85.

APPROVAL, RECORD OF PROCEEDINGS FOR SALE OF ABANDONED CANAL LANDS OF RACCOON FEEDER, NEWARK, LICKING COUNTY, OHIO.

COLUMBUS, OHIO, February 11, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of duplicate copies of the record of proceedings of your department together with communication addressed to the Governor and to the Attorney General relating to the proposed sale of abandoned lands of the Raccoon Feeder of the Ohio Canal in the city of Newark, Licking County, Ohio, which lands are more particularly described in said communication. Treating the finding made by you in said communication to the Governor and to the Attorney General, that the lands in question can not be leased so as to bring six percent annual rental on the appraisement, as a part of the whole record of proceedings relating to the sale of said lands I am of the opinion that all jurisdictional facts required by Section 13971, General Code, as a condition of the right to sell said lands have been found and determined. I am inclined to the view, however, that in the interest of regularity in the sales of canal lands under said section of the General Code, the particular finding above referred to should be made as a part of the general finding made by your department as well as in the communication directed by you to the Governor and to the Attorney General, and I take the liberty of suggesting that the record of your proceedings relating to the sale of the lands here in question be corrected in the manner above pointed out.

Inasmuch as under the provisions of Section 13971, General Code, sales of canal lands at private sale are required to have the approval of the Governor and of the Attorney General, I beg to advise that the sale of this property has my approval as evidenced by my endorsement on the duplicate copies of the record of proceedings transmitted, which are herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

86.

HOUSE BILL NO. 19—COUNTY COMMISSIONERS' EXPENSES—SUGGESTED AMENDMENT UNCONSTITUTIONAL.

SYLLABUS:

The provision in House Bill 19, relating to the payment of county commissioners' expenses, will be rendered unconstitutional and void if it is amended so as to apply only to county commissioners receiving less than a specified amount, and is thus enacted.

COLUMBUS, OHIO, February 12, 1929.

HON. HENRY F. AULT, *Chairman, Committee on Fees and Salaries, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

"Enclosed herewith please find H. B. No. 19, which bill has been referred to the Committee on Fees and Salaries and is now being considered.

It has been suggested as a proposed amendment to this bill that the sum of $300.00 to be received by each county commissioner for expenses be only given to those county commissioners whose annual salary is below a certain amount. The question has arisen as to whether such an amendment would be unconstitutional. Would you kindly give us your opinion on said question?"

House Bill 19, referred to in your communication, is a proposed amendment of Section 3001, General Code, which provides for the annual salaries of county commissioners in the several counties of the state. The only change in said section of the General Code that will be effected by House Bill 19, if it is enacted as a law, is the addition thereto of a provision authorizing the payment of the necessary expenses of county commissioners, which provision, as it now appears in said bill, is as follows:

"In addition to the regular salary provided by law for the county commissioners, each county commissioner shall receive not to exceed the sum of three hundred dollars per annum for necessary expenses which must be itemized and filed with the county auditor and such claims shall be allowed monthly and paid from the county treasury upon the warrant of the county auditor."

You state in your communication that an amendment to said bill has been suggested which makes said provision relating to the payment of the necessary expenses of county commissioners apply only to county commissioners whose annual salaries are less than a certain specified amount.

The question presented in your communication is whether the provision in House Bill 19, relating to the payment of county commissioners' expenses, would be constitutional if enacted with said suggested amendment. The only constitutional provision is the first clause of Section 26 of Article II of the State Constitution, which provides that "all laws, of a general nature, shall have a uniform operation throughout the state." The purpose of this provision of the Constitution is to prevent laws of a general nature from being in force in some counties of the state and not in others. *State* vs. *Nelson*, 52 O. S. 88, 97; *Lehman* vs. *McBride*, 15 O. S. 573, 605. In the case of *State* vs. *Nelson, supra*, it was said:

"This section of the Constitution requires that laws of a general nature shall have not only an operation, but a uniform operation throughout the state, that is the whole state, and not only in one or more counties. The operation must be uniform upon the subject matter of the statute. It cannot operate upon the named subject matter in one part of the state differently from what it operates upon it in other parts of the state. That is, the law must operate uniformly on the named subject matter in every part of the state, and when it does that it complies with this section of the Constitution.

That the provision of House Bill 19, relating to the payment of county commissioners' expenses, will be a law of a general nature if enacted either in its present form or with the suggested amendment, is a proposition that does not admit of dispute. The only question for consideration, therefore, is whether said provision, if enacted as amended, will be a law having a uniform operation throughout the state.

In the consideration of this question, it is to be noted as a cardinal rule of general application that "the constitutionality of a statute depends upon its operation and

effect and not upon the form it may be made to assume." *State* vs. *Hipp*, 38 O. S. 199. You do not state in your communication the specified amount of annual salary which is to serve as the dividing line between the county commissioners who are to receive payment for their necessary expenses and those who do not. It is evident however, that it is the purpose of said suggested amendment to exclude the county commissioners in the larger counties of the state from the benefits of said provision as to expenses, and that the effect of the suggested amendment to said provision is the same as if the language of said provision were that the same should not apply in counties in which the county commissioners received annual salaries in excess of the amount specified in the suggested amendment. Section 3001, General Code, is the only statute which provides for the annual salaries of county commissioners, which salaries, under the provisions of said section, are determined by the tax duplicate valuations in the several counties of the state; and if the suggested amendment to said provision of House Bill 19, relating to county commissioners' expenses, is enacted as a part of said provision and of Section 3001, General Code, it is certain that as long as the salaries of county commissioners are determined by the provisions of said section of the General Code, the provision therein with respect to county commissioners' expenses will not be in operation in some of the counties of the state.

It is apparent that the suggested amendment to said provision of House Bill 19, relating to the payment of county commissioners' expenses, is an attempt to classify the county commissioners in the several counties of the state with respect to the operation of said provision as a law. If this classification is one that may be properly made by the Legislature for this purpose, it follows that said provision as to the payment of county commissioners' expenses, with the suggested amendment thereof, would, if enacted, be a law of uniform operation within the meaning of the constitutional provision here under consideration, for the reason that said provision with respect to the payment of county commissioners' expenses would apply to all of the class of county commissioners as to whom it would be intended to operate. Touching this question, the court in its opinion in the case of *Briggs* vs. *State*, 52 O. S. 37, 51, said:

> "A law is general and uniform that applies to all persons and things coming within its provisions throughout the state. Its uniformity consists in the fact that no person or thing, of the description of any person or thing affected by it, is exempt from its operation. The rule as to uniformity of operation requires that the law shall have a uniform operation upon the person or things of any class upon whom or which it purports to take effect; that it shall bear equally in its burdens and benefits upon persons and things standing in the same category."

In the case of *Platt* vs. *Craig*, 66 O. S. 75, 79, the court in its opinion said:

> "Not only must such laws operate throughout the state, but they must operate uniformly, that is, there must be no exemptions as to individuals of the same class. A general law must, therefore, in its operation be co-extensive with the state and co-extensive with every class brought within the purview of the statute; but this section does not imply that a law of a general nature must necessarily affect every individual in the state, or every small subdivision of territory within the state."

Other cases on this same point may be noted, as follows: *State ex rel* vs. *Creamer*, 85 O. S. 349; *Assur* vs. *City of Cincinnati*, 88 O. S. 181; *City of Xenia* vs. *Schmidt*, 101 O. S. 437; *Sylvania Busses* vs. *Toledo*, 118 O. S. 187.

Further to this point, and as a carefully guarded limitation upon the rule above referred to, the following language, found in the opinion of the court in the case of *State ex rel.* vs. *Powell,* 109 O. S. 383, 385, should be noted:

> "Section 26, Article II, of the Constitution, was not intended to render invalid every law which does not operate upon all persons, property or political subdivisions within the state. It is sufficient if a law operates upon every person included within its operative provision, provided such operative provisions are not arbitrary and unnecessarily restricted. And the law is equally valid if it contains provisions which permit it to operate upon every locality where specified conditions prevail. A law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists."

While the Supreme Court has held in numerous cases involving the application of the constitutional provision here under consideration that classification in legislation is often proper in order to define the persons, objects or things upon which a general law is to operate and take effect, it has been likewise held that any arbitrary or artificial classification for such purpose will not be upheld; and that such classification, to be effective under said constitutional provision, must be based upon a real and substantial distinction in the nature of the class or classes upon which the law operates; *Gentach* vs. *State, ex rel.,* 71 O. S. 151; *Board of Health* vs. *Greenville,* 86 O. S. 1, 37; *City of Xenia* vs. *Schmidt,* supra.

The only reason that can be assigned as a basis for the classification of county commissioners made by the suggested amendment to the provision for county commissioners' expenses in House Bill 19, is that the county commissioners in the larger and wealthier counties of the state receive more compensation by way of salary and otherwise than do the county commissioners in the other counties of the state, and are, therefore, better able to pay their own expenses. It is to be presumed, however, that the county commissioners in each and all of the counties of the state render public services commensurate with the compensation by them respectively received. It is certain that no part of the compensation received by any county commissioner is to be considered as a gratuity to such officer, or as an award for the payment of expenses incurred by him in the discharge of his official duties.

The classification of county commissioners made by the suggested amendment here under consideration is founded on no more rational basis than would be a classification of county commissioners based upon financial worth; and in both cases the classification would be predicated fundamentally upon the same reason, to-wit, the greater ability of county commissioners in one class to pay their own expenses than county commissioners in the other class. Legally speaking, no reason can be ascribed for the payment of county commissioners' expenses in one or more counties which does not apply as well to the payment of such expenses in other counties of the state.

I am clearly of the opinion that the classification attempted by the suggested amendment referred to in your communication is arbitrary and artificial, and is not one based upon any real and substantial distinction in the class of persons upon which the provision, as amended, is to operate; and that such provision as to the payment of county commissioners' expenses, if amended as suggested in your communication, and thus enacted into law, would be unconstitutional and void.

Respectfully,
GILBERT BETTMAN,
Attorney General.