the author in support of this proposition.

From a consideration of these authorities, it is my opinion that the board of health of your city is not legally bound to pay for the services of the physician referred to. However, if no district physician has been appointed in your city, or, if one has been appointed and is paid for his services in each case, and not a specific salary, it is my opinion that the board of health may, if they believe the bills reasonable and just, certify them for payment under section 4436, and that when they have so certified them, such bills may be paid by the municipality.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1368.

THE COST OF A CULVERT TO CARRY WATER ACROSS THE STREET TO BE CONSIDERED A PART OF THE COST OF STREET IMPROVEMENT.

A culvert to carry water across a street is such a part of a street improvement that its cost is to be considered as a part of the entire cost thereof, and it is within the power of the council to assess its cost to abutting owners so long as the assessment is not in excess of benefits conferred or more than one-third of the value of the assessed property after the improvement is completed.

COLUMBUS, OHIO, January 4, 1915.

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

GENTLEMEN:—I have your letter of December 15, 1914, in which you inquire:

> "May the council of a city assess the entire cost of the construction of a culvert against abutting property owners if such culvert was necessary to

provide for a run or creek flowing across said street being improved by paving? Said street is not a county or state road, or main thoroughfare, leading into, or through, the city.

"The cost of such culvert is about $300.00 and the property owners' contention is that such cost for thus providing for a natural waterway must be assumed as a part of the city's portion of the improvement."

Provision is made in various instances for the construction of bridges and culverts, but none specifically applying to the situation you describe has been found.

Section 3812 reads:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkheads, culverts, approaches, flood gates, or waterways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

"First. By a percentage of the tax value of the property assessed.

"Second. In proportion to the benefits which may result from the improvement, or

"Third. By the foot front of the property bounding and abutting upon the improvement."

From this it is seen that it is within the power of the council to assess "any part of the entire cost on abutting owners." That the construction of a culvert, made necessary to carry water across an improvement, is a part of the entire cost, cannot be questioned.

Section 3820, General Code, reads:

"The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

Council is limited in its assessments to thirty-three and one-third per cent. of the value of the property after the improvement is made, within any period of five years. (Sec. 3819, G. C.)

This, of course, limits any one assessment in the same manner and to the same extent. The same section, 3819, G. C., limits assessments to benefits conferred. Consequently, while council under section 3812 may determine whether it will (1) assess by a percentage of tax value, (2) in proportion to benefits, or (3) by the

foot front of bounding or abutting property, yet its assessments must be limited to the value of such special benefits, or one-third of the actual value of the property after the improvement is completed, and must, under section 3820, G. C., pay from the general fund for intersections and one-fiftieth of the entire cost. It is, therefore, within the power of council to assess this culvert to the property abutting on the improvement, provided the assessment is based upon either system found in section 3812, the city pays one-fiftieth of the cost and for street intersections, and the assessment in no instance exceeds the amount of benefit conferred or one-third of the value of the property after completion of the improvement.

The contention that the city *must* bear the entire cost of the culvert cannot be sustained, although it is clear that the council may charge it to the city as a portion of the share of the city under section 3820. This, however, is within the discretion of the council, as it cannot be compelled to charge the city with more than one-fiftieth of all cost, and the cost of intersections.

If this culvert was on a county or state road, it would have to be built by the county commissioners (see sections 2421, G. C., et seq.), but being upon what might be termed a cross street, its improvement will have to be paid for by the property owners of the city, as council may determine.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1369.

BOARD OF PUBLIC WORKS NOT AUTHORIZED TO READJUST THE RENTAL RESERVED IN THE UNION GAS & ELECTRIC LIGHT COMPANY'S LEASED PROPERTY CONSISTING OF PART OF THE CANAL IN CINCINNATI.

The grant by the state of Ohio to the city of Cincinnati of a part of the canal in Cincinnati, upon which, with other canal lands, the Union Gas & Electric Light Company has a lease from the state for the purpose of maintaining a pole line, does not authorize the superintendent of public works to readjust the rental reserved in such lease and said company is required to pay the full amount of the rental stipulated for in said lease.

COLUMBUS, OHIO, January 4, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You again submit to this department for opinion the request of the Union Gas & Electric Company, of Cincinnati, to reappraise the value of its lease for pole line rights along the canal in Hamilton county, Ohio.

The facts are stated in a letter from said company as follows:

> "Under the terms of a lease between the state of Ohio and the Union Gas & Electric Company, the company pays a rental of $600 per year for the privilege of occupying for pole line purposes the outer edge of the tow path at Canal and Plum streets, Cincinnati, to a point known as Sharon Road, in Springfield township, Hamilton county.
>
> "By act of the general assembly passed May 15, 1911, to provide for leasing a part of the Miami and Erie canal to the city of Cincinnati as a

public street that part of the canal between Elm and Plum, and Mitchell avenue in the city of Cincinnati passed to the control of the city. As the Union Gas & Electric Company has a franchise authorizing it to erect poles and maintain lines along the public streets of said city free of charge, we respectfully request that your board reappraise the value of the remainder of the property occupied and readjust the rental to be paid."

The original request was withdrawn and you now ask for a reconsideration of the matter.

The lease to the Union Gas & Electric Company contains several provisions which are controlling.

These are as follows:

"Said party of the second part hereby covenants and agrees to remove its poles, wires and fixtures altogether or to remove its poles and other fixtures from the surface and place its wires under ground, whenever, in the opinion of the board of public works of the state, the maintenance of such poles, wires and fixtures on or above the surface of the ground is inconsistent with the use of such ground under any other lease hereafter made by the board of public works, or whenever the lands herein leased cease to be used for canal purposes.

* * * * * * * * * * * *

"Said party of the second part further covenants and agrees to remove its poles, wires and fixtures altogether or to remove its poles and other fixtures from the surface and place its wires under ground, whenever the city of Cincinnati, by ordinance duly passed, requires other overhead wires on neighborhood or adjacent streets to be removed or placed under ground; said removal to be within sixty days after the passage of said ordinance unless a longer time shall be fixed by the terms of the ordinance. Failure to remove said poles, fixtures and to remove said wires or place them under ground within the time fixed shall terminate and operate as a surrender of all right of the party of the second part under this lease and the board of public works of the city of Cincinnati may thereupon cause such poles, wires and fixtures to be removed at the sole cost and expense of the party of the second part.

"Said party of the second part further covenants and agrees to remove its poles and fixtures and to remove its wires *or place them under ground on such portions of the canal property as may hereafter be leased or otherwise disposed of to the city of Cincinnati for the purposes of a public park, drive, boulevard or parkway,* said party of the second part to remove its poles and fixtures, to place its wires under ground, and to thereafter maintain and keep in repair the conduits, wires and fixtures under ground, all under the direction and to the satisfaction of the board, officer or officers of the city of Cincinnati having charge of such park, drive, boulevard or parkway and under such regulations, permits, etc., as may be required by such board, officer or officers."

These provisions show that the lease or sale of this part of the canal or a portion thereof was in contemplation at the time the above lease was executed. There is no provision in this lease calling for a revaluation in case of a lease or sale to the city of Cincinnati.

The land has been leased, or a portion thereof, to the city of Cincinnati for "public street or boulevard, and for sewerage, conduit and if desired for subway purposes."

By the terms of the lease to the Union Gas & Electric Company, such company may be required to place its wires underground. Nothing is said about a revaluation or a readjustment of the rental value of the rights granted.

The lease to the Union Gas & Electric Company covers the canal for a distance of 76,680 feet, more or less. Only a part of this has been leased to the city of Cincinnati by authority of the act of 102 Ohio Laws, 168.

Section 1 of said act reads:

> "Permission shall be given to the city of Cincinnati, in the manner hereinafter provided, to enter upon, improve and occupy forever, as a public street or boulevard, and for sewerage, conduit and if desired for subway purposes, all of that part of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in said city, including the width thereof, as owned or held by the state, *but such permission shall be granted subject to all oustanding rights or claims, if any, with which it may conflict, and upon the further terms and conditions of this act.*"

The lease to the electric company granting it the right to place its poles on the bank of the canal is "an outstanding right" which may conflict with the rights granted to the city of Cincinnati by the later lease.

The fact that the electric company has a franchise which permits it to construct its poles in the streets of Cincinnati free of charge does not determine its rights under its lease with the state of Ohio.

Suppose the grant to the city of Cincinnati had been made to a private corporation which desired to use the canals for private purposes, and under the same terms of the grant to the city of Cincinnati. In that event the electric company would be seeking to enforce its rights under its lease, and it could enforce them.

The city of Cincinnati takes its grant subject to the rights of the Union Gas & Electric Company to maintain a pole line on said canal lands as granted by the state to it or to have its wires maintained underground as provided in the lease.

The lease to the electric company grants rights in canal lands in addition to that leased to Cincinnati. The company does not seek a cancellation of its lease, but asks for a readjustment of the rental reserved therein.

The lease is one entire instrument which covers a certain specified distance and the rental is fixed at a gross amount for the entire privilege.

The lease is an entirety and must either be enforced as a whole, or it must be abandoned or cancelled. If there was a readjustment of the rental, it would in effect constitute a new lease.

There is no obligation upon the part of the state to readjust the rental provided for in this lease. The state has granted certain rights to the Union Gas & Electric Company, and it has protected those rights in the grant made to the city of Cincinnati. The state is fulfilling the obligations of the lease and is entitled to the full amount of the rental stipulated for therein.

It is my opinion, therefore, that the Union Gas & Electric Company is required to pay the full amount of the rent reserved in its lease from the state and that the superintendent of public works is not authorized to readjust such rent.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

1370.

SCHOOL ATTENDANCE SHOULD NOT BE DETERMINED, UNDER SECTION 7730, GENERAL CODE, AT A TIME WHEN THERE IS AN EPIDEMIC PREVAILING IN THE SCHOOL.

School attendance should not be determined under section 7730, General Code, at a time when there is an epidemic prevailing in the school, or rather in the district wherein such school is located. Such average daily attendance should be determined during the year when the school attendance is normal or not affected by an epidemic.

When the average daily attendance of a school during the preceding year has been below twelve, because of an epidemic, and such average daily attendance for the succeeding year would be more than an average of twelve, the board could legally employ a teacher and continue such school, and the payment of such teacher would be legally authorized under the law.

COLUMBUS, OHIO, January 5, 1915.

HON. GUY O'DONNELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Under date of September 9, 1914, you submitted to this department a request for an opinion, as follows:

> "Section 7730, Ohio Law 104, page 139, in part provides:
>
> "'When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school, or schools, as the local board may direct.'
>
> "A school whose average daily attendance during the preceding year had been below twelve because of an epidemic of measles, or other sickness, and which during this year would have more than an attendance of twelve, if the board of education should desire to employ a teacher and continue this school, would the payment of such teacher be an authorized payment under the law?"

In reply thereto I desire to say that under date of December 23, 1914, in an official opinion which was rendered to Hon. Chas. F. Close, prosecuting attorney, Upper Sandusky, Ohio, upon the question as to whether or not a suspended district may be revived by the addition of resident pupils to the district so as to make certain an average attendance of more than twelve, it was held that a suspended school district may be continued by the assignment of pupils to such district, provided the board deems this course best for the advancement of education, as provided by section 7684, General Code, supra.

I am enclosing a copy of said opinion and believe that it covers the request set forth in your letter of inquiry. However, in your letter you state the average daily attendance for the preceding year had been below twelve because of an epidemic of measles and other sickness, and that the school during the present year would have more than an attendance of twelve. While it is doubtful whether it could be said that a school did not have any certain daily average attendance, because some of the scholars were detained from attending school because of sickness, nevertheless, I feel that the opinion to which I above referred and a copy of which I am enclosing, covers your question without discussing any forced absence of scholars on account of sickness.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

1371.

RIGHT OF TITLE GUARANTEE AND TRUST COMPANIES TO ACT AS DEPOSITARIES OF COUNTY FUNDS—MUST RECEIVE DEPOSITS GENERALLY IN THE SAME MANNER AS A BANK—NOT AUTHORIZED TO ISSUE ORDINARY CERTIFICATES OF DEPOSIT—MAY ISSUE CERTIFICATES OF SHARES IN MORTGAGE NOTES HELD BY SUCH COMPANY.

Title guarantee and trust companies may be designated as and act as depositaries of county funds under sections 2715, et seq., General Code, and secure the funds deposited with them in the manner provided by said sections.

These companies have not the power to receive deposits generally, in the same manner as banks, but the power given such companies "to make loans for themselves or others" implies the power to receive the money with which to make such loans and to that extent to receive deposits; that is such companies can only receive deposits for the purpose of loaning the money deposited for the benefit of the person making the deposit.

Title guarantee and trust companies are not authorized to issue ordinary certificates of deposit which would circulate in the same manner as cashier's checks, but they may deliver a proper acknowledgement or certificate for the receipt of money deposited with them.

Title guarantee and trust companies may issue certificates of shares in mortgage notes held by such companies; in the manner specified in the request for this opinion; they may also receive money deposited with them for the purpose of purchasing such certificates, in small payments, such payments being evidenced by entries in pass books; in the manner specified in the request for this opinion.

Only such part of the securities belonging to title guarantee and trust companies as are deposited with the treasurer of state must be in conformity with sections 9518 and 9519, General Code.

COLUMBUS, OHIO, January 5, 1915.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—On November 12, 1914, you requested my opinion upon the following questions with reference to title guarantee and trust companies:

> "First. May such companies act as depositaries of county funds under the provisions of the county depositary law and hypothecate their securities, taken under the provisions of sections 9851, 9518 and 9519, G. C., to secure the signers of the depositary bond against loss?"

Your first request raises the question of whether a title guarantee and trust company is such a trust company as may be designated as a depositary for county funds under sections 2715 et seq.

Section 2715 is as follows:

> "The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. In a county where such bank or trust company

> does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks, located in the county as such inactive depositaries, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, and the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary. No bank or trust company shall receive a larger deposit than one million dollars."

You will note that the language is, "shall designate * * * a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States." The county depositary law, the first section of which is quoted above, constitutes a part of the depositary laws now applicable to the state and to its political subdivisions; I think the first depositary law applied only to state funds. As first passed it was optional, but afterwards was made mandatory; it is perhaps the most complete in its provisions of any of the depositary laws, but the main features of all of them are similar; and the language used in all as to the kind of banks or trust companies which may be designated as depositaries is similar. Thus, the state depositary law now provides for the deposit of state funds in "such national banks within the state, and banks and trust companies doing business within this state, and incorporated under the laws thereof, as the board deems eligible to be made such depositaries."

The language as to the bank's eligibility as a depositary for county funds is contained in section 2715, which I have quoted above. The language used as to what banks or trust companies may be depositaries for municipal or other funds is very similar. That is, there is no qualification contained in any of the sections as to the powers which must be possessed by any given bank or trust company; and it is now provided by law that building and loan associations and private banks may be chosen as depositaries in certain cases; it was also held by the common pleas court of Franklin county, prior to the enactment making private banks eligible, that a private bank could lawfully be designated as a depositary for school funds. (State ex rel. vs. Board of Education, 15 O. D., N. P., 720.)

I am also informed that in the unreported case of Schmidt, a taxpayer, vs. County Commissioners of Franklin county, Case No. 51,448 in the court of common pleas, Franklin county, Ohio, the direct question was raised as to whether a title guarantee and trust company could be designated to act as a depositary for county funds under the act passed April 2, 1906, 98 O. L., 274. This act provided that the county commissioners should designate,

> "a bank or banks or trust companies situated in such county, and duly incorporated under the laws of this state, or organized under the laws of the United States as a depositary or depositaries of the money of the county."

This act has been amended since, and is now embodied in section 2715 of the General Code which I have heretofore quoted in this opinion, and it will be noted that the language as to what banks or trust companies shall be designated as depositaries is practically identical. In this case the common pleas court allowed a mandatory injunction to compel county commissioners to recognize title guarantee

and trust companies as eligible, within the meaning of this statute. Since that decision I am informed the Guarantee Title and Trust Company of Columbus has continuously been designated as a depositary for county funds, and has acted as such depositary, and I have no doubt that the same is true with similar companies in other parts of the state.

On April 22, 1909, Hon. D. S. Creamer, treasurer of state, requested the attorney general of Ohio for an opinion as to whether the Title Guarantee and Trust Company of Columbus was such a trust company as might be designated as a depositary for state funds; on said date the attorney general rendered an opinion which may be found in the report of the attorney general for the years 1909-1910, at page 256. This opinion is as follows:

> "Complying with your request as to whether the Title Guarantee and Trust Company of Columbus is such a trust company as may be designated as a depositary of state funds by the depositary board, I beg to advise that in my opinion the board is authorized under the statute to designate this company as one of the state depositaries if the company's financial condition is such as, in the opinion of the board, will warrant the same.
>
> "Section 200-3 of the Revised Statutes provides that:
>
> " 'It shall be the duty of said board of deposit to meet on the first Monday in October of each year, or any time after the annual meeting, upon the call of the chairman, and designate such banks, and trust companies within this state, as they may, under the provisions of this act, deem eligible to be made state depositaries for the purpose of receiving on deposit funds of this state.'
>
> "This statute just quoted controls in the matter and leaves the board free to select any bank or trust company which the board may deem financially responsible and properly managed as a state depository."

I feel, therefore, that by the decision of the court of common pleas of Franklin county, which has been continuously and in good faith acted upon by the county officials and the Title Guarantee and Trust Company, and by the opinion of Attorney General Denman, which I have quoted above, this question should be considered as settled, and, therefore, I shall not go into the question of the power of title guarantee and trust companies to act as such depositaries; but upon the strength of the former opinion of the attorney general, and the decision to which I have referred, answer that it has been settled thus far that such companies may be designated to act as such depositaries.

As to the power of such companies to hypothecate their securities taken under the provisions of sections 9851, 9518 and 9519 of the General Code to secure the signers of a depositary bond against loss, it is sufficient to say that section 9851 simply provides that the securities deposited with the treasurer of state by title guarantee and trust companies must be those permitted by sections 9518 and 9519, and expressly provides that except such deposit, the capital of such companies may be invested as the board of directors prescribes. Of course the $50,000 in securities deposited with the treasurer of state cannot be hypothecated; but if the company chooses to invest the rest of its capital also in securities specified in sections 9518 and 9519, there is no reason why such securities cannot be so hypothecated. The fact that a title guarantee and trust company may be designated as a depositary necessarily implies its right to secure the deposit of public funds in the manner provided by the statute.

Your second question is as follows:

"May such companies receive deposits and issue ordinary interest bearing certificates of deposit therefor?"

Section 9850 of the General Code, which specifies the powers of title guarantee and trust companies, is as follows:

"A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

As a corporation only has those powers which are expressly granted or necessarily implied, it follows from the above section that a title guarantee and trust company has no power to receive deposits unless such power can be implied from the language used, as it is not expressly granted. It will be noted that it has the power to make loans for itself or as agent or trustee for others, and I think it must necessarily be implied that the power to make loans for others necessarily implies the power to receive the money with which to make the loan, that is to that extent to receive deposits; but I do not believe that this power can be broadened into a power to receive deposits generally or in the manner in which deposits are received by banks; but that it can only receive deposits for the purpose of loaning the deposits for the benefit of the person depositing it. In other words, title guarantee and trust companies are not granted banking powers; and as pointed out in a former opinion to you, dated December 1, 1913, they are not expressly, or by implication, included in the catalogue of corporations which come under the supervision of the superintendent of banks.

It is difficult to determine exactly what is meant by "ordinary interest bearing certificates of deposit." If it is meant that such certificates are negotiable and such as are commonly used in banking business, then I would say that the issuance of such certificates is improper. But a certificate of deposit properly is nothing more than an evidence of indebtedness; that is, it is a written acknowledgment delivered by a bank or trust company that it has received from a certain person a certain sum of money on deposit. Such certificates have been held to be in effect equivalent to promissory notes.

My holding, therefore, is that a title guarantee and trust company may not issue certificates of deposit which would be negotiable and could circulate in the same manner as cashier's checks; but that the power given to "make loans for itself or as agent or trustee for others and guarantee the collection of interest and principal on such loans" gives such company the power to receive the money with which to make the loan and necessarily to deliver a proper acknowledgment of its receipt.

Your third question is as follows:

"May such companies issue mortgage certificates in the form shown herewith, marked exhibit 'A'?"

The mortgage certificates to which you refer, in substance is an evidence of indebtedness, the payment of which is guaranteed, by the Guarantee Title and Trust Company; the company, for example, has notes aggregating $47,700 due to it. These notes are secured by mortgages on real estate; the company deposits these notes

and mortgages with a certain trust company and issues its mortgage certificates of varying denominations for aliquot parts of the total sum deposited with the trustee. The aggregate of the different certificates may equal the total amount deposited with the trustee; in other words, these certificates are issued by the title guarantee and trust company and are secured by the deposit of the notes and mortgages in question, and each holder of the certificate has as security his proportionate share of the notes and mortgages so deposited.

I think this transaction is fairly within the power granted to such companies by section 9850, viz.:

"Making loans for itself or as agent or trustee for others, and guarantee the collection of the interest and principal of such loans."

Your fourth question is as follows:

"May such companies accept deposits and issue pass books therefor under contracts of which the following is a copy:

"'CONTRACT AND RULES AND REGULATIONS.

"'Respecting partial payment contracts to which all who accept this book assent.

"'I HEREBY purchase from the Guarantee Title and Trust Company one (1) _____ dollar ($_____) five per cent. (5%) guaranteed first mortgage bond. I agree to pay for this bond as follows: _____ dollars ($_____) herewith and _____ dollars ($_____) on or before the 10th day of every month hereafter until full payment is made, and the conditions of the purchase, delivery rate of interest, due date, privileges and penalties are all as hereinafter set forth, and are hereby agreed to by the purchaser, and accepted by the company when it receives and retains the first installment on account of such purchase.

"'Name _____
"'Street_____
"'City and County_____
"'State_____
"'Date _____, 19_____

"'CONDITIONS.

"'1. Payments are to be made at the rate of _____ dollars ($_____) per month and are to be received by the Guarantee Title and Trust Company on or before the 10th day of each month in which they are due.

"'2. The partial payments on this contract shall bear interest at the rate of four per cent (4%) per annum computed semi-annually on the 1st days of January and July. All payments made after the 5th day of the month shall bear no interest until the 1st of the following month. No interest will be allowed upon this contract as long as payments are in arrears.

"'3. If the payments remain in arrears at any time for three consecutive months, the company may cancel this contract, assume the ownership of the bond and return to the purchaser the amount paid in less three per cent. (3%) of the face value of the bond contracted for and accrued interest.

"'4. When the face value of the bond contracted for has been paid in, as evidenced by the books of the company, the company will deliver to the purchaser the bond above mentioned.

"'5. Monthly payments may be anticipated and will be entitled to the interest from the date of their payment. The bond will not fall into arrears until all monthly payments made in advance are exhausted.

"'6. The company agrees that in the event of the death of the purchaser of this bond, it will, upon request of his legal representatives purchase from them for the full amount paid in, with interest as provided by the contract, the share of the purchaser in said certificates.

"'7. The interest on the bond will be paid semi-annually after its delivery. The interest earned by the payments will be paid with the first payment of interest that is made on the bond.'"

I think this transaction is also embraced within the powers granted the company by section 9850. The depositor here is, in fact, a purchaser of a share in a mortgage loan; the company has the right to make the loan, and has the right to sell the same, and I think the method of selling, by allowing the purchaser to make small payments and allowing him interest on the payments as made is incident to the general powers granted.

Your fifth question is as follows:

"Must all securities taken by said companies be in conformity with sections 9518 and 9519, G. C., or only such part of them as are deposited with the treasurer of state?"

Section 9851 of the General Code provides:

"No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes."

Sections 9518 and 9519 specify the securities in which the capital and surplus of insurance companies, other than life insurance companies may be invested.

As to title guarantee and trust companies, the provision only covers the securities which must be deposited by said companies with the treasurer of state; that is the securities deposited by title guarantee and trust companies with the treasurer of state must be those specified in sections 9518 and 9519; and the investment of the funds of the company in securities other than those to be deposited with the treasurer of state is controlled entirely by the board of directors.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1372.

NO POWER TO REGULATE CHATTEL LOAN LICENSE.

There is no power to revoke a license to conduct the business of making loans upon chattels or personal property, etc., other than for cause specified in section 6346-6, *General Code.*

COLUMBUS, OHIO, January 6, 1915.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your letter of December 31st, 1914, you ask my opinion upon the following question:

> "May the secretary of state revoke a license to conduct the business of making loans upon chattels or personal property, or salaries or wage earnings upon any ground other than that of conviction of an offense against the laws regulating such business, as provided in section 6346-6, of the General Code?"

This question requires consideration of the following provisions of law:

> "Sec. 6346-2, General Code, provides in part as follows:
>
> "* * * Each license granted shall date from the first of the month in which it is issued and shall be granted for the period of one year, subject to revocation, as provided in this act, and such license shall be kept conspicuously displayed in the place of business of the licensee."
>
> "Sec. 6346-6, General Code, provides as follows:
>
> "Any person, firm or corporation, or any agent, officer, or employe thereof, violating any provision of this act, or that carries on the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings without first obtaining a license as provided in this act shall, for the first offense, be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00); and for a second offense not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), and it shall thereupon become the duty of the secretary of state upon such second conviction to revoke any license theretofore issued to such person, firm or corporation."

The power to revoke a license is of a nature such as that its existence must depend upon explicit grant. Such revocation can only be for cause, and the cause must be stated in the statute. That being the case, and the only cause mentioned in the statute being that referred to in section 6346-6, General Code, I am of the opinion that the secretary of state has no power to revoke a license, save upon the grounds therein referred to.

This conclusion is strengthened by the fact that section 6346-2, in speaking of revocation, uses the language, "subject to revocation, *as provided in this act;*" it being apparent therefrom that no power to revoke exists save under the provisions of the act.

I therefore repeat my opinion, which is that the power to revoke such a license is limited to revocation for the cause specified in section 6346-6, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1373.

NO POWER IN MUNICIPALITY TO COMPEL ELECTRIC LIGHT COMPANY TO PERMIT SUCH MUNICIPALITY TO USE POLES OF THE LIGHT COMPANY FOR CARRYING WIRES.

A municipality has no power to compel an electric light company to permit such municipality to use the poles of the light company for carrying the wires of the municipal light company when such light company uses the street of the municipality under a franchise which does not provide for such use.

COLUMBUS, OHIO, January 6, 1915.

HON. ARTHUR MORRIS, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—Under date of July 1st, 1914, you wrote asking my opinion as follows:

> "Is there any law whereby a municipality may compel a light company to permit the municipality to use the poles of the light company for carrying wires of the municipal light company?"

Section 9195, General Code, provides that a company organized for the purpose of supplying electricity for power purposes and for lighting streets and public and private buildings of the city or village, may, with the consent of the municipality, and under such reasonable regulations as it prescribes, construct lines for conducting electricity for power and light purposes through the street and other public places of the municipality by the erection of the necessary fixtures including posts, piers and abutments necessary for the wires.

Section 3637, General Code, provides that municipal corporations shall have power to regulate the construction and repair of wires, poles, plants and other equipment to be used for the generation and application of electricity.

Under favor of the foregoing provisions, and in accord with the general rule that a municipality on granting a privilege to use a street, has the power in its legislative discretion to impose reasonable conditions, I am of the opinion that a municipality in the grant of a franchise to an electric light company, may stipulate as a condition of said grant that the electric light company shall permit the municipality to make a reasonable use of the poles of such company for municipal wires.

Postal Telegraph Co. vs. City of Chicopee, 207 Mass., 341.
St. Louis vs. Western Union Telegraph Co., 148 U. S., 92; 166 U. S., 388.
Railroad Co. vs. Railroad Company, 36 O. S., 239.
Toledo, etc., Ry. Co. vs. Western Electric Light Co., 10 C. C., 531.

Columbus vs. Columbus Gas Co., 76 O. S., 309.
Columbus Citizens Telephone Co. vs. Columbus, 88 O. S., 466.

By a communication of later date from you, however, I am advised that your inquiry has reference to a condition where the electric light company, under a franchise unconditional in this respect, has been in operation for a number of years, and has erected and now has in use poles which the municipality now desires to use.

In the case of Toledo, etc., Ry. Co. vs. Western Electric Light Co., supra, the court held that the power of municipal authorities under the act of 1886 (Sec. 9195, G. C.) to impose reasonable regulations governing the erection and maintenance of lines for the transmission of electric light and power within the limits of the municipality, is a continuing power, and that under it a requirement made subsequent to the grant of a franchise that the poles of the company receiving the franchise may also be used to support electric light wires of parties other than the company receiving the franchise and owning the poles, was reasonable and valid, where such added use does not materially interfere with the business of such company.

The decision in the case just noted, however, was reversed by the supreme court without report on the authority of Railroad Co. vs. Railroad Co., 36 O. S., 239 and Street Railway Co. vs. Street Railway Co., 50 O. S., 603 (51 O. S., 633).

The case of Railroad Co. vs. Railroad Co., supra, which was one involving the right of one street railroad company to use the tracks of another upon compensation to be fixed by council, the court in its opinion says:

> "What we have already said in refutation of an exclusive right in the plaintiff to use the route upon which its tracks were laid for street railroad purposes, does not in the least conflict with its right of private property in the material of which this road is constructed. Such material, in place, is as strictly the private property of the corporation as it was before it was placed, save in this only, that having been placed in a public street, it was thereby dedicated to the ordinary use of the public; but, as a railroad company, such material remains the private property of the company, and for such purpose it is subject to the use and control of the owner exclusively. When, therefore, a right of way for street railroad purposes is granted over the same route to another company by the municipal authorities, the private property of the former cannot be appropriated by the latter company until compensation is first made by the latter to the former company. And in the absence of a stipulation to the contrary, it is quite clear to our minds that the municipal authorities have no more power to fix the amount of compensation that should be paid by the latter to the former company for the right to the joint use of such material than it has to determine compensation to be paid to other owners of private property taken for the same public use. In such case, if no agreement be made between the companies as to the matter of compensation, or the same be not assessed by a jury, as in other cases of the condemnation of private property to public uses, the latter company should be enjoined from forcible appropriation."

In the case of Street Railway Co. vs. Street Railway Co., supra., the court in its opinion on this point says:

> "So that, to make effective the grant of the municipal authorities to one company to occupy the tracks or structures of another, it becomes

necessary to obtain the consent of or waiver of damages by the owner; or, if that cannot be done, then to appropriate tracks or structures to such use by judicial proceedings in which compensation may be assessed."

Undoubtedly it was on a consideration and application of the principles just noted that the supreme court reversed the circuit court in the decision reported in 10 C. C., 531. Although the poles and wires of an electric light company in the streets of a municipality are subject to the reasonable regulation of the municipality with reference to the manner of their use in so far as the right of the public in the streets are concerned, yet nevertheless as between the electric light company and the municipality such poles and wires when placed in position are the private property of the electric light company; and as stated by the supreme court in the case of Railway Co. vs. Railway Co., supra, it is quite clear that the municipality, in the absence of a stipulation in the franchise to the contrary, has no power to take to itself or grant to another company the right to use such poles without the consent of the company owning and operating the same.

The poles in question being private property, it is quite clear that the proposed use of the same by the municipality would constitute a taking within the provisions of section 19 of article I of the state constitution, which provides that when private property shall be taken for public use, compensation therefor shall first be made. This consideration suggests the only remaining question which is, whether the city has the power to appropriate by condemnation the use of the service company's poles for carrying the wires of the municipal plant. As to this question it is to be borne in mind that neither the general provisions of section 19 of article I, nor those of section 5 of article XIII of the state constitution applying to corporations are to be considered as granting the power of eminent domain. The power is one inherent in the state, and which passes to the legislature by virtue of the general grant to it of legislative power. The constitutional provisions above noted simply prescribe in a measure modes for and limitations upon the exercise of the power when granted. Giesy vs. C. W. & Z. R .R. Co., 4 Ohio, 308.

Upon the foregoing considerations it follows that the power of the city to appropriate the poles in question for its own use must be found, if at all, in the provisions of some statute authorizing such appropriation, and making provision for compensation to the owner in the mode prescribed in the constitution, for with respect to matters of this kind the constitution does not execute itself.

McArthur vs. Kelly, 5 Ohio, 140.
Lamb vs. Lane, 4 O. S., 167.

By sections 3677 and 3678, of the General Code, power is granted to municipal corporations to enter upon and hold real estate both within and without their corporate limits among other purposes for electric lighting, heating and power plants and for supplying the product thereof.

By section 3990 the council of a municipality is given power to erect electric light works, and to purchase electric works already erected therein; and by this same section the council of villages is given the power, if it is unable to agree as to compensation with the owner of an existing electric light works, to appropriate the same by condemnation proceedings.

Section 3995, General Code, provides, among other things, that for the purpose of erecting and maintaining poles whereon to attach wires to carry and transmit electricity, a municipal corporation may enter upon private land and appropriate so much thereof as may be necessary for erecting such poles and wires.

I am unable to find any other statutory provisions germane to the question under consideration, and as it is quite evident that none of the statutory provisions just noted, conferring upon municipal corporations the power of appropriating by condemnation, with respect to electric works or the transmission of electricity, are broad enough in their terms to confer upon them power to appropriate the use of the poles of a public service company for carrying the wires of municipal plants, I am constrained to the opinion that such power does not exist, and that your question should be answered in the negative.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1374.

AUTHORITY OF AUDITOR OF STATE TO CHECK OUT AND EXAMINE DEPARTMENT OF SUPERINTENDENT OF BANKS.

The auditor of state should check out and examine the department of superintendent of banks with relation to the liquidation department, under section 273-2, General Code.

COLUMBUS, OHIO, January 6, 1915.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of January 2, 1915, you submit for my opinion the following:

> "Section 273-1 and section 273-2 provide for examination of departments when changes have been made, or officers retire. Taking into consideration these two sections, I desire to know whether or not the auditor of state is compelled or should check out and examine the department of superintendent of banks with relation to the liquidation department. See sections 737 to 744, G. C."

Section 273-1 to which you refer, refers to the inventory which shall be made by the accountant sent by your department to the office of the retiring state official, and refers, as I take it, solely to the state property. Section 273-2 provides as follows:

> "It shall be the further duty of such accountant to check over the transactions of such state official during his term in office, and shall make a statement thereof, in writing, to be included in such report as hereinbefore provided. Such statement shall show what sum or sums of money remain in the hands of such retiring state official at the time of the expiration of his office, which said sum or sums of money it may be his duty to turn over to his successor in office, or pay into the state treasury as provided by law."

There is no doubt in my mind that the transactions of the liquidating department of the superintendent of banks is such a transaction as referred to in said section, and that therefore the accountant who examines the department of the superintendent of banks should likewise make a statement of the transactions of the liquidating department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1375.

APPROVAL OF ACTS BY THE GOVERNOR INVOLVING EXPENDITURE OF MONEY BY THE AGRICULTURAL COMMISSION.

Since section 9 of the agricultural commission act, 103 *O. L.,* 306, *provides that:* "* * * *all similar acts involving expenditures of money shall be subject to the approval of the governor,* * * * *the expenditure by such commission with relation to exhibits and attendance at different national organizations of members and employes of the agricultural commission are proper, the record showing that the minutes in which was the resolution authorizing attendance, were approved by the governor.*

COLUMBUS, OHIO, January 6, 1915.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 20th, in which you state:

"Enclosed you will observe resolution of the agricultural commission of Ohio with relation to exhibits and attendance at different national organizations of members and employes of the agricultural commission.

"Kindly advise me whether or not these expenditures are proper and in conformity with the laws governing this department."

The resolution submitted with your inquiry reads as follows:

"Mr. Williams moved, Mr. Strode supporting, that J. W. Hammond and E. C. Schwan be authorized to make an exhibit at the international live stock exposition to be held in Chicago in December, 1914, the exhibit to consist of twenty-five lambs from the southeastern test farm, the expense for attendance at said meeting to be borne by the department of animal husbandry, experiment station division; that Messrs. J. W. Ames, E. B. Forbes, George N. Coffey, B. E. Carmichael and Director Thorne be authorized to attend the meeting of the association of American agricultural colleges and experiment stations to be held at Washington, D. C., November 9, 10 and 11, 1914; that J. W. Ames be authorized to attend the meeting of the official agricultural chemists at Washington, D. C., following the above meetings."

Section 9 of the agricultural commission act, 103 O. L., 306, provides:

"The agricultural commission is authorized to employ a secretary, heads of bureaus, experts, clerks, stenographers and other assistants and employes, and to fix their compensation and these and all similar acts involving expenditures of money shall be subject to the approval of the governor. The commissioners, secretary, experts, clerks, stenographers and other assistants and employes that may be employed, shall be entitled to receive from the state their actual and necessary traveling expenses while traveling on the business of the agricultural commission. Such expenses shall be itemized and certified to by the person who incurred the expense, and allowed by the agricultural commission."

The adoption of said resolution was an act involving the expenditure of money

within the meaning of section 9. I am informed that the resolution was approved by the governor; and I am of the opinion that payment from the state treasury of the expenses in question would be legal and proper.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1376.

DAY SCHOOL AT OHIO PENITENTIARY—PRISONER NOT REQUIRED TO REMAIN IN ONE GRADE FOR THE FULL PERIOD OF FORTY WEEKS BEFORE TAKING PROMOTIONAL EXAMINATION.

The act providing for day school at the Ohio penitentiary, 103 *O. L.,* 273, *does not require that a prisoner remain in one grade for the full period of forty weeks before becoming eligible to take a promotional examination and earn a month diminution of sentence, but on the other hand, authorizes the superintendent of schools of the Ohio penitentiary to hold promotional examinations at such times as he sees fit and allow prisoners to earn a month diminution of sentence each time they pass from one grade to the next higher one.*

COLUMBUS, OHIO, January 6, 1915.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 4, 1914, as follows:

"Referring to section 2195, General Code of Ohio (page 273, Laws of Ohio, 103).

"Section 5 thereof provides for examinations to be held for promotion from one grade to the other.

"Section 7 thereof provides for one month's diminution of sentence of prisoners for each advancement in grade.

"Section 6 provides that school shall be held not less than two hours each day, Sundays excepted; that of four school weeks; that a course of study shall consist of not less than four recitations a week, continued for a period of forty weeks.

"Instead of holding school two hours each day as provided for, same has been held for four hours each day.

"Query: In view of the fact that by holding school for four instead of two hours, as provided for in said law, the same result has been accomplished in twenty weeks, as was intended to be accomplished in forty weeks, as provided for, have I legal authority to grant one month's diminution of sentence to those who have received a passable grade on examinations held at the expiration of such period?

"You can readily see that this question is of vital importance to the man confined here, who had only six or seven months to serve at the time the school was opened. If forty weeks of schooling is required before they are entitled to any credits, as provided for, their terms will expire before the time has arrived at which I will be permitted to give them any credit."

House bill No. 233, entitled "An act providing for the establishment and maintenance of a day school for prisoners at the Ohio penitentiary," reads in part:

> "Section 4. The superintendent, having regard to previous education and intellectual capacity, shall designate the prisoners who shall attend such school. He shall prescribe a graded course of study in branches named in section 2, and classify and regulate, and prescribe tests for the promotion of prisoners according to attainments from one grade to another. He shall assist and direct the teachers in the performance of their duties and perform such other functions as the board may determine; and he shall, with the approval of the board, prescribe rules and regulations for the management and government of the school.
>
> "Section 5. Examinations may be held for promotion and the questions for examination for such promotion shall be uniform and prepared under the direction of the superintendent. Only such prisoners as receive, on examination, an average grade of seventy percentum, with no grade less than fifty percentum, in any branch, shall be passed.
>
> "Section 6. Such school be held not less than two hours each day, Sundays excepted. A school week shall consist of six days and a school month of four school weeks. A course of study shall consist of not less than four recitations a week, continued for a period of forty weeks. The school shall be classified into such number of grades as the superintendent shall prescribe.
>
> "Section 7. A prisoner, other than one sentenced for life, attending such school, shall be entitled to one month diminution of his sentence for each advancement in grade, which diminution shall not be forfeited or taken away because of a violation of any rule of discipline or for any other cause. The record in the school of a prisoner sentenced for life shall be given special consideration in any application for pardon, parole, or commutation of sentence."

It will be noted that section 4 of the act above quoted provides in part that the superintendent "shall prescribe a graded course of study in branches named in section 2, and classify and regulate, and prescribe tests for the promotion of prisoners according to attainments from one grade to another." Section 6 of the act provides in part: "that a course of study shall consist of not less than four recitations a week, continued for a period of forty weeks." Section 5 provides "that examinations may be held for promotion and the questions for examinations for such promotion shall be uniform and prepared under the direction of the superintendent." Section 7 provides for one month diminution of a prisoner's sentence "for each advancement in grade." It will be noted that no provision is made in the act as to when promotional examinations shall be held or how often, and from a reading of the entire act, it is my opinion that these examinations for promotion from one grade to another may be held at such times as the superintendent of the school sees fit. When a prisoner passes such examination and earns a promotion from one grade to the next higher one, he is entitled to a one month diminution of sentence regardless of how long he has been a pupil in the grade from which he is promoted. The act, as I read it, does not require the prisoner to remain in one grade for the entire period of forty weeks before he can be advanced to the next higher grade and earn a month diminution of sentence. However, it might be well to add that since examinations may be held at such times as the superintendent of schools sees fit, and a month diminution of sentence granted for each promotion, great care should be exercised by the superintendent when enrolling a prisoner

as a pupil in the school, so that such prisoner will be placed in that grade which his education merits. If this is done, there will be little chance of the prisoner gaining time by promotional examinations other than that which application to his studies in the prison school has earned for him.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1377.

JURISDICTION OF JUVENILE COURT OVER A BOY CEASES WHEN HE IS COMMITTED BY THE COURT TO THE BOYS' INDUSTRIAL SCHOOL.

When a boy is committed to the boys' industrial school by the juvenile court, the jurisdiction of the juvenile court ceases and such boy can only be released from the industrial school by the board of administration, upon the recommendation of the superintendent.

If the juvenile court desires to grant a rehearing, in the case of a boy committed to the boys' industrial school, it must do so within the time laid down by the rule of the court, provided the same is within the term at which the boy was committed.

COLUMBUS, OHIO, January 6, 1915.

HON. R. U. HASTINGS, *Superintendent of the Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I have your letter of October 19, 1914, as follows:

"As managing officer of the boys' industrial school, I am frequently called upon by the juvenile courts to return boys to the court for rehearing. Of course, this rehearing always terminates in the dismissal of the case by the court and such action uniformly acts as a release from the school. We have proceeded under the understanding that the court might, for proper reasons shown, grant a new hearing, but we are not clear as to what period of time might elapse before such right to grant said hearing becomes inactive.

"I am enclosing herewith copy of communication from the juvenile officer of Hamilton county which will probably explain our difficulty a little more clearly.

"I respectfully request your opinion as to the limitations of the court's authority over boys committed to and in the hands of the school, whether in cases of juvenile delinquents there is a right at any time for a new hearing, and if so, limitations as to time granting same?"

Section 2084 of the General Code, as amended, 103 O. L., 879, reads:

"Male youth, not over eighteen nor under ten years of age, may be committed to the boys' industrial school in the manner provided by law on conviction of an offense against the laws of the state."

Section 2083 of the General Code reads as follows:

"The reform school, situated in the county of Fairfield, shall be known and designated as the boys' industrial school. Its object shall be the reformation of those committed to its charge. All youth committed thereto shall be committed, until they arrive at full age, unless sooner reformed."

Section 2083 makes it clear that a boy committed to the boys' industrial school on the conviction of an offense against the laws of the state, must stand committed to such institution until he arrives at full age, unless sooner reformed. If sooner reformed, in the judgment of the institution officials, he may be paroled by the Ohio board of administration upon the recommendation of the superintendent.

It has been suggested, however, that boys committed to the boys' industrial school by the juvenile court, are not committed in the sense in which that word is used in section 2083, since they are not convicted of an offense against the laws of the state, but merely committed as delinquent children, and for this reason it is urged that the provisions of section 2083 do not apply. In view of the fact that there was no juvenile court at the time section 2083 was originally adopted, there seems to be some merit in this claim, and conceding for the purpose of argument that the point is well taken, I will endeavor to reach a solution of the question submitted without reference to section 2083, above quoted.

Section 1643, General Code, as amended, 103 O. L., page 869, reads:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Section 1652, G. C., as amended, 103 O. L., page 871, provides:

"In case of a delinquent child, the judge may continue the hearing from time to time, and may commit the child * * * to a training school for boys, or, if a girl, to an industrial school for girls * * *. In no case shall a child committed to such institutions be confined under such commitment after attaining the age of twenty-one years. * * *"

Section 1652-1 and other sections of the juvenile court act, clearly indicate that the boys' industrial school is included in the term "training school for boys" used in section 1652, supra.

It will be noticed that section 1643 provides that "when a child under the age of eighteen years comes into the custody of the court" such child shall "continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years." The boys' industrial school at Lancaster is a reform school, the object of which is to bring about the reform of the boys committed to it. Owing to this fact, it seems to me that when a boy is committed to the boys' industrial school by the juvenile court, it is no longer necessary for the juvenile court to retain jurisdiction over the child, since the child could be properly disciplined and protected by the authorities of the boys' industrial school. Therefore, inasmuch as the two reasons mentioned in section 1643 for the continuing jurisdiction of the juvenile court do not exist after the boy's commitment to Lancaster, it is my opinion that the jurisdiction of such court terminates when the boy is committed to the boys' industrial school.

Section 2092 of the General Code provides for the parole by the trustees (now the Ohio board of administration) of inmates of the boys' industrial school and

delinquent minors committed by the juvenile court when once received at the boys' industrial school, are certainly inmates within the meaning of this section. It is, therefore, my opinion that the jurisdiction of the juvenile court, though a continuing one in cases where minors are placed in children's homes or private homes, is not such in cases where boys are committed to the boys' industrial school, and that when a boy is committed to the boys' industrial school by such court, the court's jurisdiction ceases and the boy can be released from the institution only by the Ohio board of administration upon the recommendation of the superintendent.

As to the juvenile court granting a rehearing, it is my opinion that the court may grant such rehearing provided the motion for such rehearing is filed within the time required by the rule of the court; and provided further, that such rehearing is granted by the court within the term at which sentence was passed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1378.

MANNER IN WHICH STATE BOARD OF CHARITIES MAY ASSUME CHARGE OF PLACING OF INMATES WITH THE TRUSTEES OF COUNTY CHILDREN'S HOME.

If the trustees of a county children's home desire the board of state charities to assume charge of the placing of any of its inmates, they can so arrange only by transferring the guardianship of such inmates to the board of state charities, and when such children have been committed to such home, by the juvenile court, such court must first consent to such transfer. When this is done, the expense of such placing and subsequent visitation, together with one-half the amount of board, if any, paid by the board of state charities on account of a child, shall be charged by such board to the county in which the child had a legal residence when received by such board, according to the provisions of section 13524, *General Code.*

COLUMBUS, OHIO, January 6, 1915.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 28, 1914, as follows:

> "A query has come to our attention in connection with section 3000 of the General Code.
>
> "Two counties have requested the board of state charities to act as placing and visiting agents of wards of the children's homes in these counties. We desire to know whether the principles of section 1352-4 are to be applied in such instances. In other words, will the county be required to pay to the state the necessary expenses for supervising the placing of children which have not been committed to the care and custody of the board?
>
> "Certain humane societies have sought to transfer children to the board of state charities without further court procedure. Can they be accepted in that manner and will the expenses for such children be chargeable to the county in the manner directed in section 1352-4?"

Section 1352-3 of the General Code, as amended in 103 O. L., page 866, provides as follows:

"The board of state charities shall when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court, that court must first consent to such transfer.

"The board shall thereupon ipso facto become vested with the sole and exclusive guardianship of such child or children. The board shall, by its visitors, seek out suitable, permanent homes in private families for such wards; in each case making in advance a careful investigation of the character and fitness of such home for the purpose. Such children may then be placed in such investigated homes upon trial, or upon such contract as the board may deem to be for the best interests of the child, or proceedings may be had, as provided by law, for the adoption of the child by suitable persons. The board shall retain the guardianship of a child so placed upon trial or contract during its minority, and may at any time, if it deems it for the best interest of the child, cancel such contract and remove the child from such home. The board, by its visitors, shall visit at least twice a year all the homes in which children have been placed by it. Children from whom on account of some physical or mental defect it is impracticable to find good, free homes, may be so placed by the board upon agreement to pay reasonable board therefor not to exceed $3.50 per week, which shall be paid out of funds appropriated to the use of the board by the general assembly. When necessary any children so committed or transferred to the board may be maintained by it in a suitable place until a proper home is found.

"So far as practicable children shall be placed in homes of the same religious belief as that held by their parents."

Section 1352-4 provides:

"The actual traveling expenses of such child and that of the agents or visitors of said board in connection with placing such dependent or neglected child in a home and of subsequent visitation of such child, together with half the amount of board, if any, paid by said board on account of the child to the owners of such home shall be charged by the board of state charities to the county in which the child had a legal residence when received by such board. The treasurer of each county shall pay the quarterly draft of the board of state charities for the amount so chargeable against such county for the preceding quarter. The sums so received as well as payments for board as provided by sections 1352-5 and 1653 of the General Code, shall not be turned into the state treasury but shall be credited to a fund to be known as the child placing fund to be used to maintain the child placing work of the board as provided by this chapter, but such money received for children's board shall be used only to pay the board of the child for which it may be paid by the individuals liable therefor."

Section 3099 of the General Code, as amended in 103 O. L., page 892, provides:

"Unless a children's home places its wards through the agency of the board of state charities, the trustees shall appoint a competent person as visiting agent, who shall seek homes for the children in private families,

where they will be properly cared for, trained and educated. When practicable, the agent shall visit each child so placed not less than once in each year, and report from time to time to the trustees its condition, any brutal or ill treatment of it, or failure to provide suitable food, clothing or school facilities therefor in such family. The agent shall perform his or her duties under the direction of the trustees and superintendent of the children's home for which he or she is appointed, and may be assigned other duties not inconsistent with his or her regular employment as the trustees prescribe. His or her appointment shall be for one year, or until his or her successor is appointed, and he shall receive such reasonable compensation for his or her services as the trustees provide."

Under section 3099, the trustees of the home must appoint a competent man or woman to act as visiting agent. They cannot, under this section, arrange with the board of state charities to have its visiting agents act in the interest of children in charge of them (the trustees). This is clear from the provision of section 3099 that "the agent shall perform his duties under the direction of the trustees and superintendent of the children's home for which he is appointed, and may be assigned other duties consistent with his regular employment as the trustees prescribe."

If the trustees of any county children's home desire the board of state charities to assume charge of the placing of any of its inmates, they can so arrange only by transferring the guardianship of such inmates to the board of state charities, and when such children have been committed to such home by the juvenile court, such court must first consent to such transfer. When this is done, the expense of such placing and subsequent visitation, together with one-half the amount of board, if any, paid by the board of state charities on account of a child, shall be charged by such board to the county in which the child had a legal residence when received by such board, according to the provisions of section 1352-4.

This, I think, fully answers your question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1379.

POWER OF DIRECTOR OF PUBLIC SERVICE TO MAKE RULES AND REGULATIONS TO INSURE COLLECTION OF WATER, GAS OR ELECTRIC RATES.

The director of public service has power to make reasonable rules and regulations to insure the collection of water, gas or electric rates, and an assessment of ten per cent. penalty is not unreasonable nor so drastic as the rule approved in 82 *O. S.*, 216.

COLUMBUS, OHIO, January 6, 1915.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I have your letter of December 15, 1914, in which you inquire:

"Under section 3959, G. C., can the director of public service fix the rate (say $2.00 for each quarter) if paid on or before a certain date? And if not so paid, can he assess a penalty of 10 per cent., or any other reasonable sum, for non-payment?"

An inspection of the section you mention shows very clearly that it is not the one you desire construed, and I conclude that the section for consideration is 3958, which reads:

> "For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

I think the case of the city of Mansfield vs. Manufacturing Company, 82 O. S., 216, fully answers your question. In that case it was held that a regulation authorizing the director of public service to cut off the water in case of non-payment and not to turn the same on again until all back dues had been paid, and the additional sum of $1.00, was a reasonable regulation. I think this a very much more drastic regulation than the one you state, and therefore that the case considered fully answers your question. The only question that I can have in mind would be whether or not a rule like that found in 82 O. S. would not be very much better and more efficacious than any rule made in the line indicated in your question. But that is not a question of law, but one for the determination of the director of public service.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1380.

LIBRARY FUNDS MAY NOT BE RECEIVED AND DISTRIBUTED BY THE TRUSTEES OF A CITY OR VILLAGE LIBRARY, UNDER PROVISIONS OF SECTION 4300, GENERAL CODE.

The codification of the statutes in 1910, *where it omitted that portion of section* 152 *of the municipal code of* 1869, *and of section* 1768, *of the Revised Statutes, authorizing the council of a municipality to provide for the distribution and paying out of funds belonging to a municipality, when considered in connection with section* 4300, *General Code, effects a repeal of such authority, and library funds may not be received and distributed by the trustees of a city or village library.*

COLUMBUS, OHIO, January 7, 1915.

HON. HARRY W. KOONS, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—I have your letter of December 2, 1914, in which you inquire as to the right of the trustees of your public library to receive and disburse the funds raised by taxation for its support and maintenance, the controversy being whether this fund should be paid over to the library trustees, or be paid into the city treasury and handled as are other funds.

Upon the general phase of your case, an opinion I gave to Hon. O. R. Wade,

city solicitor of Fostoria, Ohio, on July 7, 1914 (of which I enclose you a copy), is in point, and I can see no reason for reviewing or modifying it. However, and as you suggest, your city library was not wholly organized and built from public money, but to the contrary has its foundation in a deed made by F. L. Fairchild and others, to the city of Mt. Vernon, Ohio, about March 17, 1884, and accepted by an ordinance passed March 24, 1884, and amended December 10, 1888.

The conveyance, so far as I am able to find, contained no provision as to the handling of the library funds, but the ordinance of March 24, 1884, provided:

> "Section 3. Be it further ordained that the city council shall, when said building has been repaired and put in proper condition and is occupied as a library and reading room, defray the expenses of a janitor therefor, and the expense of lighting and heating said building and keeping the same in repair, upon bills presented therefor approved by said trustees, out of the funds of said city, other than the funds received by said city as contributions or donations made for the purpose of said library and reading room."

Section 2 of the ordinance of December 10, 1888, reads:

> "Section 2. Notwithstanding the provisions of said section three of said ordinance, as soon as the money raised from the tax referred to, section one of this ordinance, has been placed to the credit of said city, and including the money now on hand for that purpose, the city clerk shall, and is hereby authorized to issue an order upon the treasurer for the full amount thereof, in favor of the treasurer of the board of trustees of said library and reading room to be disbursed by said board for purposes aforesaid."

The provisions of this ordinance have been followed ever since it came into effect, but an examiner from the bureau of inspection and supervision of public offices criticises this course and insists the money should be handled as stated in the Wade opinion enclosed.

Section 4300 referred to and copied into the Wade opinion, first found its place in Ohio Laws, in the codification of 1902, 96 O. L., 65, sec. 136.

Section 152 of the Municipal Code of 1869 (66 O. L., 174) reads:

> "Section 152. He shall demand and receive from the county treasurer, all taxes levied and assessments made and certified to the county auditor by authority of the council, and by said auditor placed on the tax duplicate for collection, and from all persons authorized to collect or required to pay the same, all moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses, and costs taxed in the mayor's and police courts, and all debts, of whatever kind, due the corporation, and disburse the same on the order of such person or persons as may be authorized by ordinance to issue orders for the same."

This section was almost, if not quite, literally codified in 1880 and became section 1768 of the Revised Statutes, which law was retained and kept in force by section 135 of the codification of 1902; but the provisions thereof in regard to the control of the city council over city funds and its power to order the same disbursed on the order of such person or persons, as it might name, was omitted from the codification of 1910. This change was of such character and so material as to repeal the old law and do away with the power of council as found in the act of 1866. State vs. Toney, 81 O. S., 130.

This leaves the only matter for determination to be—whether the repeal and taking away of the power held by council for so long operated as a repeal of the ordinance of 1888.

I am forced to the conclusion that the taking away from council the power granted by the act of 1866 and the enactment of section 4300, which now reads:

> "The treasurer shall receive and disburse all funds of the corporation including the school funds, and such other funds, as arise in or belong to any department or part of the corporation government.",

operated as a repeal of the ordinance of 1888, and your statement that consideration should be given the fact of the funds being handled under the ordinance of 1888 for twenty-five years, is answered by the fact that such ordinance was valid and in full force until the codification of 1910 became effective.

I am of the opinion that the conclusion reached in the opinion given Mr. Wade is correct, that it is applicable to your case, controlling, and that the course indicated by section 4300 should be followed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1381.

NOT LEGAL FOR A PERSON TO RESIGN AN OFFICE AND THEREAFTER BE APPOINTED TO FILL HIS OWN VACANCY.

It is not legal for a person to resign an office, have council increase salary and thereafter be duly appointed to fill his own vacancy and receive increase.

COLUMBUS, OHIO, January 7, 1915.

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

GENTLEMEN:—Under date of December 22, 1914, you requested an opinion on the following:

> "May the salary of an officer of a municipality be increased during his term of office by said officer resigning the position, having council (if agreeable thereto) increase the salary, and thereafter be duly and legally appointed to fill said vacancy, and thus receive the increase of salary during that portion of the term which he fills by appointment?"

Section 4213 of the General Code provides as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

It is well settled, as a principle of law, that that which is prohibited from being done directly, may not be done indirectly. The situation you present affords an example of a very manifest attempt to evade this principle, and I am of the opinion that such action is prohibited by the statute above quoted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1382.

NOT NECESSARY FOR SCHOOL DEPOSITARY BANKS TO GIVE NEW BONDS TO BIND SURETIES—BONDS.

It is not necessary for school depositary banks to give new bonds in order to bind sureties in districts where school treasurers have been dispensed with under section 4732, 104 O. L., 158, in case the bonds held by the respective boards of education bear a date prior to the date of the resolution dispensing with the school treasurer, and the terms of such bonds have not as yet expired.

It is necessary for the clerk of the school board to give a new bond when such clerk assumes the duty of the treasurer of the school funds.

It is not necessary for a county treasurer to give a bond as school treasurer, when he becomes the treasurer of the school funds of village or rural districts.

COLUMBUS, OHIO, January 7, 1915.

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

GENTLEMEN:—Under date of July 9, 1914, you submitted a request for an opinion upon the following:

"First. Will it be necessary for school depositary banks to give a new bond in order to bind sureties in a district where the school treasurer has been dispensed with under section 4782, O. L., Vol. 104, in case the bond held by the district bears a date prior to the date of the resolution dispensing with the school treasurer?

"Second. Will it be necessary for a school clerk to give a new bond in order to bind sureties in case said clerk assumes the duties of the treasurer under section 4782?

"Third. Will it be necessary for a county treasurer to give a new bond to bind sureties in case he acts as school treasurer under section 4763, O. L., Vol. 104?

"Fourth. When a county treasurer is acting as school treasurer under section 4763, O. L., Vol. 104, can he deposit school funds, after distribution, in the county depositary?

"Fifth. Section 7604, General Code, provides that boards of education must establish depositaries for school funds. Section 4782, O. L., Vol. 104, provides that when such depositaries have been established that boards of education shall, by resolution adopted by a majority vote, dispense with the treasurer. Section 4735, O. L., 104, reads as follows:

" 'The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and *powers until their terms expire and until their successors are elected and qualified.*'

"When boards of education have complied with both of the above-mentioned sections, when will the terms of office of the treasurers affected be ended?

"Sixth. If treasurers will continue to hold office under section 4735 after the board of education has adopted the resolution provided for in section 4782, dispensing with them, will it be necessary in special school districts for boards of education to elect a treasurer, or will the treasurer, serving at the time of the adoption of the resolution, continue to serve indefinitely?"

I will consider each one of these questions which you submit, separately, and in the same numerical order as that in which they are submitted in your request.

Section 4782 of the General Code, as amended, 104 O. L., page 158, which you cite in your first question, provides as follows:

> "When a depository has been provided for the school moneys of a district as authorized by law, the board of education of the district, by resolution adopted, by a vote of a majority of its members, shall dispense with a treasurer of the school moneys belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

In order to construe said section, it is necessary to consider it in connection with section 4763 of the General Code, as amended, 104 O. L., page 158. Said section 4763 as amended, provides as follows:

> "In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositaries as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

The section last quoted refers to sections 7604 to 7608 inclusive, of the General Code, which said mentioned sections provide for the establishment of legal depositories for the deposit of school funds of the respective school districts of the state. Section 7504 provides for the establishment of such depositories as follows:

> "The board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer. But no bank shall receive a deposit larger than the amount of its paid in capital stock, and in no event to exceed three hundred thousand dollars."

Section 7605, General Code, provides that such depositories of school funds shall be made upon competitive bidding and that the bank or banks receiving such depositories shall give good and sufficient bond or other security such as bonds of the United States, of the state of Ohio, etc., as follows:

> "In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent. for the full time funds or any part thereof are on deposit. Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education in the sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

Section 7606 of the General Code provides in substance for the method and manner whereby bids for such depositories shall be received. Section 7607 provides,

in substance, that in school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located, and which offer the highest rate of interest, which shall not in any event be less than two per cent. for the full time that such funds or part thereof are on deposit, and also carries a further provision that such bank or banks shall give good and sufficient bond or security; and that the treasurer of such school district must see to it that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond. Section 7609 of the General Code provides that when a depository is so lawfully established, and the funds are deposited therein, according to the provisions of the so-called school district depository law, the treasurer of the school district and his bondsmen shall be relieved from any liability occasioned by the failure of the bank, etc., as follows:

> "When a depository is lawfully provided, and the funds are deposited therein, the treasurer of the school district and his bondsmen shall be relieved from any liability occasioned by the failure of the bank or banks of deposit or by the failure of the sureties therefor, or by the failure of either of them, except as provided in cases of excessive deposits."

The only change made in said section 4782 as amended, supra, was to change the word "may" as provided in the original section, to the word "shall" as employed in said section as amended. Otherwise, said section as amended, is identically the same as the original section prior to such amendment. Sections 7604 to 7609 inclusive, relative to the creation of school fund depositories, have not been amended or changed and consequently there is no change by way of legislation in reference to the bonds which are required to be given by the bank or banks which become depositories for school funds, in accordance with sections 7605 and 7607 of the General Code, supra. I take it that the change made in said section 4782 as amended, supra, has no effect upon unexpired bonds given by banks as depositories for the security of school funds, which said bonds were given in accordance with sections 7605 and 7606, supra. If it were otherwise, then said section 4782 would be retroactive in its operation.

In Rairdin vs. Holden, Adm., 15 O. S., p. 207, it is held as follows:

> "1. The act of April 7, 1854, 'concerning suits on the bond of executors and administrators' (4 Curwen's Stat. 2571), is not in conflict with the provision of article II, section 28 of the constitution, which declares that 'the general assembly shall have no power to pass retroactive laws.'
>
> "2. A statute purely remedial in its operation in pre-existing rights, obligations, duties and interests, is not within the mischiefs against which that clause of the constitution was intended to guard, and is not, therefore, within a just construction of its terms."

It is also held that:

> "A bond is simply a contract or suretyship and the same rules apply in its construction that apply to contracts generally." Fancher, as Assignee vs. Kaneen, et als., 5 O. N. P. Rep. (n. s.) p. 614.

If such retroactive legislation had been enacted, then the same would come within the proviso of said section 28 of article II of the constitution, which provides that:

"The general assembly shall have no power to pass retroactive law or laws impairing the obligation of contract."

However, it is not necessary to further consider the question of retroactive legislation in reference to such bonds for the reason that there has been no legislation in any wise affecting bonds heretofore given under sections 7605 and 7607 of the General Code, supra, which takes away, impairs or attaches any new liability to the bonds heretofore given prior to the amendment of said section 4782, supra. Section 4782 as amended, supra, only relates to the dispensing of the treasurer of school funds when depositories are provided for in the future in accordance with law, to wit, sections 7604-7609 of the General Code, inclusive, and does not affect bonds accordingly given, when school district treasurers were dispensed with under said section prior to its last amendment.

I have gone into this aspect of the question for the reason that possibly your question might have been instigated because of the change made in section 4782, and that the same might have some effect upon such depository bonds which were given and executed prior to the amendment thereof in 104 O. L. In other words, I wish to convey the idea that it will not be necessary for banks which have heretofore been made depositories of school funds, to give a new bond, because of the change made in section 4782 supra, but that such bonds will continue in full force and effect until the end of their designated term. However, on the other hand, if your question relates to a construction of section 4782 as amended, standing alone, with reference to the time when such bond is to be given, then I wish to say that said section, in the first part thereof, specifically carries the provision that when a depository has been provided for the school moneys of a district, as authorized by law, then after that has been done, the board of education of such district, by resolution adopted by a vote of the majority of its members, shall dispense with a treasurer of the school moneys belonging to such school district, etc. That is to say, that before such treasurer can be dispensed with, there must have been theretofore established a school depository for the deposit of school funds. The action establishing a depository must have first been taken before the board of education of such district can proceed to the next step, that of dispensing with the treasurer of the school moneys. In order to establish a depository, as part of the establishment thereof a bond must be given by the bank or banks acting as such depository or depositories, before such depositories can be said to have been established. In other words, school boards which have heretofore established depositories, for the deposit of school funds, without dispensing with the treasurer of the board in accordance with the directory provisions of sections 4782, General Code, prior to its last amendment, must now dispense with such school board treasurer, which dispensing is now made mandatory under section 4787 of the General Code, as last amended.

In an opinion rendered to Hon. Clare Caldwell, city solicitor of Niles, Ohio, I have held that when a depository is created by a board of education, then the dispensing with the treasurer of such school board is now made mandatory under the recent amendment of said section 4782 of the General Code. I am herewith enclosing a copy of said opinion. This change, however, in said section 4782, supra, does not necessarily require the establishing of new depositories and the giving of new bonds in so establishing such depositories, as provided for by said sections 7604 to 7609, General Code, supra. Such depositories must be re-established and bonds given in accordance with said last mentioned sections, only when the terms expire for which such depositories were established and such bonds were to run. Therefore, the date of the bond so given must, of necessity, precede the date of the resolution provided for in said section 4782 of the General Code, as amended, supra.

Regardless of whichever reason prompted the submission of your first question, I am, nevertheless, of the conclusion, in direct answer to your first question, that it is not necessary for school depository banks to give new bonds in order to bind the sureties in districts where school treasurers have been dispensed with under section 4782 (104 O. L., p. 158) in case the bonds held by the respective boards of education bear a date prior to the date of the resolution dispensing with the school treasurer, and their terms have not expired.

In answer to your second question, section 4783 of the General Code provides that when the treasurer is so dispensed with, and the clerk assumes the duties of such treasurer, in accordance with said section 4782, as amended, supra, then before entering upon such duties, the clerk shall give an additional bond, etc., as follows:

> "When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district, shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

Said section, without further comment, answers your second question to the effect that it is necessary for the school clerk to give a new bond when such clerk assumes the duty of the treasurer under said section 4782, supra.

In answer to your third question, while said section 4763 provides that a village and rural school district which do not provide legal depositories under sections 7604 to 7608 inclusive, of the General Code, the county treasurer shall be the treasurer of the school funds of such district. Nevertheless there is no statutory provision requiring such county treasurer in such case to give the additional bond in acting as such treasurer, as in the case of the clerk of the board of education giving an additional bond when he assumes the duties of the treasurer of a school board, when the treasurer of such board is dispensed with as provided in sections 4782 and 4783, supra. Therefore, I am of the conclusion, in answer to your third question, that it is not necessary for a county treasurer to give a bond as school treasurer, when he becomes the treasurer of the school funds of the village or rural districts, in accordance with section 4763, as amended, 104 O. L., p. 158.

Your fourth question involves a consideration of the so-called county depository act. The county depository act is contained in sections 2715 and 2745, inclusive, of the General Code. Section 2715, in brief, provides the manner in which county depositories shall be established. Section 2715-1 provides that the deposits in active depositories shall at all times be subject to draft for the purpose of meeting the current expenses of the county. Section 2716 of the General Code in brief provides that the county commissioners shall publish a notice for two consecutive weeks in two newspapers of opposite politics, inviting sealed proposals from all banks or trust companies, which said proposals shall stipulate the rate of interest not to be less than two per cent. per annum on the average daily balance, on inactive deposits, and not less than one per cent. per annum on the average daily balance, on active deposits, *that will be paid for the use of the money of the county.*

Section 2722 of the General Code provides in brief that no award shall be binding on the county nor shall money of the county be deposited thereunder, until there is executed by the bank or banks, or trust companies, selected as such county depositories, a good and sufficient undertaking, *payable to the county in such sum as the commissioners direct,* etc.

Section 2723 provides what the undertaking shall contain, as follows:

"Such undertaking shall be signed by at least six resident free-holders as sureties or by a fidelity or indemnity insurance company, authorized to do business within the state and having not less than two hundred and fifty thousand dollars capital, to the satisfaction of the commissioners, conditioned for the receipt, safe keeping and payment over of all the money with interest thereon at the rate specified in the proposal, which may come under its custody under and by virtue of this chapter and under and by virtue of its proposal and the award of the commissioners, and conditioned for the faithful performance by such bank or banks or trust companies of all the duties imposed by law upon the depositary or depositaries of the *money of the county.*"

Section 2729 of the General Code provides when and for what term banks become depositories, as follows:

"Upon the acceptance by the commissioners of such undertaking, and upon the hypothecation of the bonds as hereinafter provided, such bank or banks or trust companies shall become the depositary or depositaries of the *money of the county* and remain such for three years or until the undertaking of its successor or successors is accepted by the commissioners."

Section 2737 of the General Code provides for interest on daily balances, as follows:

"All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the *credit of the county,* * * * ."

I have cited and quoted the sections providing for county depositories at some length in order to show that the provisions thereof relate solely and alone to the money or funds of the county. Nevertheless, when the funds of village or rural school districts come into the hands of the county treasurer in accordance with section 4763, G. C., supra, who likewise has control of the county funds, it is my opinion that such county treasurer could deposit the balance of such school funds after distribution, in the county depository, the same as any other funds coming legally into his hands as such county treasurer.

In answer to your fifth question, section 4763, General Code, as amended in 104 O. L., page 159, provides as follows:

"In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Section 4782 of the General Code, as amended, 104 O. L., page 159, provides as follows:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolu-

tion adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

By the provisions of the above sections, it appears that in all rural or village school districts which do not provide depositories in accordance with sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts, and when a depository has been provided for the school money of the district, as provided by law, then the board of education by adopting a resolution to that effect, shall dispense with the treasurer of the school moneys belonging to said school district and in that case the clerk of the board of education shall perform the services required by law of the treasurer of such school districts.

Section 4763 prior to its amendment, provided that in each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. Where depositories had been established before the amendment of said sections 4763 and 4782, then the clerk of the board of education would continue as such treasurer without any interruption, because of the enactment or passage of said sections. However, if no school depository had been established, then by virtue of the amendment of section 4763, in village or rural school districts, the county treasurer becomes the treasurer of the school funds and succeeds the village or township treasurer of such funds, as the case may be. It is still optional with a board of education as to whether or not it shall provide for a depository, and in such case, until a depository is provided for, then in such school district the city treasurer shall act as the treasurer of the school funds; and in village and rural school districts the county treasurer shall act as the treasurer of the school funds of such district. The act amending sections 4763 and 4782 was passed February 6, 1914, and filed in the office of the secretary of state February 19, 1914, and became effective ninety days after being so filed in the office of the secretary of state. Therefore, in all village and rural school districts which had not theretofore provided for a depository, the county treasurer became the treasurer of the school funds when said act became effective and would continue to act as such treasurer until such time as depositories are established for the school moneys of the respective village and rural school districts of the state.

In answer to your question, it is my opinion that village and township treasurers continued to act as treasurers of the school funds of their respective village and township school districts until they were superseded by county treasurers as hereinbefore pointed out, and they would continue to draw whatever salary they were entitled to until so superseded by the county treasurers. This applies, however, only to districts which had not previously provided a depository. Such county treasurers continue to act as the treasurers of the respective village and rural school district funds until such time as a depository is established for such funds, as herebefore stated.

The foregoing answers your sixth question, which, therefore, need not be specifically answered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1383.

MUNICIPAL COUNCIL, ONLY, HAS POWER TO FIX SALARY OF CLERK OF SINKING FUND TRUSTEES.

The municipal council, and not the sinking fund trustees, has the power to fix the salary of the clerk of the sinking fund trustees.

COLUMBUS, OHIO, January 7, 1915.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—I have your letter of December 15, 1914, in which you inquire whether the sinking fund commissioners were within their rights in fixing the salary of the clerk of the commission, which seems to have been criticised by the board of accounting, sometime back.

General authority to fix the number of employes of a municipality and their salaries, is found in section 4214, which reads as follows:

> "Except as otherwise provided in this title, council, by resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 4509 reads:

> "The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board."

I think that the plain reading of these two sections answers your question to the effect that the council, and not the commission, fixes the salary of the clerk.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1384.

CONTRACT OF THE CHAMPION REGISTER COMPANY COVERING FINANCIAL LOSS SUSTAINED BY FIRE AMOUNTS TO INSURANCE.

The contract made by the Champion Register Company (submitted) since it undertakes to compensate the purchaser of a "Champion Complete Accountant" for financial loss sustained by fire, amounts to insurance.

COLUMBUS, OHIO, January 7, 1915.

HON. PRICE RUSSELL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On December 31, 1914, you submitted to me the following contract with a request for my opinion as to whether or not it amounted to insurance under the provisions of section 665 of the General Code:

"$500.00 THE $500.00

"CHAMPION REGISTER COMPANY

"Authorized Capital Stock $500,000.00

"Incorporated under laws of Ohio

"(Cut of Buildings)

"HOME OFFICE

"CLEVELAND, OHIO.

"THE CHAMPION REGISTER COMPANY hereby guarantees that the CHAMPION COMPLETE ACCOUNTANT, a style _____, serial number _____, this day sold to _____ City _____ (hereinafter called the purchaser) is FIRE-PROOF; that is to say, that while in good repair and securely closed and locked, it will protect the purchaser's account slips therein contained from destruction by fire; and

"THE CHAMPION REGISTER COMPANY is by these presents bound unto the said Purchaser in the sum of FIVE HUNDRED DOLLARS to indemnify the Purchaser against any direct financial loss that he may sustain through the failure of said accountant during the period of ten years from this date to protect his account slips as above guaranteed.

"This guaranty and bond shall be operative only while this accountant is located in Purchaser's store or office in the place where it is customarily used; and no recovery shall be had hereon in excess of the sum of five hundred dollars; and no recovery shall be had for damages to the accountant itself.

"The Purchaser, by the acceptance of this guaranty and bond, agrees to give the Champion Register Company written notice of any claim arising under this instrument within three days after the fire from which said claim arises, and within thirty days after any such fire to furnish the company detailed proof of the amount and nature of such claim.

"The Purchaser further agrees that as soon as possible after any such fire the accountant shall be allowed to cool and shall immediately thereafter be carefully opened in the presence of two disinterested witnesses, one of whom shall be a justice of the peace or judge of a court of record, and both of them shall make a sworn statement in writing to the company stating that the accountant was so opened and described the condition of the accountant and its contents. The Purchaser further agrees to make every reasonable effort, both before, during and after any such fire to prevent and reduce the damage to the account slips and the loss arising therefrom.

"Full compliance by the Purchaser with the above agreement and with the terms and conditions of the contract of sale of said register by the company to the Purchaser (being contract number _____) are conditions precedent to any recovery upon this instrument; and it is especially understood that in case any payment for said accountant stipulated in said contract shall become twenty days in arrear, then this instrument shall become null and void.

"In WITNESS WHEREOF, The Champion Register Company has caused its signature and seal to be hereto affixed by its President and Secretary thereunto duly authorized, at Cleveland, Ohio, this _____ day of _____, 19_____.

"_____President.

"Gold corporate seal.

"_____Secretary."

Section 663 of the General Code is as follows:

"No company, corporation or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contract substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

"Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

May on Insurance, section 1.

In the contract submitted by you to me the register company undertakes to compensate the purchaser of an accountant for any direct financial loss that he may sustain through the failure of said accountant to protect the purchaser's account slips therein contained from destruction by fire; the consideration for this contract is the purchase of an accountant from some register company.

It seems to me, therefore, that this contract has all the necessary elements of a contract of insurance and substantially amounts to insurance and, therefore, would not be authorized unless the company issuing such a contract of indemnity is licensed under and complies with the laws of Ohio relative to fire insurance.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1385.

CITY OF YOUNGSTOWN MAY NOT BORROW MONEY TO REIMBURSE HOSPITALS FOR CARING FOR SICK POOR.

The city of Youngstown, Ohio, may not borrow money to reimburse certain hospitals for losses incurred by them in caring for the sick poor of the city, under a certain contract, the effect of which is considered.

COLUMBUS, OHIO, January 7, 1915.

HON. GEORGE J. CAREW, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of December 28th and its enclosures, and your subsequent letter of January 2, 1915, all referring to and presenting the following question:

"The council of the city of Youngstown for a number of years last past has had an arrangement with certain private charitable hospitals in the city for the care and treatment of indigent persons for and on behalf of the city. The arrangements have taken the form of proposals made to the city by the hospitals which have been accepted by ordinance.

"Prior to the enactment of the Smith one per cent. law, so called, the proposal of the hospitals was that the work in question would be undertaken by them in consideration of the receipt by them of the proceeds of a levy of 5/10 of a mill to be made by the council.

"After the Smith law went into effect and tax rates were rendered for the time being somewhat uncertain, the hospitals then in existence proposed to the city that they would do the work and accept in full compensation therefor 'our proportionate part of the money appropriated by council for this purpose in the following proportion and manner to wit: That each hospital receive such proportion of the money so appropriated by council for this purpose as the number of hospital days' treatment by each hospital shall bear to the total number of days of hospital treatment rendered by all * * *.'

"The proposal containing this offer also set forth the following stipulation on behalf of the hospitals:

"'We will keep an accurate account and report showing the names of persons admitted, time when such persons were discharged, the character of the disease or injury, the number of days treated, and such other reasonable information as you may desire to have, and will furnish to you abstracts of such accounts and reports * * *.'

"This last proposal being accepted by ordinance, the council has been levying and appropriating from year to year substantially the same amount as had been formerly levied and appropriated under the previous ordinance, viz., the substantial equivalent of a levy of five-tenths of a mill on the duplicate as it existed prior to 1911. The increase in the duplicate has been such as that such an amount would be the equivalent of a levy of very much less than five-tenths of a mill on the duplicates for the years since 1911.

"The amounts received by and apportioned among the several hospitals since 1911 have been very materially less than the actual cost to the hospitals of caring for the sick poor of the city. It is the desire of the city council to enter into a new arrangement with the hospitals which shall not only adequately compensate them for caring for the city's hospital cases in the future but shall also in a measure make up the loss of the hospitals during the last few years.

"It is suggested that the implications arising from the several ordinances of the past and the course of mutual dealing thereunder are such as to create a legal obligation on the part of the city to reimburse the hospitals for the difference between the amount actually received by them since 1911 and the actual cost of caring for the city's hospital cases.

"Is there such a legal obligation as will justify the borrowing of money under section 3916 of the General Code for the purpose of paying such an amount to the various hospitals in the proper proportions?".

In support of the idea that a legal obligation does exist, you state in your several letters that the understanding always has been that the hospitals should receive the fruits of a half mill levy. This understanding, however, was not only not expressed in the ordinance of 1911 above quoted, but the terms of that ordinance were such as to effectively negative any such understanding, and I am of the opinion that the hospitals under that ordinance were not, as a matter of right, entitled to the proceeds of a half mill levy as a consideration for the services to be performed by them.

Waiving this point, you suggest that the stipulation in the agreement of 1911 to the effect that the hospitals should furnish certain reports, etc., show an intention on the part of city and the hospitals that the city should be acquainted with the actual cost to the hospitals of performing the services in question and should appropriate an amount of money sufficient to reimburse the hospitals for such actual cost. I do not find that any such inference arises from the terms of the agreement in question. The stipulation is to the effect that certain reports and accounts are to be kept and furnished showing the names of persons admitted, the time when they were discharged, the character of the disease or injury and the number of days treated. None of these facts would disclose the cost of caring for the cases, and the necessity for furnishing such facts is easily referable to the provision above quoted which cares for the matter of apportionment of the total amount to be appropriated by council among the various hospitals, which is to be on the basis of the "number of days' treatment by each hospital."

To be sure there is a provision to the effect that in addition to the information just mentioned "such other reasonable information" as the council may desire to have shall be furnished. But there is no intimation whatever that such other information shall relate to the cost of the services, and the very fact that the furnishing of such information is made contingent upon the wishes of council is of itself sufficient to establish the conclusion that council was not to be bound to appropriate such a sum of money as should equal the cost to the hospital of rendering the services agreed to be furnished.

On the contrary the purport and intent of the ordinance in question is that the hospitals shall furnish the services in question in consideration of the receipt by them of the proportionate share of such gross amount of money as council may see fit to appropriate.

For all these reasons, and others which I have not mentioned, I am of the opinion that the city of Youngstown does not rest under a legal obligation to pay to the hospitals in question an amount representing the difference between the moneys received by them during the past few years and the actual cost to them of rendering services to the city. It therefore follows that money may not be borrowed to discharge such supposed obligation under sections 3916 et seq., General Code, it being clear from these sections, which I need not quote, that a legal obligation is necessary in order to support the exercise of the borrowing power.

I herewith return the papers submitted to me. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

1386.

JUDGMENTS AGAINST MUNICIPAL CORPORATIONS SHOULD BE PAID OUT OF SINKING FUND—ATTORNEYS' FEES.

Judgments against municipal corporations should be paid out of sinking funds. Attorneys' fees should be paid out of general funds.

If not enough funds in general fund to pay attorneys' fees, money may be borrowed in anticipation of tax collection to pay same.

Money to pay the judgment may be borrowed either under section 4520, *General Code, or under sections* 3916 *et seq., General Code.*

COLUMBUS, OHIO, January 7, 1915.

HON. GEORGE W. SHEETZ, *Village Solicitor, New Washington, Ohio.*

DEAR SIR:—On August 31st you requested my opinion on the following questions:

> "1. Out of what corporation fund or funds should a judgment, costs and attorney's fees be paid?
>
> "2. The judgment, costs and attorney's fees will amount to about $500 and when the appropriation was made in July no provision was made for the payment of this and there is not money enough in the general fund nor in the contingent fund for the satisfaction of this claim. Section 3799, G. C., provides as to the transfer of funds and that only funds brought into the treasury by taxation can be transferred and then only when the object of the fund has been accomplished or abandoned. As I understand it the moneys in the general fund came to us from the liquor tax and not by taxation, and cannot be transferred. Is this right? Could a village borrow this money and give its note until the next appropriation is made in January, 1915? If so, upon what authority?"

You have further informed me that the judgment you have in mind was in the case of Akers vs. Village of New Washington, and that the plaintiff's petition alleged that she was injured by falling upon a board walk in the village and recovered judgment for $150, also that Finley & Gallinger, attorneys, were employed by council by resolution to defend the village before you had been employed as village council and that you were afterwards associated with Finley & Gallinger in the trial and hearing of the case and that the attorney's fees mentioned are the attorney's fees contracted for by the village counsel and that the amount thereof is approximately $158.

Answering your first inquiry would say that the method of payment of judgments against municipalities is found in code sections 4506, 4513 and 4517, which read as follows:

> "Sec. 4506. (Tax for creating a sinking fund.) Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts and for the payment of all judgments final except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever.

"Section 4513. (Report of trustees to council; duty of council.) On or before the first Monday in May of each year, the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation for the payment of final judgments, except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified. Such taxes shall be in addition to all other taxes authorized by law. (96 v. 55, Sec. 108.)

"Sec. 4517. (Payment of obligations.) The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession. (97 vs. 517, Sec. 110; 96 vs. 55, Sec. 110.)

It will be seen from the foregoing sections that the judgment and costs should be paid out of the sinking fund except in condemnation cases and your statement shows that the judgment you inquire about is not one of such cases.

The attorney's fees mentioned come within the general expense of the village for legal counsel and while there is no specific statutory provision providing out of what fund legal counsel for a village should be paid yet a contemplation of the nature of the various funds will show that the legal counsel for the village should be paid out of the general fund.

The answer to the first question disposes of your inquiry as to the payment of the judgment and costs out of the general and contingent funds. Specifically answering your inquiry as to whether money received from liquor tax can be transferred would call your attention to Code section 5669, which reads as follows:

"Sec. 5669. Any surplus in the treasury of a city, village, county or township, arising from taxation upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor which is not needed for the purposes named in the statutes providing for the distribution of such taxes, may be transferred to any other fund, including the school fund, by an order of the proper authorities entered upon their minutes. (R. S., Sec. 2834d.)

It will be seen from the quoted section that transfer can be made.

Answering your inquiry as to whether the village can borrow the money in anticipation of collection of taxes would say that clearly the village could borrow money to pay the attorney's fees under the authority of Code Sec. 3913, which reads as follows:

"Sec. 3913. (Anticipation of general revenue fund; limitation.) In anticipation of the general revenue fund in any fiscal year, such corporation may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount

estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest. (96 vs. 51, Sec. 95.)

If the sinking fund is not sufficient to provide for the payment of the judgment in the case two methods of raising money to pay the same are open. In the first place the sinking fund trustees have the authority under section 4520, General Code, to refund, renew or extend the bonded debt of the municipality at a lower rate of interest, if this can be secured. In this way moneys held in the sinking fund to retire bonds falling due might be released for use in paying the judgment.

I assume, however, that this method of relief is not available for the reason that at the present time it is impossible to secure rates of interest lower than those which have been current. Therefore, the municipality would, in all likelihood, be relegated to the alternative remedy which is found in the authority of council under section 3916, General Code, to borrow money for the purpose of extending the time of payment of any indebtedness which from its limits of taxation the corporation is unable to pay at maturity. Notes or bonds may be issued under this section and the succeeding sections and when sold the proceeds should be applied to the sinking fund and through it to the extinguishment of the judgment debt.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1387.

RIGHT OF VILLAGE TO ISSUE BONDS TO PAY FOR CONSTRUCTING POLE LINE.

Under the express power given to municipalities to purchase electric current for furnishing light, heat or power to such municipality or its inhabitants by the provisions of section 3809, *General Code, as amended* 103 *O. L.*, 526, *such municipality, as an incident to the express power thus granted, has implied power to do all things that may be reasonably necessary in order to obtain the desired current.*

By express statutory power municipal corporations have the right to establish and maintain poles and wires outside of the municipality for the purpose of transmitting electricity and have the power to do so for the purpose of transmitting purchased current; such power, however, must be reasonably exercised.

COLUMBUS, OHIO, January 7, 1915.

HON. WARREN THOMAS, *Village Solicitor of Cortland, Warren, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of April 23, 1914, in which you ask my opinion on a question which may be concretely expressed as follows:

"Has the village of Cortland the right to issue bonds to pay for constructing a line of poles and wires to Warren, Ohio, a distance of eight or nine miles, for the purpose of purchasing electric current from a public service company in Warren, Ohio, to be used in lighting the streets of said village?"

The question presented by you is one of considerable difficulty. Pertinent to its consideration, section 3809, General Code, as amended April 28, 1913 (103 O. L., 526), provides as follows:

> "The council of a city may authorize, and the council of a village may make a contract with any person, firm or company for lighting the streets, alleys, land, lanes, squares and public places in the municipal corporation * * * or for the leasing of the electric light plant and equipment * * * of any person, firm, company or municipality, or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years."

I am inclined to the opinion that the power of a municipality to purchase electric current is as broad as is its power to lease the electric light plant and equipment of any person, firm, company or municipality, and that the authority of the municipality to purchase such current for the purposes designated in the statute is clearly not limited to purchases from persons or concerns producing such commodity in the municipality. The exercise by a municipality of its right to purchase electric current from a person, firm or company producing the same at some point distant from the municipality results, of course, in the necessity of erecting or constructing poles, wires or conduits for the purpose of carrying the electricity from the plant to the municipality purchasing the same. The question, then, is, May such a municipality in the purchase of electric current pursuant to the authority given it in section 3809, construct the necessary poles and wires needed for the purpose of conveying the current? There is nothing in the provisions of section 3809, before noted, which expresses any legislative intention with respect to this question.

In reference to this question, I note that section 3995, General Code, provides, among other things, that for the purpose of erecting and maintaining poles whereon to attach wires to carry and transmit electricity, a municipal corporation may enter upon private land and appropriate so much thereof as may be necessary for erecting such poles and wires, while section 3996 provides that a municipal corporation, by agreement with the county commissioners, township trustees and the council of municipal corporations, may erect such poles and wires for the purpose of transmitting electricity along public roads and streets.

The clear implication from these provisions is that a municipal corporation may condemn, or by agreement with other public authorities, otherwise secure a right of way for a line of poles and wires for transmitting electricity outside of its corporate limits. Section 3995, General Code, is so phrased that it is at least not clear that the power to secure a right of way for a line of poles and wires is dependent upon the existence of a municipal light plant outside of the corporate limits. In fact the contrary inference is more readily afforded by its language. It being clear that the general rule, that a municipal corporation may not exercise its powers outside of its own boundaries, is at least relaxed to some extent by the express provisions of law just referred to, it is pertinent to inquire as to the extent to which the rule is done away with. Surely if a municipality has the power to appropriate land for the purpose of erecting poles and wires and transmitting electricity, it must have, by inference, the power to construct such a line of poles and wires for the purpose of transmitting electricity outside of the corporate limits. So also if the power to appropriate for this purpose is dependent upon the existence of a municipally owned plant outside of the corporate limits, the power to construct a line of poles and wires cannot be held to be so dependent, if the construction of poles and wires as an activity of the municipal corporation can be justified in pursuance of any other municipal purpose than the operation of a municipal electric light plant.

Now, it is clear from section 3809, General Code, above quoted, that municipal corporations have the power to purchase electric current for certain purposes. If the municipality may purchase electric current as such, then it must necessarily follow that the corporation may provide itself with means of transmitting that current, which can only be transmitted by means of wires and conduits.

The situation, then, is this, the corporation has the incidental power to erect poles and wires for the purpose of transmitting electricity purchased by it, and to be furnished for light, heat or power to the municipality. The municipality has also the power to appropriate a right of way for a line of poles and wires outside of the corporate limits. There is no limitation, implied or otherwise, upon the power to purchase electricity with respect to the place at which delivery shall be made. Under all these facts, then, the power to construct poles and wires outside of the corporate limits, for the purpose of receiving electric current purchased outside of a municipality seems clearly to follow.

I am, therefore, of the opinion that power to go outside of a municipality in order to purchase current and construct a line of poles and wires for such purpose exists. That being the case, bonds may be issued under sections 3939 et seq., General Code, to secure funds with which to make the improvement. The fact that the village in question proposes to purchase the current at a point nine miles from its corporate limits and to construct a line of poles and wires of that length is not material as affecting the mere question of naked *power*. A power of this sort may not, as against the objection of taxpayers or other persons in interest, be arbitrarily or unreasonably exercised. Schneider vs. Menasha, 118 Wis., 298.

So that in the case which you present, other facts not apparent from your letter might exist, which would render the proposed action so unreasonable as that it might be restrained by action of a court of competent jurisdiction. Upon this question I do not pass for lack of sufficient facts. But as to the question of power I am satisfied that the conclusion as I have expressed it is the correct one.

This conclusion is, however, based upon the assumption that a contract has been, or prior to the issuance of bonds, will be made, for the purchase of the current in question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1388.

APPLICATION OF SECTION 1008, GENERAL CODE, REGULATING HOURS OF LABOR FOR WOMEN.

Section 1008, *General Code, regulating the hours of labor for women, does not apply to persons doing office work for factories, workships, millinery and dressmaking establishments, restaurants and mercantile establishments.*

COLUMBUS, OHIO, January 8, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of December 31, 1914, you submit the following inquiry:

> "Will you kindly advise this commission whether or not section 1008 of the General Code regulating the hours of labor of women, applies to persons doing office work in connection with the class of establishments enumerated therein?"

The pertinent language of section 1008, as amended 103 O. L., 556, reads thus:

> "Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week * * *."

In view of the fact that this language expressly enumerates telephone or telegraph offices, one would infer that there was no intention on the part of the general assembly to include offices of any other character, although the words "in connection with" would ordinarily be broad enough to comprehend any character of work which had connection with a factory or workshop and other establishments in said section.

It will be noted, however, that the quoted language is not used with reference to the business of the employer as a whole, but rather to a particular establishment, and I do not believe that the ordinary office work done for the owner of such establishment can be said to have been in connection with the factory under the language of this statute. It more particularly deals with the business of the manufacturer or owner of the establishment, and really has more direct connection with that part of the manufacturer's operations which deal with matters not directly pertaining to the factory, etc. It seems to me that it is the object of the statute to cover those who were engaged as operatives or in a similar capacity, rather than to those who were doing merely clerical work.

Therefore, I am of the opinion that the statute should not be applied to those who are doing office work for the establishments named in said section, with the exception, of course, of telephone or telegraph offices.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1389.

LOT OWNER CAN ONLY BE ASSESSED FOR ACTUAL FOOT FRONTAGE ABUTTING ON IMPROVEMENT.

A lot owner can only be assessed for actual foot frontage abutting on such improvement and no assessment can be levied for a portion of the improvement abutting upon land leased from the state either against the state or the lessee.

COLUMBUS, OHIO, January 8, 1915.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I have your letter of December 21, 1914, as follows:

> "H. B. Carver is the owner of lot No. 157, in this city. His lot abuts on Oxford street and the engineer claims that it is 93 feet, and therefore liable for assessment on the street for that distance.
>
> "Mr. Carver insists that he is assessed for a portion if not all the land owned by the state which he holds under lease from the state executed to him July 9, 1909. Map attached gives further details.
>
> "Is Mr. Carver liable for assessments for improvements as the lessee?"

It appears from the facts presented, that the lot owned by Mr. Carver is wider a distance back from the improvement than where it abuts thereon. The claim is made by the owner that he should only be assessed for the actual frontage, while on the other hand it is claimed that he should be assessed to a point on the improvement where a line at right angles thereto and extending away from it, would intersect his property, which would increase this assessment and charge him with the cost of the improvement where it actually abuts on property owned by the state, at least to the lot owner.

In reply to your letter, it is my opinion that Mr. Carver can only be assessed for his acutal foot frontage on the improvement and that no assessment can be levied for that portion of the improvement abutting upon the land leased from the state, either against the state or against Mr. Carver, the lessee.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

1390.

TUITION OF PUPILS ATTENDING DISTRICT SCHOOL—APPORTIONMENT OF DISTANCE.

Where a pupil lives less than one and one-half miles from the school house of the district wherein such pupil lives, there is no liability on the part of the board of education of such district to pay the tuition of pupils attending school in another adjoining district, in the absence of any agreement to pay such tuition in accordance with section 7734, General Code. In the absence of any contract for the payment of tuition, the father of such child may be held for a reasonable amount in payment of such tuition.

The distance between the home of the pupil and the school house of the district wherein such pupil resides, should be determined by the nearest route from such home to such school house as determined by section 7735, G. C.

COLUMBUS, OHIO, January 8, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Under date of December 10, 1914, you submitted a request for an opinion thereon, as follows:

> "Since I was elected prosecuting attorney at the recent election, I have been asked some questions which will have to be answered very soon in my administration, and since you are authority recognized everywhere, I want to ask your opinion concerning section 7735 of the General Code.
>
> "This condition arises in one of our school districts. The pupil is attending a village school in a grade below high school from an adjoining district, and said pupil resides less than one and one-half miles from her district school house, no agreement having been made either by the school board of her district, nor with her parent with the school board where she is now attending for the payment of tuition. Can the father of the child be held for tuition up until the present time, if no demand has been made upon him or contract had with him for the payment of said tuition?
>
> "The distance measured from the residence of the child to the school house of the district in which she lives is in this manner: From the house to the public road down a lane to the east of the house striking the public

road at that point makes it 1⅝ miles, while following the same lane which continues to run west from the house and then to the north, the lane open at both ends, and striking the public road at this place, makes it 1⅜ miles to the school house in the district in which she lives, and according to the 58 O. S., page 390, I would like to have your opinion according to which route—from which end of the lane the child should approach the public highway—the one going farthest way around or the one nearest the school house in measuring the distance.

"For thirty years heretofore the scholars have used the nearest lane, which is equally open and susceptible to travel as the other part of the lane which is the farthest from the school house. The lane in question from one end to the other goes through the farm owned by the landlord where the tenant resides and the only way to the public road is either going east from the house or west from the house. Going east is the farther distance and west is the nearest distance.

"Can the parent say by going east he is, therefore, more than one and one-half miles from the school house, or should he be expected under the law to go the nearest route to the school house with equal facility? I should like an early reply, if you please."

Section 7735 of the General Code, provides as follows:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside to such attendance."

When a pupil lives more than one and one-half miles from the public school in the district where they reside, they may attend a nearer school in the same district, or, if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the residence district must pay the tuition of such pupils, provided the other provisions of the section are complied with as to notice, etc.

In the first question you state that the pupil lives less than one and one-half miles from the district school house, therefore there is clearly no liability on the part of the board of education of the residence district to pay such tuition under the circumstances you state, there also being an absence of any provision on the part of such residence board of education to pay such tuition by contract, in accordance with section 7734, which provides in effect that the board of any district may contract with the board of another district for the admission of pupils into any school in such other district, on terms agreed to by such boards. Since no liability for such tuition attaches to the board of education of a residence district of a pupil, the question arises as to whether or not the father of the child can be held for the tuition up until the present time, even though no demand has been made upon him or contract had with him for the payment of such tuition. There is no statutory provision requiring a demand to be made upon a parent for the payment

of the tuition of such parent's child, when attending a school other than the one in which such child resides, nor is there any provision by statute, requiring that a contract should be made for the payment of such tuition. I am of the opinion that in the absence of any contract, therefore, that the father of such child can be held for the tuition thereof, up to the present time, so long as the amount of such tuition is reasonable.

In answer to your second question, the court in the case of Board of Education vs. Board of Education, 58 O. S., 390, in construing said section 7735 of the General Code, formerly section 4022a, Revised Statutes, says:

> "The legislation provides for the convenience of children in attending school, and the distance is to be taken as they travel along the most direct public highway from the school house to the nearest portion of the curtilage of their residence."

Applying this decision of the court to the circumstances set forth in your second question, I am of the opinion, therefore, in answer to the same, that such parent should be expected under the law, to send his children to such school by the nearest route to the school house.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

1391.

DIRECTOR OF PUBLIC SERVICE—JURISDICTION OVER PUBLIC UTILITIES.

The director of public service of a city has the same power as to a municipal public utility as it has in regard to public utilities privately owned and operated.

COLUMBUS, OHIO, January 8, 1915.

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

GENTLEMEN:—I have your letter of December 18, 1914, in which you inquire:

> "Has the director of public service in cities the authority to require that all services be metered and that the cost of the meters be paid by the consumer?
>
> "If the consumer refuses to pay for meter, and the director installs same, may he, by order on his journal, and under the authority of Hutchins vs. City of Cleveland (9 C. C. N. S., 229), make an additional charge against said consumer for maintenance of meter, or for meter service?"

To my mind, the case you cite answers your question in the affirmative. The second paragraph of the syllabus in that case, reads:

> "The power to assess and collect water rents in cities is vested in the directors of public service, and the manner in which they exercise this power is not subject to the control of the city council."

This case found in 10 C. C. (n. s.) 226 was affirmed without opinion in 79 O. S., 478. It cannot be thought that utilities owned by a city are subject to any different rules or more greatly restricted in powers than are those privately owned, and whatever may be done as to them in order to secure payment for service, may be done by a public service utility owned by a city.

This, I think, answers your question as to charging for the maintenance and repair of the meter and for meter services, without going into a discussion of the power of the director of public service. I do not believe that the directors of public service in cities are required to meter all services furnished, but it is naturally the easiest and best method of coming to a settlement with the consumers.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.