III.

OPINIONS OF THE ATTORNEY GENERAL FROM NOVEMBER 15, 1903, TO JANUARY 1, 1905.

(To the Governor)

AS TO CONSTRUCTION OF SECTION 1407-3, R. S.

COLUMBUS, OHIO, November 18, 1903.

HON. GEORGE K. NASH, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have asked for a construction of Section 1407-3 of the Revised Statutes of Ohio, in respect to whether such statute applies to lease-hold interests created at a time subsequent to the passage of such law.

In reply I would say, that I am of the opinion that such statute 1407-3 is prospective in its operation, and applies to lease-hold interests hereafter created, as well as those subsisting at the time of the passage of the law. There are other sections of the Revised Statutes upon the subject of lease-holds in the Ohio Company's purchase, indicating a policy upon the part of the legislature to sell such lands.

On April 4, 1902 (95 O. L., 113), Section 1407-1, R. S., was amended and provides for the sale of ministerial lands in the Ohio Company's purchase in Gallia County, but such statute by its terms confines the sale of such land to *present* lease-holds. I find no such limitation in Section 1407-3.

Very respectfully,

GEORGE H. JONES,
Ass't Attorney General.

WHETHER PERSON WHO HAS NOT RESIDED IN THE STATE OF OHIO LONG ENOUGH TO BECOME AN ELECTOR IS ELIGIBLE TO APPOINTMENT AS NOTARY PUBLIC.

COLUMBUS, OHIO, December 19, 1903.

HON. FREDRICK N. SINKS, *Private Secretary to Governor, Columbus, Ohio.*

DEAR SIR:—Yours of December 18, making inquiry as to whether, in my opinion, a person who has permanently removed from another State to Ohio, but whose residence in the latter State has not been of sufficient length to make him an elector, is eligible to be appointed as a notary public.

Section 110 of the Revised Statutes provides that,

> "The Governor may appoint and commission as notary public as many Persons of the age of twenty-one years or over, who are citizens of this State, residing in the several counties for which they are appointed, as he may deem necessary."

I understand it is claimed by the person who seeks an appointment, that, having removed to the State of Ohio with the intention of making it his permanent home, he is a citizen thereof, although not an elector, and consequently is eligible to be appointed as notary public.

I am of the opinion that he is a citizen of the State of Ohio, although not an elector. Citizenship does not depend upon the right to vote, for, if it did, minors and women would not be citizens. It is said, in Minor v. Happessett, 21 Wall, 162, that,

> "The word citizen in the United States Constitution conveys the idea of membership of a nation, and nothing more, and women and children are within its provisions."

In defining the word citizen, Rapalje, in his Law Dictionary (Vol. 1, 212), says,

> "The right to vote is not the sole test of citizenship, for many citizens are not permitted to vote, thus women, and youths under twenty-one, are none the less citizens because they cannot vote, and the latter right is also constantly lost, temporarily, by change of domicile or residence."

Hence, I am of the opinion that the person applying in this particular instance for appointment as notary public became a citizen of the State of Ohio when he moved into its borders, with the intention of making it permanently his home.

But there is another consideration which, in my opinion, makes him ineligible to appointment until he becomes an elector. A notary public is an officer, within the meaning of the Constitution of the State of Ohio. Article XV, Section 4, provides that,

> "No person shall be elected or appointed to office in this State, unless he possess the qualifications of an elector."

Hence, it follows that any person who has not resided within the State a sufficient length of time to become an elector is not eligible to appointment as a notary public.

Very truly yours,

J. M. SHEETS,
Attorney General.

REGARDING SALE OF CANAL LANDS TO THE GRASSER BRAND BREWING COMPANY, AT TOLEDO, OHIO.

COLUMBUS, OHIO, December 26, 1903.

HON. GEORGE K. NASH, *Governor of Ohio, Columbus, Ohio.*

SIR:—A letter dated December 16, 1903, addressed to you by Mr. Harvey Scribner, together with several enclosures in the nature of correspondence regarding the proposed sale to the Grasser & Brand Brewing Co., of certain canal lands, has been referred to this office.

The lands in question had been leased on August 13, 1895, to the Grasser & Brand Brewing Co., at Toledo, and there was a stipulatioin in the lease granting to the lessee an option of purchase at an appraised value of $400. The lessee now demands a deed by virtue of said option, and tenders the money, amounting to the appraised value as aforesaid.

On January 24, 1867 (64 O. L., 266), is found an act, entitled "An Act to authorize the Board of Public Works to vacate the tow path on Swan Creek, from Lock No 1, Miami and Erie Canal, to the mouth of said creek."

By the terms of this act the Board of Public Works was authorized and empowered to relinquish, surrender and release, on behalf of the State of Ohio, "To the present owners, respectively, certain lots and parcels of land bounding and abutting upon Swan Creek," etc. Such relinquishment, surrender and release, how-

ever, was to be based upon examination by the Board of Public Works and the arrival by them at the determination that such relinquishment, etc., could be made without prejudice to the interests of the State and the navigation of the canal.

It is reasonable to presume that no action under this act of January 24, 1867, has been taken by the Board of Public Works. I find nothing in the law authorizing the Board of Public Works to grant options to purchasers, which options are to take effect in the future, and I am inclined to the opinion that in order that a good title may be made of this land to the purchaser that proceedings should be had under Section 218-231, Revised Statutes.

You are no doubt aware, if this property is appraised at $500 or less, then a joint meeting of the Canal Commission, Board of Public Works, including the Chief Engineer, may be held and a resolution to the effect that such lands are not necessary or required for the use, maintenance and operation of any of the canals of this State may be passed; then yourself, as Governor, and the Attorney General may sell such lands at private sale — yourself, as Governor, to execute the deed to the purchaser.

Very respectfully,

GEORGE H. JONES,
Ass't Attorney General.

IN REFERENCE TO NEW SCHOOL CODE.

COLUMBUS, OHIO, February 26, 1904.

HON. MYRON T. HERRICK, *Governor of Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of yesterday requesting an opinion from this office as to whether or not any constitutional method may be devised whereby the local authorities in city school districts may determine for themselves the composition and size of school boards for such districts.

In my judgment a very simple plan may be adopted which will accomplish this result. The Supreme Court of Ohio has held in the case of State ex rel. v. Spellmire, et al., 67 O. S. 77, that schools are a subject matter of a general nature and that all laws which apply to the same must have a uniform operation throughout the state, in obedience to the command of Section 26 of Article II of the Constitution. There is nothing, however, in this decision which suggests the impropriety of providing by general laws for the organization of school governments throughout the state by dividing the same into city, village and township districts. Assuming, therefore, that such districts may be created and that the laws applying to each shall operate uniformly upon the subject matter throughout the state, the question you submit is whether or not this principle would be violated if the option were given to some appropriate authority in each district to determine for itself the number that should constitute the local board. A similar question arose with respect to the constitutionality of one feature of the municipal code passed by the General Assembly on October 22, 1902. In that act a Board of Public Service, to be elected at large, and a Board of Public Safety to be appointed by the mayor, was provided for every city in the state; but the option was given to the existing councils in each city to determine whether the Board of Public Service should consist of three or five members, and whether the Board of Public Safety should consist of two or four members. The constitutionality of this provision was contested in the case of Zumstein v. Mullen et al., 67 O. S. 382. It was contended in that case that to permit the cities through their councils to determine for themselves, within the limitations prescribed by the act, the number of members of these two boards would introduce a new method of classification of cities and establish a variety of municipal governments contrary to the constitution. But this was

answered by the contention that no *variety* of governments was authorized, since *each* city was required to have a Board of Public Service and a Board of Public Safety; and that no diversity in form of government existed where the only difference permitted was in the size of the boards and not in their character or powers. And the Supreme Court in passing upon the question used this language:

"While all cities must have the same powers they cannot be required to exercise them in the same manner. Uniformity of powers does not imply uniformity of ordinances."

Applying the principle in the *Zumstein* case, above cited, to the question now submitted, with respect to the organization of city school boards, I beg to suggest that some plan like the following can be devised that will, in my opinion, answer every requirement of the Constitution: The proposed act for the organization and government of the schools may require in each city school district a school board composed of at least two members elected at large and at least three members elected from wards or districts, with a maximum number at large and from wards or districts, if desired, and the existing school boards, boards of education, school councils or other local authority now constituting the governing body of the schools in each city district may be empowered to determine, within the limitations fixed by the act, what number of members shall constitute the proposed board.

The plan here suggested is presented merely as an example or an illustration of a method which would provide the option in this matter, necessary to meet the conflicting desires throughout the state and at the same time avoid constitutional obstacles. Other plans equally as good or better may be devised. The only thing necessary is that the same character of board, chosen in the same way, and possessing the same powers and functions, should be established in each city district. The number of members of such a board may, with entire propriety and safety, be left to any appropriate local authority.

Very respectfully,

WADE H. ELLIS,

Attorney General.

AS TO CONSTITUTIONALITY OF HOUSE BILL NO. 222, BY MR. CHISHOLM, PROVIDING FOR SELLING OF POOLS UPON HORSE RACES.

COLUMBUS, OHIO, April 25, 1904.

TO THE HON. MYRON T. HERRICK, *Governor of Ohio.*

SIR:—You have submitted to me House Bill No. 222, by Mr. Chisholm, and have asked whether or not the same is, in my judgment, constitutional. This bill is an amendment of Section 6939*a* Revised Statutes of Ohio. Briefly stated, it forbids, under a penalty of fine and imprisonment, the selling of pools upon horse-races; but declares that such pool-selling shall be lawful when conducted within the grounds of certain driving associations and by persons designated by such associations.

In my judgment this act violates the Constitution of Ohio in the following respects:

First: It is contrary to the provisions of Section 6, of Article 15, which declares that "Lotteries and the selling of lottery tickets, for any purpose whatever, shall forever be prohibited in this state." That poolselling is a lottery has been fully determined by the courts of New York, where a similar constitutional inhibition against lotteries was invoked upon the same question as that which is

now presented by this bill. The Constitution of New York, prior to 1894, provided in Section 10 of Article 1, as follows: "Nor shall any lottery hereafter be authorized or any sale of lottery tickets allowed within this state." It will be observed that the Ohio Constitution on the subject, stated in the self-operative form, is even stronger than that of New York. In the latter state the precise question as to whether or not a law authorizing poolselling at a horse race constituted a lottery was decided in the case of Irving v. Britton, 8 Miscellaneous Reports, 201.

An act commonly called the Ives' Pool Bill was declared to be unconstitutional in that case on the ground that poolselling was a lottery. The opinion by Judge Pryor is conclusive and convincing. After this decision the Constitution of New York was so amended as to include in express terms that which the court had said was already included under the word "lottery," and the legislature was directed to pass appropriate laws to prevent poolselling, bookmaking or any other kind of gambling. In obedience to this mandate of the Constitution the legislature of New York passed an act making it unlawful for any person to make or record any bet or wager upon a horse-race at any race-course, and although the penalty consists only in the forfeiture of the amount paid or received and is therefore so light that the law is often violated, nevertheless poolselling is still forbidden by the statutes of New York and these statutes have been upheld in the recent case of The People ex rel. Sturgis v. Fallon, 152 N. Y., 1.

In many other states poolselling has been held by the courts to constitute a lottery. To this effect is the New Jersey case of State v. Lovell, 39 N. J. L. Reports 458, and to the same effect are a number of federal decisions, among them, Horner v. United States, 147 U. S. 449, United States v. Wallis, 58 Federal 942.

That these decisions would be followed by our own Supreme Court, under the lottery clause of the Constitution, is shown by the recent case of The State ex rel. Attorney General v. The Investment Company, 64 O. S. 283, where it was held that the word "lottery" was a generic term and includes any game of chance or prize.

Second: This act violates Section 26, of Article 2, of the Constitution which provides that all laws of a general nature shall have uniform operation throughout the state. It makes it lawful to gamble on certain race-tracks of the state and unlawful everywhere else.

State ex rel. v. Ellet, 47 O. S. 90:
Ex parte Falk 42 O. S. 638:
Ex parte Van Hagan 25 O. S. 426,

and many other cases.

Third: It violates Section 2, of the First Article of our Constitution known as the Bill of Rights, and which provides that government is instituted for the equal protection and benefit of the people and forbids the granting of special privileges and immunities. This act makes it lawful for persons designated by certain associations to sell pools on horse-races and makes it unlawful for any one else to do so. It goes even further than this and discriminates between persons in the same class or calling, for while it professes to legalize poolselling within the grounds of certain associations, it does not permit all persons to sell pools even within such grounds, but limits the privilege to those designated by the association. The granting of such privileges to one, which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, has been pronounced unconstitutional by the Supreme Court of this state in State v. Gardner, 58 O. S. 599. Nor can this act be defended on the ground that it is a license or a police regulation. It is not properly a license for the reason that it is not granted by any state authority; and is not properly a police regulation, for the reason that

it does not profess to restrict the evil even in the place where it is suffered, or to protect the public by distinguishing between those who shall and those who shall not exercise the privilege of selling pools on any basis of character, reputation or other qualification, save only the favoritism of the association conducting the races. It is no doubt true that poolselling when restricted solely to the racetrack of a gentlemen's driving club would, in many instances, greatly minimize the evil, but since this bill offers inducements to all classes to organize so-called associations for the ostensible purpose of promoting the breeding and development of light harness horses and for the real purpose of engaging in bookmaking and poolselling without any control or supervision by the public authorities, it possesses none of the well recognized characteristics of a police regulation.

In several other states questions almost identical with the one here presented were passed upon by the courts of last resort. In the case of the State v. Thompson, 160 Mo. 333, the Supreme Court of that state had under consideration the constitutionality of an act permitting bookmaking and poolselling upon racecourses and fairgrounds after the procurement of a license from the State Auditor by any person of proper character, and the court upheld the act only upon the theory that it was not class legislation either as to persons or place, since all who desired to engage in the business were permitted to do so by complying with the law. The court, however, clearly intimates that if the privilege were limited to certain members of a general class, it would be unconstitutional.

In Swigart v. The People, 15 Ill. 284, the Supreme Court of that state passed upon an act excepting from the provisions of a general law against bookmaking and poolselling on horse races, such bookmaking and poolselling when conducted within the enclosure of a fair or racetrack association. The act there considered was substantially the same as the one now before you, except that the Illinois statute merely provided that the general law on the subject should not apply to poolselling at fairs or racetracks, while the Chisholm bill declares affirmatively that a certain kind of poolselling shall be lawful. Yet in the Illinois case the court held that the special exception did not take the offense out of the purview of the criminal code of that state forbidding gambling, and suggested further, that if it were necessary to pass upon the validity of such exception, when tested by the constitutional inhibition against the granting of special privileges or immunities, the act would have probably failed for the reason that it was contrary to such constitutional inhibition. But even if the bill now under consideration may be regarded as a police regulation of the evil of poolselling which is made a crime by the general terms of the statute here sought to be amended, the further serious question arises as to the right of the legislature to delegate to a private corporation or association to determine what persons and what persons only shall enjoy the privilege of permitting acts, which when committed by any other persons, are punishable by fine and imprisonment. A delegation of the power to regulate gambling in any form to a private corporation, possessing in no sense the sovereign powers of the state, is absolutely void.

My conclusion is that this act violates the constitutional mandate against lotteries, does not operate uniformly throughout the state, discriminates against citizens in the same class or situation, and delegates governmental power to a private corporation or association. For these reasons it is, in my judgment, unconstitutional.

Respectfully submitted,
WADE H. ELLIS,
Attorney General.

POWER OF THE GOVERNOR TO COMMUTE SENTENCE OF PRISONER, UNDER HABITUAL CRIMINAL LAW, SO THAT BOARD OF MANAGERS MAY GRANT PAROLE TO SUCH PRISONER.

August 5, 1904.

Hon. Myron T. Herrick, *Governor of Ohio, Columbus, Ohio.*

Dear Sir:—Your letter of the 21st ult. presents the query: Can the Governor commute the sentence of a prisoner in the Ohio penitentiary, under the habitual criminal law, who has served the definite term fixed by the court, so that the board of managers of the penitentiary can grant a parole to such prisoner?

The act familiarly known as the habitual criminal act was enacted May 4, 1885 (Vol. 82, p. 236), being Section 7388-11, R. S., which was repealed by the General Assembly May 6, 1902 (Vol. 95, O. L., p. 410). I make the following quotation from that act:

> "He (the habitual criminal) shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life, unless pardoned by the Governor, and the liability to be so detained shall be and constitute a part of every sentence to imprisonment in the penitentiary; provided, however, that at the expiration of the term for which he was so sentenced he may, in the discretion of the board of managers, 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 said board, and subject at any time to be taken back within the inclosure of said institution;" * * *

By this act there was originally granted to the board of managers the power to parole habitual criminals. The repeal of the habitual criminal act has taken from the board of managers all jurisdiction to pass upon the application of this class of inmates of the penitentiary.

The law empowering the board of managers to parole, generally known as Section 7388-9, R. S., is in full force and effect. For the consideration of this question it is only necessary to quote the following portion thereof:

> "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 a minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted) of felony and served a term in a penal institution, and any prisoner who is now or hereafter may be imprisoned under a sentence for murder in the first or second degree, and who has now or hereafter (shall have) served under said sentence twenty-five full years, may be allowed to go upon parole outside of the buildings and inclosures, 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 inclosure of said institution."

In addition to the foregoing there is full power conferred upon the board of managers by that section, and others, contained in the same act, to establish and enforce rules and regulations in connection with the application, hearing and granting or refusal of the parole, and governing the conduct of the prisoner while on parole.

It will be seen that the act still in force, to-wit, Section 7388-9, R. S., only authorizes the board of managers to parole those prisoners who have not been

previously convicted of felony and served a term in a penal institution. By the very language employed it excludes from consideration the so-called habitual criminals. They were defined to be those who, having been twice convicted, sentenced and imprisoned in some penal institution for felony, are again convicted, sentenced and imprisoned in the Ohio penitentiary for felony thereafter committed. (See repealed Section 7388-11, R. S.)

What, then, is the power of the Governor to commute sentences and what effect does a commutation of the sentence of an habitual criminal have upon the power of the board of managers to parole such criminals?

The power of the governor to commute a sentence is conferred by Section 11 of Article 3, of the constitution of the State. The portion of that section which contains that power is as follows:

> "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," etc.

This power, thus conferred upon the Governor of the State, is subject to be regulated by the General Assembly, but cannot, in any degree, be destroyed or limited. The Governor is the sole judge of when he should exercise the power, and to whom, and upon what conditions the clemency should be extended. As it is his constitutional prerogative, it is not subject to legislative or judicial control. He may attach to the reprieve, commutation or pardon, any conditions. He may thus qualify the clemency extended, and make the grant thereof subject to change; or he may unqualifiedly and without condition extend the favor to the criminal, and, when so granted, the same is irrevocable. It must be construed as an act of mercy or grace, and not as an obligation due the prisoner.

The words employed are suggestive, in that they are broader than the terms of the federal constitution conferring similar powers upon the President of the United States. The President, by Section 2, Article II, U. S. Constitution, has power to grant "reprieves and pardons." The Governor of Ohio has power to grant "reprieves, *commutations* and pardons."

Commutation has been defined in law to be "A change of the penalty or punishment from a greater to a less." (Bouvier's Law Dictionary.) It is evident that the power thus conferred is to be construed as strongly and liberally with reference to the grant of a reprieve or commutation as to a pardon.

The Supreme Court of the United States, in *ex parte* Garland, 71 U. S., 333, 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 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 any offense."

To the same effect are Carlisle v. United States, 16 Wallace, 147, and Knote v. United States, 95 U. S., 149.

In Knapp v. Thomas, 38 O. S., 377, and Sterling v. Drake, 29 O. S., 457, the Supreme Court of this State quotes the foregoing cases with approval.

In Sterling v. Drake, *supra,* the Supreme Court, in construing the word "reprieve," as used in Section 11 of Article III, of the constitution, said:

> "The power is intrusted to the Governor for merciful and beneficent purposes, and no construction should be put upon this constitutional provision that will prevent him from freely using the power of reprieve for the purposes intended."

We should likewise adopt such construction as will permit the Governor to freely use the power of "commutation" for the purposes intended.

We have adopted the definition agreed upon by common law writers of the term "commutation," as a "Change of the penalty or punishment from the greater to the less;" also, "a change of state or condition." (Bouvier's Law Dictionary; Ogletree v. Dozier, 59 G., 802.) This is the view taken by our Supreme Court in the matter of Sarah M. Victor, 31 O. S., 206; the court said:

> "In its legal acceptation, it (commutation) is a change of punishment from a higher to a lower degree, *in the scale of crimes and penalties* fixed by the law, and is presumed therefore to be beneficial to the convict. *It is an act of executive clemency, equally as a pardon, only in a less degree.*"

What, then, are the particular facts to which the term is to be made applicable?

A score or more of prisoners are now confined in the Ohio penitentiary as habitual criminals, sentenced to be confined therein for the respective terms of their natural lives. The law under which they were so sentenced has been repealed by the General Assembly. The repeal of the law does not release them, nor change their terms, for they are held by virtue of the judgment and sentence of a court in each case, and no repeal of the act can work a revocation of the judgment, nor is it within judicial power to modify their sentences. The Supreme Court has said, in a recent case, that their hope lies in the appeal to executive clemency (in re Kline, 70 O. S., p. 25). The board of managers of the penitentiary is without statutory power to consider the application of any one of them for parole, because they have all been convicted and sentenced as habitual criminals. If the Governor cannot, by the exercise of commutation vested in him, change their penalty or punishment from imprisonment for life, now being served by them as habitual criminals, to that of a lesser degree, and so make their cases cognizable by the board of managers if they should apply for a parole, then they cannot be paroled at all and cannot be relieved from life imprisonment save by an act of pardon. Their individual cases might be such as would not recommend them, or any of them, for pardon, although they might be of such character as should recommend them for parole.

With these facts before us, and the definition as used by our Supreme Court of the word "commutation," together with the express policy of the court to construe the term, and the entire constitutional section most liberally, so as to fully carry out its merciful purpose, we conclude that the effect of the commutation of the sentence of an habitual criminal to a definite term of years would be not only to change the punishment from the higher to the lower degree, but would further change the "scale of crime and penalty fixed by law," which, in the case of an "habitual," would be to relieve him of the attendant penalty and discrimination of not being able to apply for parole; and would, by such an act of the Governor, make his application for parole cognizable by the board of managers and thereby make the commutation in truth and in fact "an act of executive clemency, equally as a pardon, only in a less degree."

Respectfully submitted,

WADE H. ELLIS,

Attorney General.

LIABILITY OF STATE OF OHIO IN MATTER OF U. S. S. "ESSEX."

November 28, 1904.

HON. MYRON T. HERRICK, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have referred to this department the official correspondence connected with the loan of the U. S. S. Essex by the United States Government to the State of Ohio for the use of the Toledo battalion of the Naval Militia; also, the correspondence arising out of an alleged claim for damages made by the Canadian Electric Light Company of Quebec, and said to have been sustained by the fouling of a cable by the anchor of the U. S. S. Essex, at Quebec, while said vessel, which was manned by master and crew furnished from the Ohio Naval Militia, was being navigated from the port of Portsmouth, N. H., to the port of Toledo, Ohio.

Upon the statements appearing in the correspondence thus referred you inquire what liability, if any, arises against the State of Ohio for damages sustained by the fouling of the cable of the Canadian Electric Light Company at Quebec?

It appears that prior to April 27, 1904, an application had been made by the authorities of the State of Ohio to the U. S. Government for the loan to this State of the U. S. S. Essex for the use of the Toledo Battalion of the Naval Militia. On April 27, 1904, the Assistant Secretary of the U. S. Navy Department informed the Governor of the State of Ohio that the Navy Department was willing to loan said U. S. S. Essex, then at the port of Portsmouth, N. H., to the State of Ohio, under the usual conditions which are contained in a copy of a formal receipt. The formal receipt, referred to, among other things, recites that "The Governor of the State of Ohio hereby acknowledges the receipt of the United States Ship 'Essex' at the port of Toledo, Ohio, from the Navy Department of of the United States * * *."

In pursuance to instructions from the U. S. Navy Department, the State of Ohio, through its proper authorities, made application to the State Department of the United States to take up with the British Ambassador the matter of securing permission for the Essex to pass through the St. Lawrence River and the Lachine and Welland Canals, and on May 4, 1904, the Hon. Secretary of the Navy was informed by Francis B. Loomis, acting Secretary of State, that the permission sought had been granted by the Canadian government.

The Navy Department having notified the Governor of Ohio, on April 27, 1904, that the State of Ohio must provide officers and crew for the purpose of taking charge of said U. S. S. Essex from the port of Portsmouth, N. H., to the port of Toledo, O., where she was to be receipted for by the Governor of the State of Ohio, a detachment of the Ohio Naval Militia, consisting of four officers and thirty-six seamen, were duly ordered to Portsmouth, N. H., to man said U. S. S. Essex. Lieut. Anthony F. Nicklett reported to the commanding officer of the United States Navy Yard, and was *by him* directed to take charge of said "Essex" and to complete the fitting out of the ship. After application to the Assistant Secretary of the Navy by Lieutenant Nicklett to have the necessary repairs made to the boilers and engines, in order that said "Essex" might steam to Toledo, he was instructed and directed by the officers in charge that he must employ tugs and tow said vessel to Toledo. On the 18th day of June, 1904, said U. S. S. Essex, in tow of a tug, left the navy yard at Portsmouth, N. H.; arrived at Halifax on June 21, 1904; and on July 3, 1904, left Halifax for Montreal, in tow of tug F. W. Roebling; on July 10, while abreast Bic Island, J. Theop Corrinay, Quebec pilot No. 39, boarded the tug and took charge of tug and tow, and on July 15, 1904, the "Essex" was anchored in 12 fathoms of water at Quebec, under the direction of

Quebec pilot No. 39. On July 17, 1904, in Quebec harbor, the U. S. S. Essex dragged her anchor and fouled the cable of the Canadian Electric Light Company, and on the 17th day of July, 1904, the "Essex" proceeded on her voyage and arrived at the port of Toledo, Ohio, at 4:40 P. M., of August 7, 1904, and a receipt for said vessel was signed by the Governor of Ohio.

Even if it be conceded that the master of the U. S. S. Essex, at the time of the alleged accident was an officer of the State of Ohio, and by his tortuous act or neglect caused the damage claimed, no liability attaches to the State of Ohio, because it is an established principle that a State is not liable for the torts of its officers, although such torts are committed in the discharge of official duties, and this principle rests upon grounds of public policy.

Chapman v. State, 104 Cal., 690.
Murdoch Parlor Grate v. Com'wealth, 152 Mass., 28.
Allen v. Board of State Auditors, 122 Mich., 324.
Lewis v. State, 96 N. Y., 71.

Without discussing the question whether any liability at all arose against any person in favor of the Canadian Electric Light Company under the facts above set forth, in no event can such liability be a claim against the State of Ohio, because at the time the alleged accident is said to have occurred the State of Ohio was in no sense the "owner" or in possession of the U. S. S. Essex.

While it is no doubt the general rule that the party that mans a vessel is to be considered in possession, yet this is not always true.

Parsons on Shipping Admiralty, Vol. 1, p. 279.
In Certain Logs of Mahogany, 2d Sumner, 589.
Drinkwater v. Brig Spartan, Ware, 149-160.

In Lyman v. Redman, 23 Maine, 289, it was held that the master did not become the owner *pro hac vice* merely by victualling and manning the vessel, and by receiving a share of the profits, but that he must have entire control and direction of the vessel, and the owner must surrender all control of it.

If one party appoints the master, and another pays him, he is generally considered as holding possession of the vessel for the party appointing him.

McGilvary v. Capen, 7 Gray, 523.
Abb. on Ship, 289.

In the case in Second Sumner, 589, already referred to, Judge Story said:

"It appears to me that if the absolute owner itself retain the possession, command and control of the navigation of the vessel during the voyage, and the master is deemed as agent, acting under his instructions for the voyage, though authorized and required to fulfill the terms of the charter party, the absolute owner must under such circumstances be still deemed owner for the voyage and be liable as such to all persons * * *"

The following authorities discuss the principle laid down by Judge Story:

Marcardier v. Chespeake Ins. Co., 8 Cranch Rep., 49.
McIntyre v. Brown, 1st John. R., 229.
Gracie v. Plamer, 4th Wash. Cir. R., 110.
3 Kent Com., 3d Ed., 137.
Taggart v. Loring, 16 Mass. R., 336.
Clarkson v. Edes, 4 Cowen Rep., 478.

At the time of the alleged accident the U. S. S. Essex was in the wat[illegible]s of

Quebec by virtue of the arrangement made between the United States Government and Canada, and the State of Ohio was no party to such arrangement. The United States Government had control of the "Essex" on the voyage from Portsmouth, N. H., to Toledo, Ohio, and could have at any time changed the personnel of the master and crew and could have dismissed them from the vessel. Lieutenant Nicklett was not allowed to exercise his own judgment as to the manner in which the "Essex" was to be navigated between the ports just referred to, but the officers of the United States Navy, from whom Lieutenant Nicklett received the "Essex," overruled the suggestion made by the Lieutenant and instructed him how to navigate said vessel, and the alleged accident occurred while the "Essex" was being navigated according to the instructions given to Lieutenant Nicklett at the time he assumed command of the "Essex."

Had there been a United States naval officer aboard of said vessel supervising and directing her navigation, there certainly could be no claim that the State of Ohio was liable to any third person for damages, and no different principle can be applied in this case when it clearly appears that United States naval officers directed how the vessel should be navigated, and while being so navigated the damage ensued.

The furnishing of master, crew and provisions for the voyage by the State of Ohio, while a condition attached to the loan of the vessel by the United States Government, was for the purpose of saving to the United States Government the expense of the transfer and delivery of the vessel to the State of Ohio at the port of Toledo, but while the master and crew, that is, the individuals who were to man said vessel, were furnished at the expense of the State of Ohio, yet they were accepted by the United States Government and navigated said vessel under instructions and directions given by the United States Government, through its duly authorized officers.

The alleged accident in Quebec harbor occurred on the 17th day of July, 1904. The "Essex" arrived at the port of Toledo, Ohio, on August 7, 1904. The State of Ohio, by its Governor, under the arrangement with the United States Government, was to accept and receipt for the U. S. S. Essex upon her arrival at the port of Toledo. This fact in itself is convincing that the understanding of all parties was that the United States Government was to deliver at Toledo, Ohio, the said vessel, and that the responsibility for said vessel was not assumed by the State of Ohio until her delivery at said port of Toledo, Ohio.

Upon the foregoing facts I am of the opinion that no liability exists against the State of Ohio in favor of the Canadian Electric Light Company.

Very truly yours,

WADE H. ELLIS,

Attorney General.

(To Members of the Legislature)

SPECIAL RELIEF BILLS UNCONSTITUTIONAL.

COLUMBUS, OHIO, January 30, 1904.

The Committee on County Affairs, House of Representatives, 76th General Assembly.

GENTLEMEN: — You have referred to me the question of the constitutionality of House Bill No. 8, entitled "A Bill for the Relief of Dwight A. Austin, Treasurer of Geauga county, Ohio, and his Sureties." This proposed measure authorizes the Commissioners of Geauga county to reimburse the said Dwight A. Austin for public monies lost by him as county treasurer through the failure of a certain banking house with which said monies were deposited. It further empowers said Commissioners to levy a tax upon all the property in Geauga county for this purpose, and releases the said Austin and his sureties for all liability for the loss referred to.

It is true that the Supreme Court of this State in the cases of Board of Education v. McLandsborough, 36 O. S. 227, and State v. Board of Education, 38 O. S. 3, has held that where public money in the custody of a public officer is lost without his fault, the legislature may constitutionally pass a special act relieving such officer and his sureties from the payment of such money and directing that a tax be levied in the territory upon which the loss must fall to meet the deficit. But in the light of more recent decisions, it seems clear that these cases, decided more than twenty years ago, would not now be regarded as authority upon the proposition determined by them. During the last few years the supreme court of this state has made quite obvious its attitude toward special legislation of whatever form or character. It has been limiting to a more and more exacting degree the subjects of local legislation, and has been holding invalid with increasing emphasis laws operating only in particular counties or municipalities; insisting always upon the wholesome principle that all acts, so far as practicable, shall challenge the interest of every section of the state and the consideration of the entire membership of the legislature.

Hixson v. Burson, 54 O. S. 470:
Cincinnati v. Steinkamp, 54 O. S. 284:
State ex rel. v. Davis et al., 55 O. S. 15:
Gaylord v. Hubbard, 56 O. S. 25:
State ex rel. Attorney General v. Beacom, 66 O. S. 491:
Pump v. Lucas County et al., 49 O. L. B. 26.

Nor will the rule *stare decisis* save such special acts; for the court has frequently declared that it will not be bound by this rule unless the reasoning employed in the earlier case appeals to its sound judgment; that the principle in favor of the stability of decisions cannot be invoked to interfere with the overruling of a former case upon a constitutional question when the same is clearly erroneous and no rights have vested under it, and finally, that "No amount of wrong adjudication can justify a practical abrogation of the Constitution."

State ex rel Knisely v. Jones, 66 O. S. 453:
State ex rel Guilbert v. Yates, 66 O. S. 546:
State ex rel Guilbert v. Lewis, 48 O. L. B. 1001.

The bill you submit applies to Geauga county alone. It imposes a burden upon the people there which is not borne by any other county in the State. It relieves one county treasurer and his sureties from an obligation by which all other

county treasurers and their sureties in Ohio are bound. It may well be contended, therefore, that this bill violates the following sections of the Constitution of this State:

First: Section 2 of Article I, which declares that government is instituted for the "equal protection and benefit" of all the people. See Coal Company v. Rosser, 53, O. S. 12, holding invalid an act which gave to a particular class of litigants a privilege in the way of attorney's fees not granted to others; State ex rel. v. Ferris, 53 O. S. 314, declaring unconstituional an act which exempted certain estates from the inheritance tax; State v. Gardner, 58 O. S. 599, finding void a license law which exempted certain persons from its operation, and various other cases which annul attempts of the legislature to establish special privileges and immunities.

Second: Section 26 of Article II, which ordains that all laws of a general nature shall have a uniform operation throughout the State. A case directly in point upon this section of the Constitution is that of Commissioners of Hamilton County v. Rosche Brothers, 50 O. S. 103, which held that an act to provide for refunding the taxes of certain taxpayers in Hamilton County, benefitting particular individuals only and imposing a burden upon one county not borne by any other, was unconstitutional and void. In the later case of State ex rel. v. Davis et al., 55. O. S. 15, the Supreme Court, in declaring invalid an act imposing a special tax upon Mahoning County, say that the people of that county have the right to insist that a burden of such a character shall not be laid upon them "unless in pursuance of a law operating everywhere within the state and representing the considerate judgment of the entire body of the representation."

Third: Section 28 of Article II, which declares that the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts. In Commissioners v. Rosche Brothers, cited above, it is held that an act providing for the refunding of particular taxes erroneously paid is void in so far as it creates and attaches a liability to a county for a past transaction. In State v. Commissioners of Perry County, 5 O. S. 497, it is held that an act which imposes upon the county of Perry the forfeiture of subsisting rights under a legal contract, is invalid. In Gompf et al v. Wolfinger et al., 67 O. S. 145, it is held that "a judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted." Applying the reasoning of these cases to the questions raised by the bill you submit for consideration, it is hard to avoid the conclusion that the obligaton of a county treasurer upon his bond, which has already accrued under existing laws, cannot be annulled by an act of the legislature subsequently passed.

Section 1080 of the Revised Statutes fixes the liability of all county treasurers on their bonds. Section 1126 R. S. provides the method by which all county treasurers may be sued on their bonds. Section 5837 R. S. furnishes a method by which all sureties on county treasurers' bonds may be released upon application and notice. The courts of this state have uniformly held that neither a county treasurer nor his sureties can escape liability for the safe keeping of public monies, no matter how such monies may be lost. In State v. Harper, 6 O. S. 607, it was held that even where the residence of the county treasurer was forcibly broken into and the public money in his custody was, without any fault of his, feloniously taken and carried away, nevertheless he and his sureties were bound upon his bond to make good the amount stolen, the rule being that a treasurer is absolutely obligated upon his contract to keep and pay over all public funds coming into his hands.

The bill pending before your Committee would make an exception to this general rule in favor of a particular county treasurer. It would make the law in Geauga County, as to a particular case, different from that of any other county

in the state. The liability of Austin and his sureties has already accrued. And now by force of a law, operating retroactively and impairing the obligation of a contract of suretyship of which Geauga County is the beneficiary, it is proposed to annul this obligation. This proposed act does not assume to pay a moral claim against the state at large and out of state funds, but votes away the money of one county alone. Nor is it certain that such an act would be valid if submitted to a vote of the people concerned, for the reason that any minority, however small, is equally entitled to the protection of the Constitution. No doubt, there is much to be said in equity and justice in favor of such a bill. Many like it have been enacted in the past, but in view of the grave doubt of its validity, I respectfully suggest three courses that may be pursued:

First: Let the people of Geauga County recompense their treasurer by private subscription, so that those only who waive their constitutional rights may share the burden, and those who do not care to contribute may have the protection to which they are entitled.

Second: Guard against such hardships in the future by a general law.

Third: Enact the present bill and let its constitutionality be immediately tested in a proper proceeding.

Very respectfully,

WADE H. ELLIS,
Attorney General.

NOTE: — Subsequent to the date of the above the Supreme Court of Ohio in State ex rel. Karg v. Commissioners of Crane Tp., 71 O. S. 496, unreported, affirmed the decision of the Circuit Court of Wyandot County, declaring special relief bills to be unconstituional.

CONSTITUTIONALITY OF PROPOSED LEGISLATION.

COLUMBUS, February 2, 1904.

HON. W. H. BURNETT, *Member of House of Representatives, Columbus, Ohio.*

DEAR SIR:—I beg to advise you that the bill you have submitted to me, entitled "An Act to authorize the council of any incorporated village, having a population of not less than 875 nor more than 925, to call a special election and to make a special levy for the purpose of fostering, promoting and assisting the establishment of a shoe factory," is unconstitutional for the following reasons:

First: It proposes a classification of municipalities which the Supreme Court of the State has held to be invalid; and,

Second: It authorizes the aid of a municipality to a private enterprise, which is also forbidden by the constitution.

Very respectfully,

WADE H. ELLIS,
Attorney General.

CONSTITUTIONALITY OF PROPOSED BILL FOR IMPROVEMENT OF ROADS AND HIGHWAYS.

COLUMBUS, OHIO, March 4, 1904.

HON. C. A. JUDSON, *Finance Chairman, Sub-Committee on Roads and Highways, Columbus, Ohio.*

DEAR SIR:—Your communication of February 24th is received. You make two inquiries:

> First: "Would it be constitutional to provide in the bill, that any aid which may be granted in the bill from the state, shall be used on the roads under the control of the County Commissioners to Township Trustees; or should the bill provide that the aid so granted may be used by any and all the authorities controlling roads; or in other words, must it be provided that this aid may be used by the authorities controlling both the roads in the cities and the country?"

In reply to this I would say that any local authorities having charge of the subject matter, may be empowered to distribute the state aid referred to in your inquiry.

> Second: "In the event that any part of the aid thus granted by the state be raised by direct levy, how shall we provide for the distribution of this among the different counties of the State? Can we distribute it equally among the counties, or may we distribute it by the road mileage in the several counties?"

I am of the opinion that the aid may be distributed upon the basis of the road mileage in the several counties.

The question of state aid has been legislated upon in several states of the union, notably in New York and Massachusetts. In New York one-half of the expense incurred in constructing roads is paid by the state, the other half is paid by the county and town or by the abutting owners as follows: If the improvement is initiated by a resolution of the board of supervisors (corresponding to the board of county commissioners) and not upon petition of freeholders, the 50% is paid by the county in the first instance, but the county is reimbursed by the town or township to the extent of 15% of the total cost of the improvement. If the action of the board of supervisors is based upon a petition of the freeholders, then the 15% above referred to is assessed upon the abutting property owners according to benefits. Those benefits are determined by the town or township assessors upon ten days notice of the time and place of apportionment, thus giving the abutting owners an opportunity to be heard.

The New York scheme, however, contemplates that after the board of supervisors, either upon their own motion or upon the petition of the freeholders, shall have found the particular road or section thereof to be necessary, the state engineer shall make surveys, plats and estimates of the work, and after such plans, specifications and estimates have been submitted to the board of supervisors and approved by them, such engineer shall advertise for bids and let the contract. The state engineer, or the county engineer or surveyor, under the instructions of the state engineer, supervises the doing of the work. It thus will be seen that under the New York scheme, the moneys of the state are paid out to the persons doing the work and as the work progresses. This shows how state aid is apportioned under such a plan. The New York statute also excludes from the operation of the law "highways within any city or incorporated village."

Massachusetts has a State Commission, which practically controls the entire construction of what are there called state roads, and the statutes provide that the several counties of the state must repay to the state 25% of the money which has been expended by the commission in the construction of the road.

By an examination of the statutes of the states referred to, it is seen that the state aid is apportioned to the particular improvement, road or section of road constructed, and that such aid is paid out by the state officers as demanded by the progress of the work from time to time.

Your inquiries indicate that other methods than those adopted by either of the states referred to are contemplated in the bill you are preparing, and I am of the

opinion that the apportionment may be made in the manner I have already indicated in answer to your second question, and that state aid may be distributed through the proper local authorities.

Very respectfully,
WADE H. ELLIS,
Attorney General.

OPERATION OF TITLE 2, CHAPTER 16, R. S., GOVERNING SAVINGS AND LOAN ASSOCIATIONS.

COLUMBUS, OHIO, May 10, 1904.

HON. D. H. MOORE, *Athens, Ohio.*

DEAR SIR:—The Secretary of State has handed me your letter of the 7th inst., to answer, requesting an opinion as to the operation of Title 2, Chapter 16, R. S., governing savings and loan associations.

I have given careful search to the provisions mentioned by you as governing associations of this class, and I do not find any provision for a capitalization of any such association of less than $25,000, which is mentioned in Section 3797, R. S. If there is a provision contained in any of the amendments passed at the recent session of the General Assembly I have not, as yet, obtained them, and therefore do not speak with regard to any such amendments.

The law that was held unconstitutional regulating such associations was contained in Sections 3631v and 3631f, R. S., the Supreme Court holding that these sections, being of a general nature and not of uniform operation throughout the State, have violated Section 26, of Article II, of the Constitution. But this decision could not operate to decrease the amount of capital stock required of such association, and until my attention would be called to a statute providing such associations might have a capital stock of about $12,000 I am inclined to the belief that an association with that size capital is not permissible in this State.

I have considered the provisions contained in Section 3806b, R. S., wherein a company organized in pursuance of those sections may commence business when $15,000 of capital are actually paid in, but I do not think that that section, which is special in form, contains the powers to which you refer.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CAPITAL REQUIRED OF SAVINGS AND LOAN ASSOCIATIONS.

COLUMBUS, OHIO, May 23, 1904.

HON. D. H. MOORE, *Athens, Ohio.*

DEAR SIR:—Your's of the 16th at hand and should have received my attention sooner had it not been for enforced absence from the city.

I have given to the question therein suggested the most liberal construction, in my opinion, possible and while Section 3797 provides that Savings and Loan Associations cannot "commence business with a subscribed capital of less than fifty thousand dollars except in villages having a population at the federal census of 1880 or at any federal census thereafter of less than 2500, and in such villages no such association shall commence business with a subscribed capital of less than twenty-five thousand dollars"— yet it appears to me that in such villages it is

only necessary to have at least one-half of each subscription fully paid up which would make, of a subscribed capital of twenty-five thousand dollars $12,500 paid in.

The decennial census shows that in 1880 Athens had a population of 2457: in 1890, 2620; and in 1900, 3066; therefore, at the time you would seek to incorporate, the last decennial census would control, and you could not revert to the privileges extended to villages of your population under the census of 1880.

While there may be some very good reasons for saying this section might be unconstitutional, yet I do not see how, in advance of the court so declaring, that I could approve articles of incorporation for such an association in a village the size of Athens unless there was a subscribed capital therein of fifty thousand dollars and at least one-half of the same fully paid up.

With personal regards, I remain, Very truly yours,

WADE H. ELLIS,
Attorney General.

IN REGARD TO VILLAGE SCHOOL DISTRICTS.

COLUMBUS, OHIO, July 6, 1904.

HON. HOMER KIMBALL, *Madison, Ohio.*

DEAR SIR:—Your letter bearing date of June 29, 1904, relative to village school districts, is received. In reply I will say that Section 3888, of the Harrison School Code, provides, that "each incorporated village now existing or hereafter created * * * shall constitute a village school district." And, while it is true that Section 3894 of said code makes provision for a transfer of a part or whole of any school district, yet this transfer must be made by the mutual consent of the boards of education having control of the territory.

Section 3888 makes the district in the village of Richmond a village district. After the November election, at which time a board of education will have to be elected for this village district, the board of education of the village district of Richmond and the board of education of Painesville township may, by mutual consent, make such transfers affecting the territory of the two districts that they may deem proper.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ACT INCREASING SALARIES OF MEMBERS OF LEGISLATURE.

COLUMBUS, OHIO, August 2, 1904.

HON. CHARLES A. BRANNOCK, *Bethel, Ohio.*

DEAR SIR:—Your letter of August 1st received. You inquire whether, in case it should be decided that the act increasing the salaries of circuit judges of Ohio is valid and effective from its passage, the act increasing the salaries of members of the legislature would also be effective from the date of its passage? In reply I would say that Section 31 of Article 2 of the Constitution of this state expressly provides that no change in the compensation of the members and officers of the General Assembly shall take effect during their term of office.

You further inquire, in your letter, whether the constitutional provisions as to increase of compensation applies to *per diem* pay or to salary? In the case of Gobrecht v. Cincinnati, 51 O. S., 68, the supreme court of this state held:

"The pay of a member of the board of legislation fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not salary within the meaning of Section 20, of Article 2, of the Constitution and such an officer's salary may be increased during his term."

Section 40, R. S., provided a fixed salary for the members of the General Assembly, being the sum of $600.00 for each year and I am inclined to the opinion that this compensation is a salary within the terms of the constitution and, therefore, that the increase of salary provided for in the act passed by the recent legislature does not become operative during the present term of the members of the General Assembly.

Very truly yours,

GEORGE H. JONES,

Ass't Attorney General

(To the Secretary of State)

AS TO SECTION 3821*gg*, R. S.

COLUMBUS, OHIO, December 16, 1903.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours of December 15, making inquiry of me as to whether, in my opinion, a safe deposit company under the provisions of Section 3821gg, R. S. (96 O. L., 18), may take on the business of a savings and loan association in addition to that of a safe deposit and trust company, duly received.

In my opinion, it cannot. This section of the statute, as you will observe, provides that,

> "Any company now incorporated under the laws of the State of Ohio, as a savings and loan association, and having at the time of the passage of this act paid-up capital stock of not less than $200,000, and organized and doing business in this State, or any company heretofore organized under the laws of this State as a safe deposit and trust company, may also engage in the business of a safe deposit and trust company."

While it is perfectly apparent that the framer of this bill either omitted something from its provisions which he intended to insert, or inserted more than he intended to insert, yet he failed, if it was his intention so to do, to confer upon safe deposit and trust companies the additional power to engage in the business of a savings and loan company. A savings and loan company is given the power to engage in the business of a safe deposit and trust company, but a safe deposit and trust company is not given authority in this section to engage in the business of a savings and loan association. That being the case, it follows, as a matter of course, if a safe and deposit company desires to take on the business of a savings and loan association it must organize as a savings and loan association and consolidate, as is provided for by statute.

Very truly yours,

J. M. SHEETS,
Attorney General.

IN THE MATTER OF THE PROVIDENT HOME BUILDING SOCIETY.

COLUMBUS, OHIO, March 3, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 1st inst. containing correspondence with Wm. J. Brewer, President of The Provident Home Building Society of 204 Temple Court, New York, making inquiry as to what such association would have to do in order to be qualified to do business in Ohio. Upon examination of the character of business done by this company, as evidenced by the literature handed me, I am of the opinion that the company will be compelled to comply with the provisions of the act of April 25, 1898, being otherwise known as Sections 3821*r* to 3821*z* of the Revised Statutes, inclusive, which requires a deposit to be made with the state treasurer of $100,000 in cash or bonds of the United States or of the State of Ohio, or of any county or municipal corporation in the State of Ohio, for the protection of the investors in these certificates of such company. This has been fully sustained by the Supreme Court of this state

in the case of the State of Ohio ex rel. Attorney General v. the Home Co-operative Union reported in the 63 O. S. 547.

I return herewith the enclosures sent me.

Yours truly,

WADE H. ELLIS,

Attorney General.

AMENDMENT OF ARTICLES OF INCORPORATION REGARDING CAPITAL STOCK, UNDER SECTION 3238A, TOLEDO CLUB.

COLUMBUS, OHIO, April 5, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus Ohio.*

DEAR SIR:—Your letter of March 23, with a letter of Mr. E. J. Marshall attached, has been by the Attorney General referred to me. You ask:

> "Whether a company, not for profit, but having capital stock, can be amended under Section 3238a, providing for the elimination of the provision in its articles regarding capital stock?"

Upon an examination of the statutes and decisions, I am of the opinion that a company, not for profit, cannot by amendment under Section 3238a provide for the elimination of the provision regarding capital stock. It appears by the letter of Mr. Marshall that shares of stock in the Toledo Club are owned and held indiscriminately by persons not members, as well as by members. Such stockholders certainly have an interest in the property of the corporation, and upon the dissolution of the corporation would be entitled to share in the remaining assets. I do not think that the interests of these stockholders can be divested by an amendment to the original articles of the Toledo Club, and I am, therefore, of the opinion that if the nature of the corporation is to be so changed as to practically result in a new company, such result may only be accomplished by original articles.

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

ELECTION OF SCHOOL DIRECTORS IN SUB-DISTRICTS.

COLUMBUS, OHIO, May 24, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your request of May 19, asking my opinion concerning the election of school directors in sub-districts, received. I submit the following:

That while school elections in city, village, township and special school districts are held at the regular November election, yet, under Section 3921*a*, which is a subsequent enactment, the directors in sub-districts are to be elected on the second Monday of April, beginning with the year 1905.

Very truly yours,

WADE H. ELLIS,

Attorney General.

WHETHER A SAVINGS AND LOAN ASSOCIATION CAN BE INCORPORATED TO DO BUSINESS IN AN UNINCORPORATED VILLAGE.

COLUMBUS, OHIO, June 22, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of June 20 is received, enclosing an inquiry from J. F. Rudolph, Oberlin, Ohio, as to whether a savings and loan association can be incorporated to do business in an unincorporated village, and asking for a ruling on the question.

It appears to me that, in answering your inquiry, an examination of Sections 3236, R. S., and 3797, R. S., is called for. Section 3236, R. S., amongst other things provides that the articles of incorporation of a domestic company shall state "the place where it is to be located or where its principal business is to be transacted." There is no restriction in this section as to the place, so that it be within the limits of the State. In Pelton v. The Transportation Company, 37 O. S., 450, it is held that under the act of April 24, 1859, 56 O. L., 115, which provided that the articles of incorporation should state "the name of the county or place where the principal office of such company is situate," that it was a sufficient designation to name the township as the place of business where the actual place of business was not within some other municipal political sub-division of the State. And the court in this case held that it was competent, under such articles, for the corporation to transfer its principal office from one building to another within a specified county or place whenever its own inconvenience or advantage may be subserved, and the reasons given in this opinion by Judge McIlvaine sustained the proposition that the place of business of a corporation may be outside the limits of a municipality.

Section 3797 provides for the submission of articles of incorporation of savings and loan associations by the Secretary of State to the Attorney General, and, if certified by him, to be in conformity with law, the Secretary shall record the same. There is no express provision in Section 3797, or in any other section in Chapter 16 of Bates' Annotated Statutes, confining the location of savings and loan associations to municipalities. I am therefore of the opinion that a savings and loan association may be located at any place within a county, either within or outside of a municipality, but that the place of business, wherever it may be located, should be specifically designated in the articles.

Very respectfully,

GEORGE H. JONES,
Ass't Attorney General.

WHETHER A BANKING COMPANY INCORPORATED UNDER THE FREE BANKING ACT OF 1851 IS WITHIN THE PROVISIONS OF THE GENERAL CORPORATION LAWS REQUIRING THE NAME TO BEGIN WITH "THE" AND END WITH "COMPANY."

COLUMBUS, OHIO, June 29, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of yours of May 27. The question therein proposed is, in brief, whether or not a banking company incorporated under the Free Banking Act of 1851 is within the provisions of the general cor-

poration laws requiring the name to begin with the word "The" and end with the word "Company." In answer thereto I would say:

Under Title 2 of the Revised Statutes beginning with Section 3232 the subject of corporations covers seventeen chapters.

Chapter 1 is devoted exclusively to the "creation of corporations and general provisions." In that chapter, embracing Section 3236, it is provided as follows:

> "The name of the corporation, which shall begin with the word 'the' and end with the word 'company' unless the organization is not for profit," etc.

Chapter 16 is devoted to Savings and Loan Associations and Chapter 16-a is devoted to banks and banking.

The Free Banking Act is included in Section 3821-64 to 88 inclusive.

Does the provision contained in Section 3236 limit or control the provisions regulating free banking?

In answering this question, the case of the State v. The Pioneer Live Stock Company, 38 O. S. 347 is helpful. In that case the defendant was organized as a corporation under Section 3235 R. S., which is one of the sections in Chapter 1, providing for the creation of corporations. The contention was made by the attorneys for the company that an insurance company could be organized under the general chapter, while the Attorney General (Nash) contended that Chapters 10 and 11, being special chapters applicable to both fire and life insurance companies, provided the exclusive methods for the organization of such insurance companies. In other words, that the Chapters upon special forms of corporations govern and control these special corporations to the exclusion of the general provisions. Judge McIlvaine said:

> "We agree with the Attorney General in the opinion, that the whole subject of insurance by companies incorporated under the laws of this state, is regulated by these chapters, and that no insurance company can be incorporated under the general provisions of Section 3235. The special provisions made in these chapters in relation to the organization of insurance incorporations withdraws such corporations from the general provisions of Section 3235, which relates to corporations generally."

I think the foregoing authority very much in point. To carry the argument further — Section 3236 (general section), which provides the method of naming a corporation, also provides that such corporations cannot incorporate with less than *Five* subscribers or incorporators. While Section 3821-64, being Section 1 of the Free Banking Act, provides that *Three* persons may engage in the business of banking, etc.

Section 3821-65 provides the form of a certificate which such banking company shall make, and it is provided therein that such certificate shall specify:

> "First, the name assumed by such company, and by which it shall be known in its dealings; also the name of the place where its banking operations shall be carried on, at which place such banking company shall keep an office for the transaction of business and for the redemption of its circulating notes."
>
> "Second, the amount of the capital stock of such company and the number of shares into which the same is divided."
>
> "Third, the name and place of residence and the number of shares held by each member of the company."
>
> "Fourth, the time when such company shall have been formed, etc."

By comparing this provision with the form of the articles of incorporation required by Section 3236 (general section) it will be found that the two are not similar. The question would then arise, which shall control?

Under the authority above cited it must be the special provision in the banking chapter, and if it controls in any one particular, why not control in all? Any other reasoning would lead to the conclusion that a bank could be incorporated, at least in part under Chapter 1 of Title 2, and would not be required to incorporate under Chapter 16-a; a procedure which should never be sanctioned.

My conclusion is, therefore, that in regard to banking companies organized under the Free Banking Act it is not required that the name of the same begin with the word "The" and end with the word "Company."

Very truly yours,

WADE H. ELLIS,

Attorney General.

RIGHT OF BURIAL LEAGUE OF UNITED STATES TO DO BUSINESS IN OHIO.

COLUMBUS, OHIO, July 1, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication of the 4th ult, together with the enclosures transmitted to you by the Burial League of the United States, of Pittsburg, Pa., has received my attention.

It is my opinion, after examining the enclosures referred to, that the contract proposed to be written within the State of Ohio by this company substantially amounts to insurance, and is forbidden by Section 289, of the Revised Statutes of Ohio, unless such company qualifies to engage in such business as required by the statutes governing insurance companies. I return herewith all of the enclosures sent me.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION OF THE UNION CENTRAL CASUALTY COMPANY OF CLEVELAND, OHIO.

COLUMBUS, OHIO, July 9, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I transmit you herewith the letter of McMillin & Ingersoll, attorneys-at-law, at Cleveland, Ohio, together with the draft attached thereto No. 69937, issued by The Dime Savings & Banking Company of Cleveland, Ohio, upon the Bank of America of New York; also the articles of incorporation of the Union Central Casualty Company, and in answer to the inquiry transmitted with such enclosures would say that the Union Central Casualty Company purports to do and engage in the business of insuring persons against accidental personal injury of every description whatever and for loss of life caused by accidental injury, and certain other purposes not necessary to further detail.

It is sufficient to say that this is a joint stock insurance company as designated by Chapter 11, Title 2, Div. 2, Part 2 of the Revised Statutes and that the capital stock of all such companies must be not less than one hundred

thousand dollars. As the capital stock of this company is but fifty thousand dollars I cannot certify that the articles of incorporation are in accordance with the provisions of the Revised Statutes and, therefore, return the same without my approval.

Very truly yours,
WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION OF HAVILAND BANKING COMPANY.

COLUMBUS, OHIO, July 14, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith articles of incorporation of the Haviland State Banking Company, together with the draft attached thereto and the letter accompanying the same, signed by H. Walter Doty.

As these articles of incorporatiion do not distinctly specify the laws under which the company proposes to incorporate, other than the statement "under the general corporation laws of said State," I am of the opinion:

1. That banking companies cannot incorporate under the general corporation laws of the State, since we have special chapters under which the same may become incorporated which are essentially different from those relating to corporations generally. And where such provisions are made for banking corporations, as are provided in Chapter 16 and 16a of Title 2, the provisions therein contained are exclusive of any other method of incorporating such companies. See State v. The Pioneer Live Stock Co., 38 O. S., 347.

2. If this is assumed to be a banking corporation under Chapter 16a, R. S., commonly known as the "free banking act," such act does not permit a company incorporated thereunder to have a capital stock of less than $25,000. The amount of the capital stock provided by the proposed articles of incorporation of the Haviland State Banking Company is $20,000. I therefore return the same, unapproved.

Very truly yours,
WADE H. ELLIS,
Attorney General.

IN THE MATTER OF THE UNION CENTRAL CASUALTY COMPANY.

July 14, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Pursuant to your request of the 13th inst., again submitting to me the articles of incorporation of the Union Central Casualty Company, I have again considered the form of the articles of such proposed corporatiion, and the letter of Messrs. McMillin & Ingersoll, under date of July 12, accompanying the same.

I have nothing to add to my former letter nor in any way to change the opinion therein expressed, that the kind of insurance set forth in the purposes of the corporation, cannot be carried on in Ohio with a less capital than that mentioned in Section 3634, R. S.

The counsel for the company, in their letter, in support of their contention that this form of corporation can be organized with a less capital than $100,000, insist that their view is borne out by Section 3630i, R. S.; but as the proposed cor-

poration is a stock corporation, and the section under which the counsel rely defines the powers conferred upon *assessment* companies, the section is not at all applicable to the point at issue. The first paragraph, containing the purposes of the corporation, make it beyond doubt such a corporation as is contemplated by Chapter 11, as defined in Section 3641, R. S.

The articles of incorporation are, therefore, returned to you, together with the accompanying draft, not approved by this department.

Very truly yours,

WADE H. ELLIS,

Attorney General.

TAX DUE FROM THE JACKSON BREWING COMPANY.

COLUMBUS, OHIO, July 18, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours of the 14th inst., is before me. It contains an inquiry regarding the amount due from the Jackson Brewing Company of Cincinnati for taxes computed under the "Willis Law," and presenting directly the question as to whether a domestic corporation which has made an assignment is exempted from the requirement of filing an annual report under that act. In view of the recent amendment under date of April 25, 1904 (97 O. L., 381), there can no longer be any question of the duty of the assignee of an insolvent corporation to cause to be prepared and filed the reports required by that act, but as the question embraces reports under previous years antedating the amendment of April 25, 1904, as to such reports the question must be solved by the law as it then existed.

The original act found in 95 O. L., pages 124 to 128 inclusive, contains this provision, being part of Section 2 thereof:

> "The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act."

It seems to be the contention of counsel representing the Jackson Brewing Company that as the company was not engaged in business during 1902 and 1903 and had no means of paying the tax, that therefore it was exempted from making the report and paying the fees required, and that its assignee would be so exempted.

The purpose of the Willis law, was to levy upon all forms of corporations a certain franchise or excise tax. It was held in the case of the Southern Gum Co. v. Laylin, 66 O. S., 578, that the tax so levied was not a property tax, but that it was a franchise or excise tax. The tax was charged upon the theory that a corporation possessed superior advantages, under the law governing corporations of uniting capital, and in many other respects than those possessed by natural persons. And because of these superior advantages, the tax was laid as a franchise, and not as a property tax.

A method is provided for the dissolution of corporations and the revocation of their charters, and under this law, evidence of such dissolution and revocation must be certified to the Secretary of State, and the mere retirement from business, or voluntary dissolution of a corporation, without having filed the certificate, is by the provisions cited, not sufficient to exempt it from the requirement to make

reports. This is made the duty of the officers of the corporation, and penalties are provided for enforcing this duty. When a corporation makes an assignment, the assignee stands in the shoes of the assignor, and he has no higher rights in the property assigned than those possessed by the assignor prior to the assignment. (Hodgson v. Barrett 33 O. S., 63). When a corporation assigns such act does not give to the assignee any power to evade the requirements laid down by the law governing the duties of the corporation. This is especially true of duties which the corporation owes to the public.

I am therefore of the opinion that until the law is complied with, surrendering, dissolving or revoking the charter of the corporation that it or its assignee is required to continue the duty imposed by the act, and make the reports as herein required.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TAX DUE FROM AMERICAN MOTOR CARRIAGE COMPANY OR ITS RECEIVER.

COLUMBUS, OHIO, July 19, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of yours of the 14th inst., enclosing communications from the counsel representing the American Motor Carriage Company, relative to the amount of tax chargeable against such corporation by the terms of the "Willis Law."

From the facts, as given by you, I observe that the American Motor Carriage Company is a foreign corporation, having been organized under the laws of the State of Delaware and that in order to secure a certificate of authority from your department to engage in business in the State of Ohio, it fully complied with Sections 148*c* and 148*d* of the Revised Statutes of Ohio, under date of October 21, 1902.

The fee which it then paid was $500. It failed to file the report for the month of September, 1903, being the time when the tax, under that law, becomes due from foreign corporations.

You further inform me that on the 8th day of June, 1904, such corporation tendered a certificate of retirement through its counsel Messrs. Blandin, Rice & Ginn, certifying that on May 22, 1903, it had fully retired from business in this state. On May 22, 1903, by your statement, it appears that the company went into the hands of the Prudential Trust Company, as receiver. The question now arises as to the amount of tax chargeable against the company or its receiver. This must be solved by the law as it existed at that time. Subsequent amendments should not be given a retroactive operation.

Section 4 of the act provides, that upon the filing of the report and the payment of the fee provided for, the Secretary of State shall make out and deliver to the corporation a certificate of compliance by it, with the law, and the payment of the annual fee therein provided for.

Section 5 provides that in case any corporation required to file its report and pay the fee prescribed in the former section of the act, shall fail or neglect to make such report, or pay such fee, within the period prescribed in said sections respectively, it shall be subject to a penalty of $500.00, and an additional penalty of $100.00 per day for each day's omission after the time limited in such act for the filing of such report and the paying of such fee.

Section 8 of the act, among other things, provides that every foreign corpo-

ration when it shall retire from business in this state is required to file with the Secretary of State a certificate of that fact, signed by the president and secretary of the corporation. It further provides that "the mere retirement from business or voluntary dissolution of a * * * foreign corporation without having filed the certificate provided for in this section shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act."

In the consideration of this question, it is unnecessary to determine what was the effect of the certificate of retirement, which was made on the 8th day of June, 1904, by the counsel of the corporation, certifying that on May 22, 1903, it had retired from business in this state.

The constitutionality of this tax was upheld in Southern Gum Company v. Laylin, 66 O. S. 578, and in the case of the Treasurer of Athens County v. Dale, Receiver, 60 O. S. 180, the Supreme Court announced the doctrine that a receiver's first duty was to pay taxes due the state.

Under the terms of the "Willis Law" there is no provision made for considering any fractional part of a year in the computation of the tax, nor is there any express provision for a remitter of any part of the tax, in case the company had paid the same and should go out of business before the expiration of the full year covered by the payment. It being a filing fee required with each annual report there should not enter into its construction any consideration of a fractional part of a year.

While it is eminently proper to make the annual charge for the entire year, although the corporation may have ceased to do business during the year, the same reasoning cannot with equal force be applied to the payment of the penalties provided by the act.

In view of the foregoing facts, I would recommend that the tax be computed as of the month of September, 1903, and that this amount be presented, without any claim for penalties, to be paid as a preferred claim by the receiver, and that the corporation be exempted, upon such payment, from any further or other claim under the Willis law.

I herewith return to you the correspondence had with Messrs. Blandin, Rice & Ginn, being letters addressed to you under date of June 11th and June 30th, 1904.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CONCERNING ARTICLES OF INCORPORATION OF THE FARMERS' BANK AND TRUST COMPANY, OF POMEROY, OHIO.

July 25, 1904.

HON. L. C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith the articles of incorporation of the Farmers' Bank and Trust Company, of Pomeroy, Ohio, together with the letter accompanying the same and the draft upon the National Park Bank, of New York, for $25.

The purpose for which this corporation is attempted to be formed is the exercise of powers conferred by Section 3821a, R. S., as being the powers of safe deposit and trust companies. Such corporations cannot be created with the powers therein defined with a capital stock of $25,000, which is the amount set forth in the accompanying articles of incorporation. The person who drew these articles of incorporation evidently intended to draw them under Section 3797, R. S., which

defines the powers of savings and loan associations, but, as I have said, the powers sought to be exercised are those of safe deposit and trust companies. I therefore return the articles of incorporation to you without my approval.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION OF THE FARMERS' BANK & TRUST COMPANY, POMEROY.

COLUMBUS, OHIO, August 1, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of the Farmers' Bank and Trust Company, Pomeroy, Ohio, is herewith returned to you, not approved, for the following reasons: The articles referred to are for the incorporation of a safe deposit and trust company proposed to be organized under Sections 3821*a* and 3821*g*, R. S., and among other powers sought to be assumed by this company is the power to act as executor and administrator of estates of decedents. This power was sought to be fully conferred upon companies of this character, but the supreme court in construing the sections referred to, on the second day of February, 1904, held, in the case of Schumacher v. McCallip, et al., 69 O. S., p. 500, that the sections of the statutes attempting to confer that authority upon trust companies was unconstitutional and void. The first paragraph of the syllabus is as follows:

> "Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons because the legislation evincing an intention to clothe them with such capacity (Sections 3821*c*, 3821*f*, Revised Statutes) is void, being of a general nature and not of uniform operation throughout the state as is required by Section 26, Article 2 of the Constitution."

There was no legislation adopted at the last session of the General Assembly in any way altering the sections of the statutes referred to so as to constitutionally confer these powers sought to be exercised by this company.

It is my opinion that, with a change in the purposes of the corporation so as to eliminate the power to act as executors or administrators, the corporate articles should be approved, but with those powers inserted in the purposes and the same having been declared to be not constitutional conferred upon such companies, I cannot approve the same and, therefore, return them to you.

Very truly yours,

WADE H. ELLIS,

Attorney General.

INCORPORATION OF VILLAGE.

September 10, 1904.

HON. LEWIS C. LAYLIN. *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging the receipt of yours of the 8th inst., enclosing a communication from Mr. French Crow, clerk of the board of deputy state supervisors of elections in and for Marion County. I beg to say, in answer thereto, that

by Section 1536-17, Revised Statutes, the preliminary steps are set forth therein for the incorporation of a village, and after providing for a record to be made of the proceedings and filed with the county recorder it is provided, that

> "The recorder shall certify and forward to the Secretary of State a transcript of the same, and that the corporation shall then be a village or hamlet, as the case may be, under the name adopted in the petition, with all the powers and authority, etc."

It would appear from this section that the corporation is not legally a corporation until such steps have been complied with, and when it is provided by Section 1536-21 (old Section 1565) that the first election of officers of the corporation may be at a special election held at any time not exceeding six months after the incorporation, it should be so construed that the six months period must be computed from the date of the certification of the proceedings by the county auditor to the Secretary of State. It is optional with the incorporators whether they have the election of officers at the time of the first annual municipal election after its creation or at a special election held within the period, as above mentioned. The officers so elected shall be and constitute the legal officers of the municipality.

Enclosed I hand you the letter addressed to you by Mr. Crow.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO THE ELECTION OF CLERK OF COURTS IN SHELBY COUNTY, OHIO.

September 26, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have your communication requesting an opinion from this department in answer to the question proposed by the Board of Deputy State Supervisors of Elections of Shelby County, as to the election of a clerk of the court.

The facts involved are as follows: The clerk of the court, who was duly elected, was removed in the month of March, 1904. If he had not been so removed his term would have expired August 1st, 1906. An appointment was made of a successor pursuant to the provisions of the statutes (Sec. 1243).

The questions presented are, when does the appointee's term cease and when should a successor be elected, and should the election be for the unexpired term or a full term of three years?

The office of clerk of the court of common pleas is created, and the length of the term is fixed by Article IV, Section 16 of the Constitution as follows:

> "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 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 therein."

Section 1240 Revised Statutes, provides:

> "There shall be elected triennially, in each county, a clerk of the court of common pleas, who shall hold his office three years, beginning on the first Monday of August next after his election."

Section 1243, Revised Statutes, provides:

> "When a vacancy in the office of clerk occurs, the county commissioners shall appoint a clerk *pro tempore,* who shall give bond and take the oath of office, as prescribed for the clerk elect; and if the commissioners are not in session on the occurring of such vacancy, the county auditor shall forthwith give written notice to them of the fact, and they shall thereupon meet and make the appointment; and if the commissioners fail to appoint for ten days after they, severally, have had notice of the vacancy, the appointment shall be made by the county auditor."

The appointment of the successor of the clerk was made pursuant to Section 1243, R. S., and it will be observed that the clerk was appointed "pro tempore."

The question suggested in connection herewith requires the construction of those words "pro tempore," as to whether or not that should include the balance of the term for which the clerk, who was removed, had been elected.

With regard to other offices than that of clerk, other language is used to express more definitely the appointive term, as in Section 1208, R. S., where it is provided with regard to filling of vacancies in the office of sheriff, that, "the appointee shall hold his office for and during the unexpired term of the sheriff whose place he fills."

In case of a vacancy occurring in the office of the county recorder the appointment of a successor shall be made to hold until "his successor is elected and qualified."

In case of a vacancy in the office of county treasurer, pursuant to Section 1082, the county commissioners shall forthwith appoint some suitable person *"to fill such vacancy."*

Substantially the same provision is made with regard to the office of county auditor. Other sections of the Revised Statutes regarding other offices, county, municipal and otherwise, might be cited, wherein different, but more definite language is employed than in Section 1243 under consideration.

In addition to these specifiel sections, Section 11, R. S., should be cited, which is as follows:

> "When an elective office becomes vacant, and is filled by appointment, which appointee shall hold the office until his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy; but this section shall not be construed to postpone the time for such election beyond that at which it would have been held, had no such vacancy occurred, nor to affect the official term, or the time for the commencement of the same, of any one elected to such office before the occurrence of such vacancy."

These sections of the statutes, together with Section 10 of Article IV of the Constitution are all that need be considered in the determination of the question submitted. If the appointment of the successor to the clerk continues for the balance of the term for which the clerk was elected, there would be no election until the first Tuesday of November, 1905; but is such the case?

Construing Section 11, R. S., with regard to when a successor should be elected, the Supreme Court has held in the case of the State v. Barbee, 45 O. S., 349, that,

> "The first proper election is the first regular occurrence of that election at which the officer, whose successor is to be chosen, was elected; or, in other words, the first election occurring appropriate to that particular office under the law regulating elections to that office."

This, to my mind, definitely answers the question as to when a successor should be elected, which is "at the first proper election that is held more than thirty days after the occurrence of the vacancy."

The vacancy having occurred in March, 1904, the election of a clerk should be had the first Tuesday of November, 1904.

By Section 1240, R. S., above cited, the term of the clerk who will be elected in November, 1904, will not begin until the first Monday of August next after his election, meaning thereby in 1905. As the office of clerk of courts is a constitutional office, the length of the term having been fixed by the constitution at three years from the election of any such officer, it contemplates an election for the constitutional term, and it would follow from this, that when the successor in that office is elected it should be for a term of three years beginning with the first Monday of August, 1905. The appointment of a clerk for any period beyond the first Monday of August, 1905, would be ineffective to delay the requirement of an election as herein above set forth.

It therefore follows, as my opinion, that at the next election in November a clerk of court of common pleas should be elected for the full term of three years, such term to begin on the first Monday of August, 1905, and that until that date the present appointee, unless sooner removed, is entitled to retain possession, and discharge the duties of the office.

I herewith transmit the letter of the Board of Deputy State Supervisors, which is addressed to you.

Very truly yours,
Wade H. Ellis,
Attorney General.

ARTICLES OF INCORPORATION OF JACKSON COUNTY HOME TELEPHONE CO.

September 17, 1904.

Hon. Lewis C. Laylin, *Secretary of State, Columbus, Ohio.*

Dear Sir:—I beg to acknowledge the receipt of yours of the 14th inst., submitting to me an amendment to the Articles of Incorporation of the Jackson County Home Telephone Company, and, answering the queries presented by your communication concerning the same, I would say:

Section 3237, Revised Statutes, provides that when the corporation is organized for a purpose which includes the construction of an improvement which is not to be located at a single place, the articles of incorporation must set forth, among other things, the termini of the improvement and the counties in or through which it or its branches shall pass.

While this section in its original application undoubtedly pertains to the construction of steam railroads and similar properties, yet its language is broad enough to comprehend and include the construction of a telephone company, as that should be construed to be an "improvement" within the sense of the term as used in that section. But in adopting that construction the relation of the particular statutes governing such companies, together with the power of municipalities thereover, should be taken into consideration, and the strictness of the description of the termini should not be adhered to as was required in the case of Railroad Company v. Sullivant, 5 O. S. 276.

As was said by the Supreme Court in the case of Callender v. Railroad Company, 11 O. S. 524, that,

"For the purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purposes (it was found convenient) to have reasonable certainty expressed in the charter. For like reasons, and to secure the same objects, the certificate is required to express with like certainty, as was before expressed in the charter, as well the place of the termini and the counties through which a license to construct is asked, as the name of the company.

"To require a greater degree of certainty, in the certificate or charter, to give it validity, would necessarily defeat its object in many, if not the most of cases contemplated by the statute. For it is only by force of the license derived from the certificate, under the statute, that the company could send its engineers upon the lands of others, along the route, to make the necessary estimates to determine upon the feasibility of any route upon which to make a location, and determine the necessary points of the termini of the road, with entire precision."

The Court in that case upheld a certificate of a railroad company which did not describe the termini with any more precision than is done in the certificate under consideration. But having in mind that municipal corporations have the right, in a large degree, to fix the location of the line, and necessarily the termini of such improvements, more liberality should attend the construction of such a certificate than that of a railroad company. Hence I am of the opinion that in view of the character of the improvement, the description of the termini given in the accompanying certificate is sufficiently exact to comply with the statute.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ELECTION OF VILLAGE OFFICERS IN VILLAGE OF TIRO, CRAWFORD CO.

September 26, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging the receipt of yours of recent date enclosing communication from Mr. Charles McConnell, of Tiro, Crawford County, Ohio, presenting the question as to whether or not their village council could fix a date for the election of municipal officers at a time other than that provided for general elections, and answering the same I refer you to Section 1723, R. S., which has been preserved and carried forward into the New Municipal Code, apparently unrepealed and in full force and effect. This provision is as follows:

"The first Monday of April shall be the regular annual period for the election of officers of municipal corporations: provided, that any village situated in a township where the annual elections are held outside of the limits of such village, the Council of such village may, by ordinance, fix the time for holding the annual election for the officers of such village on the Saturday next preceding the first Monday in April."

The conditions required by this section of the statutes existed in the village referred to; that is, that it is situated in a township where the annual elections are held outside of the limits of the village, and where the village has, by ordinance, fixed the time for holding the annual election of officers of such village on the Saturday next preceding the first Monday in April.

Section 222 of the New Municipal Code, fixing the election of municipal officers on the first Monday of April, was amended by the so called "Chapman Law," passed March 17th, 1904, and the portion thereof material to consider in the solution of this question is as follows:

> "The election of the successors of all elective municipal officers whose terms now expire on the first Monday of May shall be held on the first Tuesday after the first Monday in November next following the expiration of such terms, etc."

The first Monday of May was fixed by the New Municipal Code as the date upon which the terms of municipal officers should cease, but by the Chapman Law these terms were extended to the first Monday of January. The Chapman Law is general in its scope and effect, both as to the extension of terms to the period herein mentioned, and as to the times of holding the election for municipal officers. By its general provisions applying to the same subject matter, viz., the election of municipal officers, no construction should be adopted thereof which would work a violation or change in the operation of its general terms, unless it was expressly or fairly intended that such exception should exist.

While repeals by implication are not favored by the statutes, yet it has been repeatedly held that a law revising the entire subject matter of an act, and evidently a substitute for it, repeals the earlier one by implication. This doctrine has been announced so many times by the Supreme Court that a citation of authorities seems unnecessary.

The subject of elections, as well as the subject of the government of municipal authorities, has recently undergone complete revision with the legislative purpose of making the laws relating thereto uniform in their operation upon all classes expressed therein. Bearing in mind the object and purpose of the legislation thus enacted in obedience to the judgment of the Supreme Court, requiring laws of a general nature to have uniform operation throughout the State, I conclude that Section 1723, R. S., is repealed by the enactment of the act of March 17, 1904, above referred to, and that section having been the basis for the ordinance of the village, fixing the Saturday preceding the first Monday in April as the time for the election of municipal officers, the ordinance also loses all force and effect and the same cannot operate to fix a different date for the election of such officers other than that provided by the Chapman law, which provision is that such officers shall be elected on the first Tuesday after the first Monday of November next following the expiration of their terms.

The communication of Mr. McConnell further presents the question as to the duty of the village council to repeal the ordinance and enact a new one fixing a different date, and in answer thereto I would only say as to that suggestion that as the ordinance in question has no force or effect to change the date of the election of such officers its repeal is immaterial, but the same might be done to clear its record of a useless ordinance.

It will be unnecessary for the village to attempt to establish by ordinance an election day for municipal officers, as the statute has done that and made it general as to all villages and all cities.

The communication of Mr. McConnell, addressed to you, is returned herewith.

Very truly yours,

WADE H. ELLIS,

Attorney General.

BANKING CORPORATIONS USING THE WORDS "THE" AND "COMPANY."

October 21, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Answering the accompanying letter transmitted to us for reply, I beg to say that heretofore in an opinion rendered by this Department to your Department, it was held that it was not necessary nor proper for banking corporations to be organized under the general corporation law so as to require the name to begin with the word "The" and end with the word "Company," as contained in Section 3286, Revised Statutes. The authority then cited was the State of Ohio v. Pioneer Live Stock Company, 38 O. S. 347, in which the Supreme Court said that special chapters having been enacted, as applicable to insurance companies, the organization of such companies should conform to the requirements of those chapters, being Chapters 10 and 11, and not under the chapter governing corporations generally.

Applying the same reasoning to the questions presented by the letter enclosed, separate sections of the Revised Statutes which provide for the government of various banking institutions are as follows:

1. Sections 3797 et seq., govern savings and loan associations.
2. Sections 3821a et seq., govern safe deposit and trust companies.
3. Sections 3821h govern collateral loan companies.
4. Sections 3821r et seq., govern bond and investment companies.
5. Sections 3821-64 et seq., govern banks organized under the free banking act.
6. Sections 3836-1 et seq., govern building and loan associations.

The powers conferred by the various sections governing these separate banking companies, associations, etc., are not conferred upon one and the same company or corporation; no one corporation having the power to assume those conferred upon another corporation, except under the provisions permitting the powers of safe deposit and trust companies to be exercised by savings and loan associations.

Therefore, it seems to me that a banking company organized under the Free Banking Act should not contain within its name the words "trust company" or "investment company," because this would deceive or have a tendency to deceive the public as to the character of the business carried on by such organization, and the name adopted should be of such kind as to in some sense express the character of the organization, company or association, and the business in which it proposes to engage. There is no express statute or statutes providing for the forms of names to be taken by companies organized under these various provisions, but the general authority is vested in the Secretary of State in this regard by Sec. 3238, R. S., as follows:

> "But the Secretary of State shall not in any case file or record any articles of incorporation in which the name of the corporation is such as is likely to mislead the public as to the character or purpose of the business authorized by its charter, etc."

This power is sufficiently broad to authorize you to determine the character of name which should be assumed by every corporation applying to you for articles of incorporation.

Very truly yours,
WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION STAFFORD AND MARIETTA TELEPHONE COMPANY.

November 4, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of the articles of incorporation of the Stafford and Marietta Telephone Company, to be located at Stafford, Monroe County, Ohio, together with the communication accompanying the same, by which the question is presented of whether a corporation is permitted to be created under the laws of Ohio for the purpose of building, operating and maintaining telephone and telegraph lines. This is proposed to be done by this corporation.

Heretofore, in an opinion addressed to you, I have expressed the views that Section 3235 of the Revised Statutes provides for corporations exercising but a single "purpose," and I cited to you the decision of the Supreme Court in the case of *State ex rel. v. Taylor,* 55 O. S., 67, in which the court held that the word "purpose," is designedly in the singular number. That, in order to authorize the carrying out of more than one purpose by a corporation, it must be evidenced from the legislation that such power was intended to be conferred upon the corporation. Since the decision in the case above cited many acts of the General Assembly have evidenced the intent to combine two or more purposes in one corporation, but this has been done by direct and express legislation authorizing the same. The power of combining the telegraph and telephone business in a single corporation is evidenced from Chapter 4, Title 2, Part II, of the Revised Statutes.

The subject of Chapter 4 is "Magnetic Telegraph Companies." From Section 3454 to 3471, inclusive, are found the statutes governing both of such companies. Section 3471, R. S., is as follows:

> "The provisions of this chapter 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 restriction as are herein prescribed for magnetic telegraph companies."

By this section it is thus made apparent that both of these classes of corporations are treated of in the same chapter, and the same statutes govern and define their powers.

In the case of *Railway Co. v. Telegraph Association,* 48 O. S., 390, this question was directly put in issue. The City and Suburban Telegraph Association was formed for the purpose "of constructing, maintaining and operating *telegraph and telephone lines,* etc." The petition averred that these were combined purposes for which the company was organized. The defendant's answer, among other things, alleged (page 395) "that the plaintiff exercises the powers of a telephone company and maintains its poles and wires without any lawful authority whatever." The court held, among other things, in the consideration of Section 3471, R. S, that "the term telegraph, as a mode of transmitting messages and other communications, is sufficiently comprehensive to embrace the telephone and that without the extension of the chapter governing Magnetic Telegraph Companies to those of telephone companies the powers enunciated in that chapter would be extended to telephone companies."

By this decision we are relieved from the consideration of this charter as containing two different and separate kinds of businesses. The businesses, while given different names, are both embraced under the one head of "Telegraph Companies," and I hold that the purpose of building, maintaining and operating telephone and telegraph lines is but a single purpose, and that a corporation so formed

is authorized to carry on the same; but the articles of incorporation should set forth the termini of the proposed improvement and the counties in or through which it or its branches shall pass, as required by Section 3237, R. S. For the reason that the articles of this company do not so describe the termini of the proposed improvement the same should not be accepted by you until so modified in that particular.

I herewith return the articles of incorporation, and communication accompanying the same.

Very truly yours,
WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION OF FARMERS' AND CITIZENS' BANKING COMPANY OF MONROEVILLE, OHIO.

November 5, 1904

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— I beg to acknowledge the receipt of your favor of the 2d inst., accompanying the articles of incorporation of the Farmers and Citizens' Banking Company, of Monroeville, Huron County, Ohio, submitted to me for my approval, pursuant to Section 3797, R. S.

I return the same to you herewith, without my approval, for the following reasons:

1. The Farmers and Citizens' Banking Company proposes to organize under Chapter 16, of Title 2, Part II, of the Revised Statutes. This chapter governs savings and loan associations. In the articles of the company it is stated that the corporation is formed "for the purpose of receiving deposits of money *and other valuables,* dealing in commercial paper *and choses in action,* discounting bills and notes, receiving for safe keeping money *and other property,* and doing all things pertaining to the business of a savings and loan association, with all transactions incident thereto."

The power of receiving deposits *other than money* is not a power of a savings and loan associatiion, but is included within the powers enumerated in Section 3821a of the Revised Statutes, which governs the powers of a *safe deposit and trust company.* Under the law as it now stands, Section 3821gg-1, R. S., being the act of May 10, 1902, 95 O. L., page 531, a savings and loan association may combine with a safe deposit and trust company, and thus by combination assume the powers of both forms of association; but that is only permitted after the combination is effected.

If the company in question means to assume the duties and liabilities of a safe deposit and trust company in addition to those of a savings and loan association it should express in its name that fact; but I assume that the company in the village of Monroeville does not attempt to qualify as a safe deposit and trust company and only means to do the general business of a savings and loan association, and if so it should strike out of its articles of incorporation the language used which I have underscored above, to-wit: "And other valuables," "and choses in action," "and other property."

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING FRANCIS L. JUDD & CO., OF CLEVELAND, OHIO.

November 10, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 9th, bearing therewith the inquiry of Francis L. Judd & Co., of Cleveland, Ohio, relative to the organization of a corporation for the following purposes:

> "Guaranteeing the return of the par value of stocks or bonds on a specified date. This to be accomplished by the company issuing the stock or bonds depositing with the guarantee company a per cent of the face value of same, which amount would, under compound interest for the intervening time, equal the face value of the stock or bond. The guarantee company would in turn deposit the said amount with a trust company or national bank, or would invest same in good railroad bonds, muncipal, county or state bonds, and deposit the same with a trust company to secure the payment of the aforesaid stock or bonds."

The purpose, above quoted, is taken from the letter of the company addressed to you under date of November 5. While this proposed company is unique in the purpose which it seeks to adopt, I am of the opinion that it should be classified with that character of guarantee companies provided for by paragraph 2 of Section 3641 (97 O. L., p. 408), namely, "to guarantee the performance of contracts other than insurance policies." Such corporation, in order to do the business above set forth, would be compelled to qualify under the section and chapter of the Revised Statutes referred to.

I return herewith the letter of the company addressed to you.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CORPORATION ORGANIZING FOR PURPOSE OF SAVINGS AND LOAN ASSOCIATION AND SAFE DEPOSIT AND TRUST COMPANY.

November 21, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 19th inst., accompanying the letter of John A. Mansfield, attorney-at-law, Steubenville, Ohio, which you submit for my consideration, and with the request for a written opinion upon the following propositions involved therein:

(1) Can a corporation be organized under the laws of Ohio to carry on the business of a savings and loan association and that of a safe deposit and trust company as a single corporation?

(2) If so, what is the least amount of capital stock with which such company can be incorporated?

On the 18th day of February, 1902, this department held that under the statutes governing such corporations, no authority was conferred to unite in one charter the powers of a savings and loan association and those of a safe deposit and trust company.

(See Report of Attorney General, 1901, page 49).

On the 10th of May, 1902 (95 O. L., 531), the General Assembly passed

an act authorizing the consolidation of savings and loan associations with safe deposit and trust companies in certain cases, and providing the method of effecting such consolidation.

On the 22d day of October, 1902, the General Assembly further enlarged the powers of such corporations in this regard. (96 O. L., 18). As these acts both embrace the evident purpose of the General Assembly in permitting companies incorporated respectively to engage in the business carried on by a savings and loan association and by a safe deposit and trust company, to consolidate as provided by such acts and thereby engage in, as such consolidated corporation, the businesses theretofore pursued by each, it seemed to follow that the rule in State ex rel. v. Taylor, 55 O. S., 61, that a corporation could only be organized under the laws of the State of Ohio for a single purpose,— no longer applies, and that if the business of separate organizations might be combined in one by the combination or consolidation permitted by the statutes cited, such businesses would seem to form but a single purpose, and it would be lawful to incorporate a company with such combined purposes specified in its original articles.

In answer to the second question proposed, it will be observed that if the business of a savings and loan association and that of a safe deposit and trust company are to be carried on by a single corporation, incorporated for that purpose, the capital stock of such corporation would not be that which is provided for savings and loan associations by Sec. 3797, R. S., nor that which is provided for safe deposit and trust companies by Sections 3821a-d, R. S., but should be that required by the act of October 22, 1902, (Sec. 3821gg, R. S.) which is $200,000.

I return herewith communications addressed to you by John A. Mansfield, Steubenville, Ohio.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CORPORATION MAY CHANGE COMMON INTO PREFERRED STOCK WITH CONSENT OF ALL ITS STOCKHOLDERS.

November 21, 1904.

HON. L. C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — This department is in receipt of the certificate of The J. B. Friend Company, of Toledo, Ohio, accompanying your request for an opinion upon the following question arising therefrom:

> "Can a corporation organized under Chapter 1, Title 2, Div. 2 of the Revised Statutes of Ohio, change part of its common into preferred stock, without increasing the capital stock of the corporation, when the same is approved by all the stockholders of the corporation?"

I have examined the authorities bearing upon this question with great care because my immediate predecessor in this department has twice expressed opinions thereon, as appears in the "Report of the Attorney General for 1903," pages 33 and 126, arriving at a conclusion thereon with which I cannot wholly agree. He holds that the power exists among stockholders by unanimous consent, but that it is not provided for by statute, and that the statute does not authorize the certificate of the fact to be made to the Secretary of State.

With his conclusion that the power exists by consent of the stockholders I fully agree, but believe further that the power is one incidental to such corporations and can be exercised pursuant to the requirements of the statute hereinafter cited; nor can I agree with his conclusion that the statutes do not authorize a certificate of the action of the stockholders thereon to be filed with the Secretary of State.

The sections of the Revised Statutes of Ohio bearing upon this question are 3235a, 3236, 3238a, 3239 and 3263. By consideration of these sections, and the construction of corporate powers thereunder, it is evident that the power is expressly conferred upon such a corporation, at the time of its organization, to issue both common and preferred stock; that it might lawfully provide for the same in the original articles, and that if common and preferred stock be issued, the designation thereof should be stated and expressed in the certificate of incorporation. (3235a, R. S.); that if preferred stock was not issued originally, it could be provided for subsequently, by amendment to its articles of incorporation, if duly adopted at a stockholders' meeting, regularly called, as provided for in Section 3238a, R. S. When so adopted a copy of such amendment should be certified to the Secretary of State for purpose of record as required by the section last cited. In the case of The J. B. Friend Company, these requirements have been fully complied with.

To deny the power of a corporation to change part of its common to preferred stock, is to assert that a corporation must in the first instance issue preferred stock, for if not done then that the same can only be accomplished by increasing its capital as provided by Section 3263, R. S.

A corporation may have need to issue preferred stock for the legitimate purposes of the corporation (for it has been held to be but one method of raising necessary revenues), but it may not be necessary, or it may not desire to increase its capital. It should be permitted to change its common to preferred stock, without compelling it to increase its capital. The statutes should not receive such construction so as to work such limitation upon corporate powers, unless the language used would not be susceptible of other interpretation. This is especially true, when the same thing could be accomplished in an indirect manner by reducing the capital stock in the amount required for preferred, and then increasing the same by issuing preferred to the amount of the reduction, thereby having the same amount of capital but having it changed to part common and part preferred. This indirection cannot be necessary to accomplish that which is perfectly lawful.

Again, the power is assumed to exist in a corporation by the limitation provided for in Section 3235a, R. S.; and in 3238a, R. S. it is plainly provided that that "which might lawfully have been provided for" in the original articles could be added thereto by amendment, except no substantial change in the corporate purposes and no increase or decrease of capital stock could be thus provided for.

In the case of the Painesville National Bank v. The King Varnish Co., 8 C. C., 563, the power to issue preferred shares was sustained, although the stock was not issued pursuant to Section 3263, R. S., thereby denying that the provisions of that section are exclusive.

The decisions of the courts of last resort of other states are not very helpful, as the cases bearing upon this point therein have called for the construction of statutes not similar to ours. In the case of Lockland v. Van Alstyne, 31 Mich., pp. 76, 81, the Supreme Court sustains the proposition that the right to create preferred stock may be gained if consent of all the stockholders is secured. No question is presented here of the rights of a minority of the stockholders, but unanimous consent of all the stockholders has been obtained to this action.

In view of this I have no hesitancy in saying that the action taken by the stockholders of this company has been legal in all respects, and that the certificate made by the officers of such company should be filed and recorded pursuant to Section 3238a, R. S.

I herewith return to you the correspondence, money order, and articles of incorporation accompanying your letter.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO ISSUANCE OF COMMISSION TO T. J. MIRANDA AS JUSTICE OF THE PEACE.

December 2, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your inquiry relative to the issuance of a commission by the Governor to T. J. Miranda, whose name has been certified as one of the justices of the peace elected for the township of Bethel, Clark Co., Ohio, by the election board of said county, is received. It is claimed that T. J. Miranda served as a judge of the election in the precinct in which he was a candidate for justice of the peace.

In reply I beg leave to say that I am of the opinion that the duty does not devolve upon the Governor to determine the legality of the election; that he is only required, upon a proper certificate being filed, to issue a commission, and that he would not be warranted in this instance in withholding the commission.

Very truly yours,

WADE H. ELLIS,

Attorney General.

TERM OF TOWNSHIP TREASURER UNDER APPOINTMENT.

December 14, 1904.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — A communication from O. F. Murphey, Esq., of Mt. Vernon, Ohio, addressed to you, has been referred to this department for answer.

It is not within the province of this department to give advice to others than the Governor, State Officers and Prosecuting Attorneys, and then only in matters in which the State is a party or directly interested. For this reason I address this communication to you.

Mr. Murphey says that on the 22d of September last the treasurer of his township tendered his resignation to the board of trustees, and at the same time a successor was appointed by said board to fill the unexpired term; that the term of the retiring treasurer began in September, 1903. He also states that at the last election the Democrats placed on their ticket the name of a candidate for township treasurer, but that no such candidate was placed on the Republican ticket; that the Democratic candidate was voted for at said election and received 912 votes. Mr. Murphey desires to know whether or not the name of the treasurer so elected should be included in the certificate of election with the other township officers?

Section 1451 of the Revised Statutes makes provision for the township trustees to fill vacancies in township offices by appointment, and further provides that in case of a vacancy in the office of clerk or treasurer, such appointee shall hold until his successor shall be elected as provided in Section 1448.

Sec. 1448 provides that at the next annual election after the passage of this act and at the first election of any new township, a treasurer shall be elected for one year, a clerk for two years, and thereafter a township treasurer and clerk shall not be elected at the same annual election.

Township treasurers will be elected at the November election, 1905, and therefore a township treasurer could not have been elected at the last November election, and the appointment made by the township trustees is for the unexpired term, and the appointee's successor will be elected at the November election, 1905.

This identical question has been before the Circuit Court of the Sixth Circuit, in the case of State ex rel, Ingraham v. Lehman, 10 Circuit Court Report, 328, and that court has held that an appointee by the township trustees in the office of township treasurer holds only until the next general election and not for the unexpired term; and while the consideration which I have given to the matter has led to a different conclusion, yet a township clerk, relying on the decision cited, might be warranted in including the name of the treasurer in the certificate.

Very truly yours,

WADE H. ELLIS,

Attorney General.

(To the Auditor of State)

CLERK OF THE BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS CANNOT RECEIVE MILEAGE PAYABLE OUT OF THE COUNTY TREASURY.

COLUMBUS, OHIO, November 27, 1903.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your communication enclosing a letter from the auditor of Adams County, making inquiry as to whether a bill presented to him by the clerk of the board of deputy state supervisors of elections of that county, for the sum of $20, which he claims to be due him as mileage from the county-seat to Columbus and return, was a proper charge against the county.

It appears, from the statement of facts, that a proceeding in mandamus was commenced in the Supreme Court against the board of deputy state supervisors of Adams County and clerk of the board, to compel them to tabulate and count certain votes returned to them by the judges of one of the election precincts of that county, and that the clerk came to Columbus ostensibly in connection with that case. Such being the facts upon which this claim is founded, it is clear that it is not a proper charge against the county and should not be allowed.

To warrant the payment of compensation or expenses to a public officer out of the county treasury, two things must always occur. First: The duty performed for which the officer claims compensation should be allowed or expenses should be paid, must have been enjoined upon him by law. Second: The law must authorize the payment of such compensation or expenses out of the county treasury. Both of these conditions are lacking in this case. The law prescribing the duties of the clerk of the board of deputy state supervisors does not require his personal presence in the city of Columbus in response to a mandamus proceeding. He was a party to the case, and charged with failure to perform an official duty. He was not subpœnaed to appear before the Court, and, even if he had been, his per diem and mileage (if entitled thereto), would have to be taxed as costs and paid by the losing party, not charged up to the county of Adams.

Again, the law providing for compensation to the clerk of the board of deputy state supervisors of elections does not provide that he shall receive any compensation by way of mileage. The only provisions of the statute bearing upon the compensation of clerks of boards of deputy state supervisors of elections will be found in Revised Statutes, Section 2966-4, and the act of October 22, 1902 (96 O. L., p. 13).

Section 2966-4, R. S., provides that each clerk of the boards of deputy state supervisors of elections shall receive not to exceed $100 per year for his services, to be fixed by the board of deputy state supervisors, but makes no provision for the payment of mileage.

This provision, however, is modified by the act of October 22, 1902, which provides that each clerk of the boards of deputy state supervisors of elections shall receive as compensation $2 for each election precinct of his county for each election held, the returns of which are by law required to be made to the boards of deputy state supervisors of elections, but not less than $100 per year; but nowhere is any provision made for the payment of mileage to the clerk.

Hence, it follows that, as the law never made any provision for the payment of mileage to the clerk, he is not entitled to receive mileage payable out of the county treasury.

Very truly,

J. M. SHEETS,
Attorney General.

SECTION 1260 R. S. GOVERNS FEES TO BE ALLOWED CLERK OF COURTS OF CUYAHOGA COUNTY.

COLUMBUS, OHIO, December 7, 1903.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

MY DEAR SIR:—In response to your inquiry as to what provision of statute governs the fees to be allowed to the clerk of courts of Cuyahoga County, I beg to say that in my opinion Section 1260, R. S., as amended May 4, 1891, governs.

The act of April 23, 1896 (92 O. L., 602), as amended March 11, 1898 (93 O. L., 440), which assumes to provide a special salary system for Cuyahoga County is, when tested by the principles announced in the case of State ex rel. Guilbert v. Yates, unconstitutional.

It will be observed that Section 1260, R. S., as amended March 22, 1893 (90 O. L., 104, et seq.), expressly exempts Cuyahoga County from its provisions. Whether that act, by reason of the exemption of Cuyahoga County from its provisions, is unconstitutional or not becomes a matter of no importance, for if it is then Section 1260, as amended May 14, 1891, being the only constitutional provision upon the subject, would apply. If, however, the act of March 22, 1893, is constitutional, then Cuyahoga County is exempted from its operation by its own express provisions. It thus appears that whatever view we may take of the amendment of March 22, 1893, it has no application to Cuyahoga County.

For these reasons I have arrived at the conclusion announced in the beginning of this opinion. Very truly yours,

J. M. SHEETS,
Attorney General.

BONDS OF MUNICIPALITY CANNOT BE SOLD FOR LESS THAN THEIR PAR VALUE.

COLUMBUS, OHIO, December 16, 1903

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In reply to your communication of this date, transmitting to me the inquiry of the city auditor of Niles, Ohio, as to whether or not the city of Niles, or said auditor, has authority to enter into a contract with a bond purchasing company, agreeing to pay to such company the sum of $1,000 for "blank bonds and attorney fees," and thus make it appear that the bonds are sold for a greater rate per cent than they bear, when in fact the amount stipulated in such contract to be paid is a rebate to the bond purchasing company of that amount, I call your attention to Section 97 of the Municipal Code, wherein it says, "in no case shall the bonds of the corporation be sold for less than their par value."

I am informed by your communication that the bonds in question bear four and one-half per cent, and to agree to such contract would be a violation of the provision cited, and be but a scheme to circumvent the statute and have the bonds sold for less than their par value.

I would therefore hold that the contract cannot be entered into, and that the city auditor, nor any other officer representing the city, has any authority to enter into such contract.

Respectfully,

SMITH W. BENNETT,
Special Counsel.

WARRANTS OR ORDERS ON VILLAGE FUNDS MUST BE COUNTERSIGNED BY VILLAGE CLERK.

COLUMBUS, OHIO, January 21, 1904.

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

GENTLEMEN:—It is the opinion of this department that no bills should be paid out of the funds of a village until the warrant or order upon such funds is countersigned by the village clerk; and upon the payment of any moneys into the village treasury, being receipts of any municipal industry or other source, when the same is paid in, the order for the payment of the same into the treasury should likewise be countersigned by the clerk for the purpose of making the books of the clerk and treasurer tally.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TRUSTEES OF SINKING FUND TO COLLECT RENT DUE CORPORATIONS HAVING SUCH OFFICERS; MAYOR'S FEES IN STATE CASES.

COLUMBUS, OHIO, January 21, 1904.

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

DEAR SIRS:—Acknowledging receipt of yours of the 18th inst., containing enclosure of letter from Mr. B. A. Reed, City Auditor of Piqua, Ohio, with your request for answers to the questions there proposed, I beg to say:

Question 1. The collection of the rents due to the corporation must be made by the Trustees of the Sinking Fund in such cities as have such officers. Section 112 of the Municipal Code provides:

> "The Trustees of the Sinking Fund shall collect all rents due to the corporation and invest the same as other funds. They shall have the power to investigate all transactions involving or affecting the Sinking Fund in any branch or department of the Municipal Government, and shall have such other powers and perform such other duties as may be conferred or required by Council."

The collection of the rents for the use of the city buildings is not dependent upon whether or not there is, or is not a bonded indebtedness for the building of such buildings, but as the statute now reads it is made the express duty of the Trustees to collect and invest the same as other funds.

Question 2. The City Council is authorized by Section 117 of the Municipal Code, to fix salaries of the officers therein mentioned which includes the Mayor's salary. If the acting Mayor served for a given number of days, and the Council has refused to pay him for his time served, his remedy would be by an action against the city for that amount due him, but in the event that the city has paid the entire compensation to the Mayor, in whose stead the acting Mayor served, the acting Mayor is relegated to his individual action against the Mayor for the portion due him, upon the theory that the city will not be compelled to pay two officers for the same service.

Question 3. If the receipts from taxation applied to the Board of Public Service, are not sufficient to pay the salaries and expenditures, the balance of

their salaries cannot be paid from the Water Works Fund, unless same is duly appropriated for that purpose.

Question 4. It is stated in the letter of the Auditor that the compensation or salary of the Mayor is fixed by an ordinance of the city at $1200 per annum "All perquisites of the office to go into the city treasury," and you inquire who is entitled to the fees in the Mayor's court in state cases, the city or the Mayor? The Mayor has the jurisdiction of a Justice of the Peace in criminal cases, and by Section 1745 he is required to keep a docket "and shall be entitled to receive same fees that are or may be allowed Justices of the Peace for similar services." As your question refers to state cases, I understand from that that you do not mean prosecutions under municipal ordinances. For state cases proper the Mayor, by virtue of Sections 1745 and 1751, would be entitled to his fees, but this is not extended to prosecutions under municipal ordinances.

As the remaining question refers to the method or system to be kept by the different municipal boards, being largely a question of bookkeeping, I submit same to you to be answered by the Bureau, so as to conform to the rules adopted.

I herewith return the letter of Mr. Reed.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BUILDING OWNED BY W. C. T. U., PART OF WHICH IS RENTED FOR OTHER THAN PUBLIC CHARITIES, IS SUBJECT TO TAXATION.

COLUMBUS, OHIO, February 18, 1904.

HON. W. D. GUILBERT, *Auditor of State.*

DEAR SIR:—I acknowledge receipt, by reference from your office, of communication addressed to you by J. B. Molyneaux, President of the Board of Review of Cleveland, Ohio. The following statement of facts is submitted by said letter:

> "The Woman's Christian Temperance Union of Cleveland, Ohio, is the owner of a certain building in that city; a part of the said building is not used for purely public charity but is rented to individuals and the rents are applied to the support of the institution."

Upon this statement you ask for an opinion as to whether or not any part of the building referred to is subject to taxation under the laws of this state. I would say that upon the statement of facts submitted I am of the opinion that the part of the building rented for other purposes than that of "purely public charity" is liable to taxation under the laws of the State of Ohio.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONSTRUCTION OF LATTER PART OF SECTION 43, MUNICIPAL CODE, REFERRING TO CREATION OF CONTINGENT FUND.

COLUMBUS, OHIO, March 7, 1904.

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

GENTLEMEN: — I am in receipt of your communication of the 3d inst., enclosing letter of the City Auditor of New Philadelphia, Ohio, in which you request an answer from me to the queries there presented.

1. The construction of the latter part of Section 43, of the Municipal Code, referring to the creation of a contingent fund, is as follows:

> "In making the semi-annual appropriations and apportionments herein required council shall have authority to deduct and set apart out of any moneys not otherwise appropriated such sum as it shall deem proper as a contingent fund to provide for any deficiency in any of the detailed appropriations so to be made, which deficiency may lawfully and by any unforeseen emergency happen, and such contingent fund or any part thereof may be expended for any such emergency only by an ordinance passed by two-thirds of all the members elected to council and approved by the mayor."

The deficiency in any of the detailed appropriations must be such as arises from an unforeseen emergency; it must relate to an appropriation actually made. And to make a case within the meaning of this provision something unforeseen shall happen affecting the object for which the specific appropriation has been made, and which, by requiring an unexpected expenditure of money appropriated to that particular object has caused or will cause a deficiency in the appropriation.

If no appropriation has been made to pay the costs of a condemnation suit it can be taken care of in the budget about to be made up, but cannot be paid through the Sinking Fund Trustees because of the limitations contained in Section 101.

2. The second question presented regarding the payment of salaries and fees to any municipal officer is stated too broadly, and cannot be answered without applying it direct to some particular officer of the municipality. If it is meant to refer to the office of mayor, this department has heretofore held, on the 3d day of February, 1903, that the mayor is not entitled to fees for cases arising upon violation of ordinance where the city is a party, but that he is entitled to his fees in state and civil cases brought before him where the city is not a party; for under Section 1745, not repealed, he is entitled to receive the same fees that are or may be made or allowed Justices of the Peace for similar services.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE EMPLOYMENT AND PAY OF EXPERT WITNESSES.

COLUMBUS, OHIO, March 24, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your request for an official opinion of the construction of the act relating to the employment and pay of expert witnesses found in Volume 95, O. L., p. 282. The bill submitted for allowance to your department is an item of $183, extra compensation allowed physicians as experts, above fees allowed them as witnesses. While it is within the power of county commissioners to allow, and to pay such experts such compensation for their services as the court approves, and as the commissioners may deem just and proper, yet I cannot agree that such expense should be borne by the State of Ohio as any part of the costs to be allowed and paid through your department.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COLLECTION OF DOW TAX, UNDER SECTION 4364-14A.

COLUMBUS, OHIO, April 2, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of April 1 is received. You make this inquiry:

> "Can a county treasurer proceed to enforce the collection of 'Dow tax' that has been assessed and charged upon the liquor assessment duplicate, under the provisions of Section 4364-14a, R. S., before the expiration of ten days from the date of such entry upon such duplicate?"

In reply, I would say that under and by virtue of Section 4364-14a the assessment, together with a penalty of 20 per cent, is collectable as soon as such assessment is placed upon the duplicate of the proper county by the auditor thereof. You will observe that by said Section 4364-14a, R. S., the Dow tax found to be due upon the report from the Dairy and Food Commissioner is a delinquent assessment, and therefore is immediately collectable.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONCERNING COMPENSATION AND EXPENSES ALLOWED COUNTY COMMISSIONERS.

COLUMBUS, OHIO, May 10, 1904.

HON. W. D. GUILBERT, *Auditor of State.*

SIR:—You have made several inquiries of this department which I will answer in their order:

> 1. What, if any, compensation or expenses are county commissioners entitled to under Sections 2804, 2813*a* R. S. when acting as a board of equalization?

On April 4, 1904, the legislature passed, and on April 23, 1904, the governor approved an act entitled "An act to amend Section 897 of the Revised Statutes of Ohio as amended April 24, 1893 (O. L. 90, p. 258) and to repeal certain acts and sections of the Revised Statutes." Sections 1 and 2, of this act are as follows:

> "Section 1. That Section 897 of the Revised Statutes of Ohio, as amended April 24, 1893, be amended so as to read as follows:
>
> Sec. 897. The annual compensation of each county commissioner shall be determined as follows:
>
> In each county, in which on the twentieth day of December of the preceding year the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, the compensation shall be seven hundred and fifty dollars ($750.00), and in addition thereto in each county in which such aggregate is more than $5,000,000.00, three dollars on each full $100,000,00 of the amount of such duplicate in excess of said sum of $5,000,000.00. But in counties where ditch work is carried on by the commissioners, in addition to the salary herein before provided, each county commissioner shall receive three dollars per day for the time they are actually employed in ditch work, the total amount so received for such ditch work not to exceed the sum of three hundred dollars in any one year.

> The compensation herein provided shall be paid in equal monthly installments out of the county treasury upon the warrant of the county auditor.
>
> Sec. 2. The compensation provided in the preceding section shall be in full payment of all services rendered as such commissioner. But such total compensation shall not exceed the sum of $3,500.00 per annum."

It is observed that by Section 2 the compensation provided in Section 1 is to be in full payment of all services rendered as such commissioner.

Section 2804 R. S. and Section 2813*a* R. S. provides that the county commissioners shall act as an annual county board for the equalization of the real and personal property, moneys and credits in each county and that they shall receive the sum of three dollars for each day employed in the performance of their duty as such annual county board.

The act of April 4, 1904, approved April 23, 1904, and already referred to, in so far as compensation to the commissioners is concerned supersedes Section 2813*a* R. S., and the county commissioners are entitled only to the salary now fixed by law and their services as members of the board of equalization are compensated by their salary.

> 2. What, if any, compensation, mileage or expenses are the county commissioners entitled to under Section 4903 when acting as turnpike directors?

The answer to the first inquiry practically disposes of this one, as the present salaries allowed county commissioners are, by the terms of the act, full compensation for all services they are required to perform as such commissioners, therefore, county commissioners under Section 4903 are not entitled to any compensation, mileage or expenses.

> 3. What, if any, expenses are county commissioners entitled to under Section 897-5 R. S.?

Section 897-5 R. S. provides substantially that when necessary to travel on official business within his county, each county commissioner, *except in counties where the compensation of county commissioners is now or hereafter may be fixed by a stated salary,* shall be allowed, in addition to his compensation and mileage, any other reasonable and necessary expenses actually paid in the discharge of his duty, not to exceed two hundred dollars in any one year. Attention is called to the provision in this section that expenses may not be allowed to county commissioners in any county where the compensation of the commissioner is fixed by stated salary, so that, as under the present law the compensation of all county commissioners is a stated salary, such commissioners are not entitled to any expenses under Section 897-5 R. S.

> 4. What, if any, compensation, mileage or expenses are the county commissioners entitled to under Section 4506 R. S., and new Section 897 for services in ditch work?

New Section 897 provides that in addition to the salary of county commissioners they shall receive three dollars per day for the time they are actually employed in ditch work, the total amount so received for such ditch work not to exceed the sum of three hundred dollars in any one year. The provision in Section 4506 R. S., allowing the county commissioners three dollars per day for services rendered in and about county ditches is superseded by new Section 897, just referred to, and therefore, the county commissioners for the time they are actually employed in ditch work are not entitled to either mileage or expenses, but simply the sum of three dollars per day while they are engaged in such work.

5. Are the present incumbents of the office of county commissioner in the several counties to be compensated under the act passed April 4, 1904, and approved by the governor April 23, 1904?

Prior to the passage of the act just referred to, county commissioners, under the general laws, were compensated at the rate of three dollars per day and mileage for the days they were actually engaged in and about the business of their respective counties. Such compensation, so based, is not salary within the meaning of Section 20, Article II of the Constitution, and consequently the act now in force, fixing a stated salary for county commissioners is in full force and affect in every county in the state. It is true there have been special laws passed by the legislature, heretofore, fixing a stated salary as compensation for county commissioners in certain counties in the state, but when such laws have been before the courts and particularly before the Supreme Court of this state, they have been held to be unconstitutional, so that, all county commissioners from the time of the passage of the act referred to, approved by the governor on April 23, 1904, are compensated by a stated salary, except in the cases of ditch work when they are compensated at the rate of three dollars per day.

Very respectfully,

WADE H. ELLIS,
Attorney General.

EXPENSE OF OFFICIALS CONNECTED WITH WATERWORKS INCURRED IN ATTENDANCE UPON CONVENTION MAY NOT BE PAID BY CITY.

COLUMBUS, OHIO, May 23, 1904.

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

GENTLEMEN:—I beg to acknowledge the receipt of yours of the 14th inst., enclosing letter of Edward Philipps, City Auditor of Dayton, Ohio, suggesting an inquiry to be answered by this department, as follows:

> "Can the expenses of officials connected with the Water Works Department in attendance upon the national convention of water works officials, in St. Louis, be paid by the city?"

I am of the opinion that the expenses so incurred cannot be provided for out of the funds of the city.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CERTIFICATION OF ASSESSMENTS BY CLERK OF COUNCIL TO COUNTY AUDITOR.

COLUMBUS, OHIO, June 17, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio (Bureau of Inspection and Supervision of Public Offices).*

DEAR SIR:—I beg to acknowledge the receipt of yours of the 9th inst., and considering Section 94 of the Municipal Code, covering the certifying of estimates

for local improvements, am of the opinion that the clerk of the council should certify all assessments, on or before the second Monday in September, to the county auditor for collection, and that the same should not be certified in installments annually, but that when the term "assessment" is used it is meant to embrace all installments thereof, and when they are unpaid they should all be certified together so that the amount of the liens upon the property, arising by reason of assessments, may be able to be shown by an examination of the record of the same in the county auditor's office. Very truly yours,

WADE H. ELLIS,
Attorney General.

AS TO WHETHER SECTION 2823, R. S., AS AMENDED APRIL, 1904. IS INCLUSIVE OF CHILDREN'S HOMES, ETC.

COLUMBUS, OHIO, June 29, 1904.

HON. W. D. GUILBERT, *Chief of Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

DEAR SIR:—I have received your request, under date of June 22, 1904, for an opinion as to whether Section 2823, of the Revised Statutes, as amended April 23, 1904, limiting the rate of taxation for the general county fund to three mills, is inclusive of the levies for maintenance of children's homes, relief of indigent soldiers and expenses of elections, or whether a special levy for all or any of these purposes may be made in addition to the three mills authorized by this section.

The sections authorizing public support of children's homes are 929 and 246. The first-mentioned section provides that county commissioners may provide means by taxation for the purchase and support of the same, and Section 946 requires that they make annual assessments of taxes sufficient to support and defray all necessary expenses of the home. As to election expenses, Section (2966-4) provides that they shall be defrayed out of the county treasury, as other county expenses, and the county commissioners shall make the necessary levy to meet the same.

Section (3107-50) authorizes and requires the county commissioners,

"in addition to the taxes now levied by law for other purposes"

to levy a tax not exceeding three-tenths of a mill for the relief of indigent soldiers. Prior to the passage of the amended Section (2823), under consideration it was held in W. & L. E. Ry. Co. v. Stewart, 13 C. C., 358, that the limitations prescribed in the section as it then read was applicable only to the levies provided for in Title XIII, Chapter 5, of the Revised Statutes.

The levies for none of the purposes inquired of in your communication are among those provided for in the title and chapter referred to. Following the decision of the Circuit Court it may be considered settled that the levies for children's homes, relief of indigent soldiers and election expenses are exclusive of those provided for under Section 2823, unless something by way of amendment appears to destroy the force of that decision. Not only is nothing of the kind found in the amended statute, but it appears that the bill as introduced attempted by unequivocal language to include within the three-mill levy all that the original section had done, but in addition "those specially provided for by law." "Those specially provided for by law" are the very ones enumerated in your letter. The General Assembly by amendment struck out the words "and those specially provided for by law," thus clearly evidencing their intention to make no change in the old statute in that particular.

I am, therefore, of the opinion that the limit prescribed for county purposes by Section 2853 does not include levies for children's homes, relief of indigent soldiers or election expenses.

Very respectfully,

WADE H. ELLIS,
Attorney General.

RESERVE REQUIRED BY SAFE DEPOSIT AND TRUST COMPANIES.

COLUMBUS, OHIO, July 12, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your communication accompanying the letter of S. C. Arbuckle addressed to you under date of June 30th, and submitted to me for reply.

In answer thereto I beg to say regarding trust companies under the laws of this state, the reserve required of such companies as mentioned in Section 3821*b* is as follows:

> "Such company (safe deposit and trust companies) shall at all times have on hand in lawful money of the United States as a reserve an amount equal to fifteen per centum of all deposits, payable on demand or within ten days; and when such reserve shall be below such percentum of such deposits, said company shall not make new loans, nor make any dividends of its profits until the required proportion between the aggregate amount of its deposits and its reserve shall be restored; provided that clearing house certificates representing specie or lawful money specially deposited in the vault of such safe deposit company, or the United States sub-treasury for the purpose of any clearing house association of which such company may be a member, may be recorded as a part not exceeding one-third of said reserve; provided, further, that one other third of said fifteen percentum shall consist of bonds of the United States or this State, the absolute property of said company, and the remaining third of said fifteen percentum in lawful money of the United States."

They are required to make reports as provided in Section 3817, which covers every banking institution or incorporation engaged in the business of banking.

The reports are to be made to the Auditor of State upon the form as provided in Section 3819 R. S., showing the condition thereof before the commencement of business on the first Monday of the months of April and October of each year. They are subject to such further reports as may be required by the Auditor of State, who, for that purpose, has the right and power at any time, through an expert appointed by him, to make a full examination of the affairs and condition of such company.

Regarding state banks, by Section 3821-76 R. S., such bank is required to maintain an amount equal to at least "twenty per cent. of its deposits, such company shall not make any new loan or discount otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividends of its profits, until the required proportion of its deposits, and its lawful money of the United States shall be restored; and for such purpose money actually invested in bonds of the United States shall be deemed equivalent to lawful money of the United States."

Such banks are required to make the report provided for in Section 3821-79 R. S. as follows:

"Every banking company shall make to the auditor of state a report, according to the form which may be prescribed by him, verified by the oath of the president or cashier of such company, which report shall exhibit in detail, and under appropriate heads such as he shall require, the resources and liabilities of the company before the commencement of business in the morning of the first Monday of the months of January and July of each year, and shall transmit the same to the auditor of state within ten days thereafter."

By Section 3817 R. S., the language therein employed requiring reports of "every banking institution, or incorporation engaged in the business of banking," is sufficiently broad to include reports of state banks.

I do not find any separate provision subjecting state banks "to call reports."

Very truly yours,

WADE H. ELLIS,
Attorney General.

IN THE MATTER OF THE SALARIES OF CIRCUIT JUDGES.

July 20, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have taken the time necessary to fully and carefully examine the question you submit, as to whether or not judges of the Circuit Court, serving in existing terms, may have the benefit of House Bill No. 151, passed May 2, 1904, increasing the salaries of Circuit Judges from $4,000 to $6,000 per annum.

The legislature clearly intended that this increase should apply to incumbents now in office, as well as to those to be elected hereafter, and it is unquestionably the duty of other departments of the State government to give effect to the enactments of the legislature according to the intention manifested, assuming them to be constitutional unless they clearly violate the supreme law. Deference to the legislative authority, therefore, as well as to the opinions of several eminent lawyers of the State, has induced a more extended consideration of the question here presented than might otherwise seem appropriate.

The constitutional provisions on the subject of the compensation of public officers are as follows:

In Article II (the legislative article), Section 31 provides that the members and officers of the General Assembly shall receive a fixed compensation to be prescribed by law, and no change therein "shall take effect during their term of office." In Article III (the executive article), Section 19 provides that "the officers mentioned in this article shall, at stated times, receive for their services a compensation, to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected." In Article IV (the judicial article), Section 14 provides that "judges of the Supreme Court, and of the Court of Common Pleas, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished or increased during their term of office."

In addition to these three sections, apparently intended to control the principal offices established by the constitution for the three great departments of the State government, there is another and a general inhibition against increasing or diminishing official salaries during existing terms, which is found in Section 20 of Article II, and which 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."

These constitutional provisions would seem not only to indicate an emphatic public policy against changes in the salaries of public officers during existing terms, but to include in the injunction every office of the government, whether State or local, and whether established by the constitution or the statutes.

The question to be considered is whether the constitution discloses a purpose to except from this public policy, and to exclude from the operation of the sections above cited the office of judge of the Circuit Court. The argument in support of the view that judges of the Circuit Court stand alone in this respect may be stated as follows:

Section 14 of Article IV mentions only judges of the Supreme Court and of the Court of Common Pleas. The Circuit Court is omitted. When this court was established by the amendment of 1883 no inhibition was incorporated against increasing the salaries of the new judges during their terms. Failure to do so is said to have been intentional, and those who brought about the establishment of the new court believed that the omission to expressly include that office among those whose salaries the legislature was forbidden to increase or diminish during existing terms was effective to permit the salaries of Circuit judges to be increased at any time.

Further, it is suggested that Section 20 of Article II *does not apply to offices created by the constitution,* but only to minor, local, or at least statutory, offices, for the reason that the words "unless the office be abolished" are used, thus showing that this section is dealing with such offices only as the General Assembly has power to abolish.

Further, it may be said that if Section 20 of Article II applies to offices created by the constitution, then Section 31 of Article II, Section 19 of Article III and Section 14 of Article IV become mere surplusage. For if the *general* provisions in Section 20 of Article II are sufficient to forbid increases in any and all public salaries during existing terms, then the *special* provisions in the legislative, executive and judicial articles just referred to would be unnecessary. In other words, such construction should be given to the constitution as will give force and effect to all its parts, and when all these sections are read the question is answered by the rule *expressio unius exclusio alterius.*

I have given full consideration to the argument as thus stated, but am unable to agree with that view for the following reasons:

First: The history of Section 20 of Article II, as shown by the constitutional debates, indicates that this inhibition against changing salaries so as to affect incumbents in office was intended to apply to all offices, whether created by the constitution or by statute. (See Constitutional Debates, Volume 1, pages 233 and 234, et seq.) When this section was under consideration it was thought that the salaries of many constitutional officers would be fixed by the constitution itself, and this accounts for the words in Section 20 of Article II, "the General Assembly, in *cases not provided for in this Constitution,* shall fix the term of office and the compensation of all officers," etc. After the unwisdom of fixing salaries in the constitution became apparent, Sections 31 of Article II, 19 of Article III and 14 of Article IV were adopted, expressly committing to the legislature the duty of fixing the salaries, respectively, of all officers mentioned in the legislative article, of all officers mentioned in the executive article and of *certain* officers mentioned in the judicial article, and expressly forbidding, in each instance, any change during existing terms. At the same time Section 20 of Article II, with the words "in cases not provided for in this constitution," was left undisturbed.

Now, it is perfectly clear that if the framers of the constitution had fixed in the constitution itself the salaries of all officers referred to in Section 31 of Article II, Section 19 of Article III and Section 14 of Article IV, and then had omitted these sections altogether, the judges of the Circuit Court would be subject to the operation of Section 20 of Article II, for their office would be one whose compensation had been "not provided for in this constitution."

Does the failure of the constitution to provide in *any* case for the compensation of officers make Section 20 of Article II inapplicable to some *one* case for which the constitution has not provided? Is the case of a Circuit Judge any the less a case not provided for in the constitution simply because there are *no* cases that *are* provided for in the constitution?

It seems to me in view of the circumstances under which the various sections of the constitution on this subject of increasing or diminishing salaries during existing terms were adopted that the provisions of Sections 31 of Article II, 19 of Article III and 14 of Article IV on this subject are in fact cumulative, and since the constitution in *no* case provides for both the term and compensation of public offices, Section 20 of Article II would be sufficient, standing alone, to prohibit a change in the salary of the incumbent of any and every public office. But the force of Section 20 of Article II is not weakened by other sections applying specifically to particular offices. The only effect of the special provisions, with respect to particular offices, is to make unnecessary in those instances an appeal to Section 20 of Article II.

Second: That Section 20 of Article II applies to constitutional offices is shown in a number of adjudicated cases. The contention that it does not so apply proceeds upon the theory that the words in that section, "*in cases* not provided for in this constitution," mean *in offices* not provided in the constitution. This contention is answered in State v. Neibling, 6 O. S., 40, where the court discusses this section at pages 43 and 44 and, using the italics as indicated below, say:

> "But it is provided in the 20th Section of the Second Article of the Constitution, that 'the General Assembly *in cases not provided for* in this constitution shall fix the term of office,' etc. Now, the *case* of a clerk of the court holding his office by appointment to fill a vacancy, is one of the *cases* in which the constitution has not fixed the term of office but left that to be done by the legislature."

It will be seen from the above decision that the Supreme Court not only disposes of the contention that the words "in cases" as used in Section 20 of Article II, mean "in offices," but expressly holds that this section applies to an office created by the constitution, for the office of clerk of the courts is such an office.

In State ex rel. v. Howe, 25 O. S., 588, the court holds that Section 20 of Article II applies to the office of a trustee of a state institution, which office is created by Section 2 of Article VII, of the constitution.

In Walker v. Cincinnati, 21 O. S., 14, there is one proposition which still remains good law, and that is that Section 20 of Article II applies to "such offices as may be created to aid in the permanent administration" of the "government of the state." Surely it will not be contended that the office of Judge of the Circuit Court is not such an office.

In State ex rel. v. Raine, Auditor, 49 O. S., 580, the syllabus declares that any statute which increases "the salary attached to a public office, contravenes Section 20 of Article II of the constitution of this state in so far as it affects the salary of an incumbent of an office during the term he was serving, when the statute was enacted." It will be observed that the court speaks here of the

salary attached to a *public office.* There is no suggestion that this means merely a local office, or an office created by the legislature. There is no suggestion that it does not include an office created by the constitution. Is not an office created by the constitution a public office, and if the constitution does not fix the term or compensation of the office it creates, is not the legislature required, by Section 20 of Article II to perform the duty left undone? And if it performs that duty is it not subject to the limitation and restriction imposed by the very section of the constitution which requires it to act? It is perhaps true that the *power* to fix the terms and compensation of public offices not provided for in the constitution, is derived from the general grant of legislative authority in Section 1 of Article II, but the *duty* to do so is nevertheless enjoined in Section 20 of Article II, and the *limitation* in the exercise of the power or the performance of the duty is also contained in the last named section.

Third: With respect to the office of Judge of the Circuit Court, the very section of the constitution which establishes that court, (Section 6 of Article IV), while it expressly leaves to the legislature the duty of fixing the term, says nothing whatever on the subject of compensation. Thus it is clearly a case where the omission of the constitution is to be supplied by the legislature under the command of Section 20 of Article II, but subject, of course, to the limitations and restrictions of that section.

Fourth: The fact that Section 20 of Article II uses the words "unless the office be abolished," in forbidding any change that shall affect the salary of an officer during his existing term, affords no sound basis for limiting the application of this section to offices which the legislature has power to abolish. It is perfectly clear, of course, that the section must *include* such offices, but it does not follow that it *excludes* other offices.

Fifth: The fact that the constitution of this state in four different places forbids any change in official salaries during existing terms, first, with respect to members and officers of the general assembly, next, with respect to all state officers created for the executive department, next with respect to the highest and the lowest courts of general jurisdiction and finally in a sort of *"omnium gatherum,"* to *all* officers whose terms and compensation are not fixed in the constitution, would seem to indicate an unmistakable policy on the subject. This policy being obvious, and including within its scope every character of public office, an exception should be very manifest to justify recognition. The constitution should be construed to satisfy this purpose rather than to defeat it. It should be construed in harmony with this purpose rather than in antagonism to it. It is important, therefore, to note the effect in other directions of a holding that Section 20 of Article II does not apply to offices created by the constitution. While this would except the office of judge of the circuit court, it would also permit the legislature hereafter to increase the salaries during existing terms of probate judges, justices of the peace, county clerks, trustees of benevolent, penal and reformatory institutions and members of the board of public works, whose offices are created by the constitution, and as to which there is no inhibition against changing salaries unless it be found in Section 20 of Article II. More than this, it is important to observe that such a construction would permit the salaries of these officers and the judges of the circuit courts to be *diminished* during existing terms, for if the last legislature has power to raise, the next would have power to reduce. Certainly the intention ought to be quite clear to persuade us that the constitution designed that of all public officers in Ohio, state and local, legislative, executive and judicial, constitutional and statutory, the only ones whose salaries may be increased during an existing term, and the only ones whose salaries are at the mercy of the legislature to be reduced at any time, are the judges of the circuit court, the probate judges, the clerks of

the court of common pleas, justices of the peace, trustees of state institutions and members of the state board of public works.

If the constitution evinced any purpose to exempt from the inhibition against increasing or diminishing salaries of officers already commissioned, this or that *class* of officers, the purpose might be more easily recognized. If, as in Pennsylvania, there was some basis for a construction which would except *all* judicial offices from the mandate against changing salaries during existing terms, the contention for the other view of the question here presented might be easier to sustain. The opinion of the Attorney General of Pennsylvania, in which the conclusion is reached that an act increasing generally the salaries of the judges of the courts of that state, applies to incumbents in office, I have read carefully and with much interest. It is not helpful, however, to a solution of the question presented in this state for the reason that the history of the Pennsylvania constitution on this subject, shows clearly that it was intended to except judges of the courts from the operation of the rule against increasing or diminishing public salaries during existing terms, and the length of the terms of the judges in Pennsylvania makes this view more easily accepted. In Ohio, on the contrary, the constitution discloses a purpose to *include* the office of judge among those whose compensation cannot be increased or diminished during an existing term, and in addition to this, the terms of our judges are short, and inequalities in salaries among members of the same court, caused by legislative enactments on the subject, soon pass away by the expiration of existing terms. If the terms of the supreme and circuit court judges (which may be changed by the legislature) are hereafter lengthened, as many thoughtful citizens believe they should be, the salaries can be fixed with a view to avoiding the inequalities which changes produce.

I desire to advise you, that, in my judgment, the act which you have referred to me cannot constitutionally be made to apply to the salaries of judges of the circuit court now in office under existing terms. The increase in salaries should begin with the new term, and in the mean time the judges of the circuit court should receive the compensation provided by the laws in effect before the enactment of the new statute.

Since this question, however, is one upon which a contrary opinion to that here expressed may be entertained, and since there is every reason why the judges of the circuit court, now serving, should receive the benefit of the increased salary intended for them by the legislature, if the constitution permits it, I have suggested that this question be submitted to the supreme court in a proper proceeding and as early as practicable. You are, therefore, advised to withhold the payment of the additional amounts provided in the act referred to until the determination of any such suit that may be brought, and if the judgment of the court sanctions the payment of such increase of salary to the members of the circuit court now serving, their acceptance in the mean time of the amounts heretofore authorized by law, will not, in my judgment, prejudice their right to claim the additional sums.

Very truly yours,

WADE H. ELLIS,
Attorney General.

NOTE: Since the above opinion was rendered the case of Foreman v. The People has been published in 209 Illinois Reports at page 567, which sustains the view here expressed.

THE RIGHT OF AN HISTORICAL SOCIETY TO OCCUPY A COUNTY BUILDING.

COLUMBUS, OHIO, July 21, 1904.

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

DEAR SIR:—Answering yours of the 20th inst., I would say if the Historical Society or association mentioned in your letter is one of the character described in Section 3107-44*k* R. S., such association may be permitted to occupy a county building, and the commissioners of the county have the power to grant such permission, if such building is not necessary for other county purposes.

After the granting of such permission the maintenance of such building becomes a duty for which the county commissioners are authorized to provide. The services of a janitor, fuel and light and other necessary expenses would, under such circumstances, be included within the term "maintenance" and the payment of such expenses can be lawfully authorized by them.

Very truly yours,

WADE H. ELLIS,

Attorney General.

RIGHT OF COUNTY SURVEYOR TO MILEAGE UNDER SECTION 1183.

September 1, 1904.

HON. W. D. GUILBERT, *Chief Inspector and Supervisor, Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

DEAR SIR:—A communication signed by James C. Wonden, surveyor of Logan County, Ohio, bearing date August 24, 1904, and referred to this department by you, is received.

The communication contains an inquiry as to the right of a county surveyor to mileage, under Section 1183, R. S. The last legislature enacted a new surveyors' law, and thereby repealed all sections and parts of sections of the Revised Statutes upon which surveyors' fees were based. This law, however, is being contested in the Supreme Court, but until a determination is had the presumption is that the law is constitutional and until the law is declared unconstitutional the county surveyors would not be entitled to collect fees under Section 1183 and kindred sections.

I might say, however, that if the county surveyor is employed by the day he would not, under Section 1183, be entitled to mileage.

Very truly yours,

WADE H. ELLIS,

Attorney General.

SHERIFF'S FEES IN COMMITTING TO INDUSTRIAL SCHOOLS.

September 26, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter inquiring whether sheriffs are entitled to the same fees under Section 771, R. S., as they are under Section 759, R. S., as amended April 25, 1904, 97 O. L., 319, is received.

I am of the opinion that, inasmuch as Section 771 provides that the sheriff shall receive for his services, in committing to the Girls' Industrial School, the same fees as to the Boys' Industrial School, that the amendment of April 25, 1904, increases the fees of the sheriff so that they may be the same for committing to either institution referred to.

Very truly yours,
WADE H. ELLIS,
Attorney General.

FEES OF MAYOR AND CHIEF OF POLICE IN CERTAIN CASES.

September 27, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your communication containing questions suggested by the Bureau of Uniform Accounting, regarding the salary of the mayor and chief of police in the city of Cambridge, Ohio. The question involves the right of those officers to receive certain fees in addition to the salaries which have been provided by the city council. Limiting the answer to the direct point in controversy, I would say that the mayor and chief of police are not entitled to any fees accruing from the arrest of individuals for violation of city ordinances.

Under Section 126, of the New Municipal Code, it is provided that:

> "The council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act, and, except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury."

It would follow from the foregoing that the fees collected in that class of cases should be paid into the city treasury, and not retained by the officers mentioned.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHETHER PROBATE JUDGE IS ALLOWED TO FURNISH BOOKS FOR ADMINISTRATORS, ETC., AND PAY FOR SAME OUT OF COUNTY TREASURY.

The Bureau of Inspection and Supervision of Public Offices, Auditor of State's Department, Columbus, Ohio.

GENTLEMEN: — Your communication dated November 15, 1904, is received. You inquire "whether a probate judge may order account books and receipt books for the use of administrators, executors and guardians, and whether bills for the same, approved by him, shall be allowed by the County Commissioners and paid out of the county treasury, under Section 523, R. S., of Ohio?"

Section 523 is as follows:

> "There is established in each county of this State a probate court, which shall be held at the county seat, in an office in which shall be deposited and safely kept by the judge of the court all books, records and papers pertaining to the court; and such office shall be furnished by

> the county commissioners, and provided with suitable cases for the safe keeping and preservation of the books and papers of the court and also with such *blank-books, blanks, and stationery as are required by the judge in the discharge of his official duties.*"

You will observe that only such blank-books, blanks and stationery as are required by the judge in the discharge of his official duties are to be furnished by the county commissioners. I am of the opinion that furnishing account books and receipt books for the use of administrators, executors and guardians is no part of the official duty of the probate judge, and such books should not be paid for out of the county treasury.

Very truly yours,

WADE H. ELLIS,

Attorney General.

METHOD OF COLLECTING WATER RENTS.

COLUMBUS, OHIO, December 8, 1904.

HON. W. D. GUILBERT, *Audior of State, Columbus, Ohio.*

DEAR SIR:—Replying to the inquiries contained in your favor of the 3d inst., relative to the method of collecting water rents pursuant to Section 2411 R. S., (1536-522) Municipal Code), I beg to say that section provides that:

> "The trustees of the water works in those cities which own municipal water works, shall have the power to assess and collect from time to time a water rent of sufficient amount, in such manner as they may deem most equitable upon all tenements and premises supplied with water; * * * to be collected in the same manner as other city taxes."

The provision that such water rents "as remain unpaid * * * are to be collected in the same manner as other city taxes" implies that the same method shall be resorted to as is made necessary for the collection of city taxes. This method is regulated by statute.

For the purpose of collection, other city assessments are permitted to be paid to city officers until a certain time in the year, after which, certain city officers are required to certify the unpaid assessments to the county auditor to be placed upon the duplicate against the property which is assessed. But it will be observed that in all such instances, provision is made for the method of making the assessment, and certain particular proceedings are required to be complied with in order that such assessments may be made a lien upon the premises sought to be charged therewith.

There is no provision contained in the Revised Statutes, directing the method of creating a lien upon the premises for the non-payment of water rents. This, by the statute under consideration, is left in certain cities to the officers thereof, and only extends its authority to such officers to provide for assessing "the cost and expenses of laying or extending water mains upon the lots or lands bounding or abutting upon the streets., etc., along which such water mains are laid." The statute does not delegate to the municipal authorities the power to provide for creating a lien upon premises and tenements supplied with water, any charge or amount unpaid therefor. The language used therein providing for the collection of unpaid water rents as other city taxes, does not, in my opinion, include the power to enforce it as a lien, because the preceding paragraph does not provide for the creation of the lien, nor is such lien otherwise authorized to be created.

It would follow therefrom that no authority is vested in a municipal officer to certify any delinquent lists of water rents to the county auditor to be by him placed upon the tax duplicate as a lien against the real estate upon which the water was used or to which it was supplied.

Very truly yours,
WADE H. ELLIS,
Attorney General.

REGARDING THE POWERS AND DUTIES OF ASSESSORS.

December 9, 1904.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of a comunication from your department, addressed to me by the Bureau of Inspection and Supervision of Public Offices, presenting four questions regarding the powers and duties of assessors, which I quote below, and to each of which I have subjoined my answers.

> 1. Are assessors, elected in cities having no township organization, municipal officers? If so, must the council fix their compensation under authoity of the Municipal Code?

The provisions contained in the Revised Statutes for the election of assessors are as follows:

For the election of assessors in townships, provision is made in Section 1448, R. S.

For the election of assessors in municipal corporations, divided into wards, provision is made in Section 1718, R. S.

For the election of assessors in municipal corporations, where election precincts are divided, the provision is made in Section 2966-15 (97 O. L., p. 225).

The mere fact that assessors are required to be elected by the statute in municipal sub-divisions, such as wards and precincts, does not designate such officers municipal officers. The original act for election of assessors was "An act to provide for the election of township assessors." They are not, by the municipal code, designated as municipal officers.

The executive officers of cities are designated by Section 128 of the Code, and the executive officers of villages are designated by Section 199 of the Code. In neither of these sections is found the office of assessor. It has been held that for purposes of political organization and civil administration the State is divided into counties and townships; that cities and villages are associations under general laws for the private or local interest or advantage of the inhabitants; that the townships are agencies of the State in the administration of its government, but that the officers derive their power from within the limits of the township, and are to exercise it only within those limits, and just as the power of the State to preserve order is vested in the township, and by the township in a constable elected by the electors thereof, so the power of assessment for taxation is apportioned among the townships and vested in assessors elected for that purpose. The election may be by township, ward or precinct, as the law may prescribe, and the voters within such sub-division cast their votes for such officer, who exercises his duties only within the territory over which he is elected. The duties of an assessor are appropriate to the township as forming part of the State organization, and the officer is, in that sense, an officer of the township, although elected only for a portion of the township. (State of Ohio ex rel. Cunningham v. Cappeller, County Auditor. Cinti. L. B., Vol. 3, p. 853).

The opinion in the case of Lorillard v. Monroe, 11 N. Y., 392, is helpful in determining the classification of such officers. The Court of Appeals in that case said:

"The imposition and collection of the public burthens is an essential and important part of the political government of the State, and it is committed in part to the agency of officers appointed by the local divisions called towns, and in part to the officers of the counties, upon reasons of economy and convenience; and the official machinery which is organized within the towns and counties is public in the same sense as is that part of the same system which is managed by the State officers residing at the seat of government, and whose operations embrace the whole State. It is a convenient arrangement to have the assessors chosen by the electors of the towns within which they are to perform their duties, for the reason that the people of these small territorial divisions will be most likely to know the qualification of those from among whom the selection is to be made. When chosen, they are public officers, as truly as the highest official functionaries in the State. Their duties in no respect concern the strictly corporate interests of the towns, such as their common lands and their corporate personal property, or the contracts which as corporations they are permitted to make, nor are their duties limited to their effects on the towns as political bodies. The description and valuation of property for the purpose of taxation, which they are required to make, form the basis upon which the State and county taxes are imposed; and although money is raised by the same arrangement to be expended within the towns, the purposes for which it is to be employed are as much public as are those for which the State and county taxes are expended."

I am, therefore, of the opinion that the assessors elected in such cities are not municipal officers.

The second portion of this question is, I think, answered by the foregoing; that is, that the compensation of such assessors is not to be fixed by the municipal councils. The councils of municipalities are required to fix the compensation of all officers chosen under the authority of the act of October 22, 1902, otherwise known as the Municipal Code, but as assessors are not elected under the provisions of that act it follows that they are not included within its terms, and their compensation is not fixed and established by the councils thereof.

2. Have such assessors authority to appoint a requisite number of assistants, such appointments being subject to the approval of the county auditor?

Pursuant to the provisions contained in Section 2794, R. S.:

"Any district, township or ward assessor, who shall deem it necessary to enable him to complete, within the time prescribed, the listing and valuation of the property, moneys and credits of his district, township or ward, may, with the approbation of the county auditor, appoint some well qualified citizen of his county or twonship to act as an assistant and assign to him such portion of his district, township or ward, as he shall think proper," etc.

It is clear from the provisions contained therein that the General Assembly contemplated that an assessor might appoint more than one assistant, subject to the approval of the county auditor, if the assessor should deem it necessary to

enable complete "within the time prescribed the listing and valuation of the property, etc.

Further, it is a well-known rule of construction that where the exigencies of the case require, words in the singular number may be construed as plural and *vice versa;* especially is this true where the context reasonably indicates the legislative purpose that the statutes should have such meaning. It follows, from what I have said, that an assessor may, under the terms given by Section 2794, appoint one or more assistants for the purposes mentioned in the act, with the approbation of the county auditor.

> 3. What authority should approve the bonds of such assessors?

The question having been limited to assessors elected in cities having no township organization, it would follow that the approval of the bond of such officers could not be had pursuant to Section 1517, R. S., which applies generally to township assessors, and the approval of which bonds is required to be made by the township trustees. In the absence of a township organization, by analogy, we find that similar duties should devolve upon the councils of the cities; and resulting from that, it would follow that the approval of the bonds of such assessors should be left to the councils of such cities.

> 4. Their term commencing on the first Monday in January, at what date does their compensation commence and for how long?

Using the reasoning of the judge announcing the opinion in the Cappeller case, above cited, it is evident that while the term of office may be said to commence pursuant to the Chapman law, so-called (Section 1442, R. S.), upon the first Monday in January after the election; yet, under the statutes, the duties of the officer are not intended, by the General Assembly, to commence at that time, and the statute fixing their term of office is not determinative of the period of time at which their compensation should begin. The statute governing their compensation should receive such construction as to authorize the payment at the rate prescribed by law for the time necessarily employed in the performance of their duties, and no more.

Very truly yours,

WADE H. ELLIS,

Attorney General.

FEES OF SHERIFF.

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

DEAR SIR:—The inquiry contained in your letter of the 3d inst. has received my consideration. The query suggested is as follows:

> "What fee is the sheriff entitled to for taking a youth from Cleveland to the Cincinnati House of Refuge on an order from the Juvenile Court?"

Chapter 6b, Title IV, Vol. 1, Revised Statutes of Ohio, provides for the creation of Juvenile Courts. Among other things, it provides for the disposition of neglected children, and of the class known as "delinquent children."

The provision relating thereto taken from Section 6 of the act of May 1, 1902, (548-42, 548-45) is as follows:

> "The court may make an order committing the child to the care of some suitable State institution, * * * or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring or obtaining homes for dependent or neglected children."
>
> "Or the court may cause the child to be placed in a suitable family home, * * * or the court may commit such child, if a boy, to a training industrial school for boys, * * * or the court may commit the child to any institution within the county, incorporated under the laws of this State, that may care for delinquent children, or be provided by a city or county suitable for the care of such children," etc.

The Cincinnati House of Refuge under Section 2063 (being Section 1536-338, R. S.) has authority to receive youths for confinement therein.

Under the act above cited, creating Juvenile Courts, no provision has been made for compensation to the sheriff or other officer executing the order of commitment necessary for the lawful committing of a youth by such court within or to such an institution. No express provision having been made thereon in that chapter, and the duty having been, by order of court, imposed upon the sheriff of the county to obey the command of the court, we must look to Chapter 8, Title VIII, R. S., fixing the fees of sheriffs for such services.

It is provided by Section 1311, R. S., that the sheriff "shall execute all warrants, writs and other process to him directed by the proper and lawful authority." It is further provided by Section 1230, R. S., that for committing a person to prison, etc., he shall receive 60 cents, and also:

> "Traveling fees upon all writs, precepts, etc., 8 cents per mile going and returning, provided, that where more than one person be named in such writ, mileage shall be charged for the shortest distance necessary to be traveled."

It is my opinion that the order of commitment made by such court should be construed as a "writ * * * directed by the proper and lawful authority," and that it should be construed to be such a writ as is governed by Section 1230, R. S., above cited, and the fees of the sheriff should be computed thereunder.

Very truly yours,

WADE H. ELLIS,

Attorney General.

(To the Treasurer of State)

AS TO DEPOSITS MADE WITH TREASURER OF STATE BY EAST END SAVINGS AND TRUST CO. OF CLEVELAND, ET AL., SECTION 3821*d*.

COLUMBUS, OHIO, March 5, 1904.

HON. W. S. MCKINNON, *State Treasurer, Columbus, Ohio.*

DEAR SIR:—Relative to the inquiry contained in the letter of Henderson, Quail & Siddall, attorneys, as to the deposits made with the State Treasurer by The East End Savings & Trust Company and The Central Trust Company of Cleveland, I would say that these deposits are made pursuant to Section 3821*d* *R. S.*, and are held by you as treasurer of state as security for a faithful performance of all the trusts assumed by such companies. I construe this to mean that they are held to insure the payment of all liabilities incurred by such companies. If these companies desire to take out these deposits they should each satisfy you that the liabilities against them and each of them are fully paid and discharged, or their payment otherwise secured.

It is stated that The East End Savings & Trust Company have transferred substantially all their assets to The Cleveland Trust Company, but that its organization is retained with a nominal capital of $5,000, in which form they intend to proceed to discharge their original liabilities which have been assumed by The Cleveland Trust Company.

You should then be satisfied, by a copy of the agreement made between The East End Savings & Trust Company and The Cleveland Trust Company, that the liabilities of The East End Savings & Trust Company have been fully assumed by The Cleveland Trust Company, and if they have, then the deposit made by The Cleveland Trust Co. would be construed as security for the payment of the liabilities of The East End Savings & Trust Company. I should think that you would require a copy of such agreement and satisfactory proof that all the liabilities have been taken care of.

As to the deposit of The Central Trust Co., which is in process of liquidation and which I understand is not being merged into another trust company, more definite proof will be required as to its liabilities having been fully paid and discharged. I construe the character of both these deposits broader than the counsel for the bank have done in their letter in which they say "Neither of said companies hold any appointment in any trust capacity from any court and in this condition of things the representatives of both companies desire to have returned both the securities so deposited with the State Treasurer." They hold that a deposit is made to secure trusts merely, while I incline to the view that the deposit secures all the liabilities. If there are but few outstanding liabilities and security for their payment would be made by bond or otherwise executed by good and sufficient sureties, I should think you will be justified, on the execution of such bond as is satisfactory to you, to deliver over to the parties entitled thereto the deposit in question.

Yours truly,

WADE H. ELLIS,

Attorney General.

CHARACTER OF SECURITIES TO BE DEPOSITED WITH TREASURER OF STATE BY SAFE DEPOSIT AND TRUST COMPANIES.

COLUMBUS, OHIO, March 10, 1904.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of the 8th inst., enclosing a communication from the Citizens' Savings and Trust Company of Cleveland, dated March 2, relative to the character of deposit which may be accepted by you under the statutes governing safe deposit and trust companies. In answer I beg to say that Section 3821*d* of the R. S. establishes the character of the securities to be deposited with you for the faithful performance of all the trusts assumed by such companies. The language of the statute upon that subject is as follows:

> "until such company shall have deposited with the treasurer of state one hundred thousand dollars in cash, or in securities in which said company is by law allowed to invest its capital."

This language is repeated at another place in the statute with reference to companies of less amount of capital, and a provision follows both clauses containing this language, "provided, the full amount of such deposit so to be made by any such company may be made in bonds of the United States or state of Ohio."

It follows that when defining what securities may be deposited with you by such companies, other than "bonds of the United States or state of Ohio," we are compelled to examine Sections 3821*a* original act, and 3821*g* R. S. to determine in what securities such companies are, by law, allowed to invest their capital.

Section 3821*a* R. S. provides:

> "All moneys or properties received in trust by such companies, unless by the terms of the trust some other mode of investment is prescribed, together with the capital of such company, shall be loaned on or invested *only* in the authorized loans of the United States, or of the State of Ohio, or cities, counties, or towns of this state, or the stocks or bonds of any state in the Union which has for five years previous to such investment being made regularly paid the interest on its legal bonded debt in lawful money of the United States, or cities, counties, or towns of such states, which shall have so paid the interest on the legal bonded debt of such cities, counties or towns, or stocks of any national banks organized within this state, or the first mortgage bonds of any railroad company within the states above named, which has earned and paid regular dividends on its stock for five years next preceding such loan, or investment, or first mortgages on real estate in this state or of individuals with a sufficient pledge of any of the aforesaid securities, or may be loaned to this state, or to any county, city, or town therein."

Section 3821*g* R. S. provides that

> "Any safe deposit and trust company organized under the acts to which this is supplementary, and engaged (exclusively) in the business of a safe deposit and trust company, may loan or invest any moneys or properties received in trust by such company, together with the capital of such company, in the following securities, in addition to those now authorized by law, i. e., in the stocks of gas light and coke companies, gas companies, gas and electric light companies, or stocks of street railway companies which have paid regular dividends on their stocks for five years next preceding such loan or investment, and are located in the county in

which such safe deposit and trust company is located, or in which it has its principal office."

The words "located in the county in which such safe deposit and trust company is located, or in which it has its principal office," is a limiting clause defining the character of the companies embraced in the last preceding paragraph, to-wit: gas light and coke companies, gas companies, gas and electric light companies, and street railway companies, and therefore no safe deposit and trust company has the authority to invest its moneys, or properties, or capital in any such last mentioned companies unless the company seeking to so invest its money, etc., is located in the same county, or has its principal office in the county where such mentioned companies are located. Upon critical examination of the statute I am satisfied that you, as Treasurer of State, are not authorized to receive from safe deposit and trust companies any other character of securities than those herein mentioned.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING DEPOSITORY FOR STATE FUNDS.

November 16, 1904.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge your request for an opinion regarding the construction of Section 1 of the act of the General Assembly, approved May 3, 1904, entitled "An act to provide a depository for state funds." (97 O. L., 535, 537.) The section in question is as follows:

> "Every state officer, employe, board, department or commission, receiving money, checks or drafts, for or on behalf of the State, from fees, rentals, penalties, costs, fines, sales of property, or otherwise, shall, on or before Monday of each week pay to the Treasurer of State all such money, checks or drafts received during the preceding week, and on the same day file a detailed, verified statement of such receipts with the Auditor of State."

This is a new provision governing the time of accounting of every State officer, employe, board, department or commission who receives money, checks or drafts for or on behalf of the State. The language is sufficiently broad to include all incomes of all kinds, such as fees, rentals, penalties, costs, fines, sales of property or otherwise. It requires such officer, employe, board, department or commission receiving money, checks or drafts on behalf of the State to pay the same to the Treasurer of State on or before Monday of each week the several amounts received during the week preceding. It further requires a detailed, verified statement of such receipts, to be made on the day of payment and filed with the Auditor of State. By this means the same method is required as by other sections of the statute so that at all times the statements of receipts filed with the Auditor of State will correspond with the amounts received during the same period by the Treasurer of State.

This act went into full force and effect the 3d day of May, 1904.

Very truly yours,
WADE H. ELLIS,
Attorney General.

(To the Superintendent of Insurance)

WHETHER MERCHANTS AND MANUFACTURERS' INSURANCE CO., OF CINCINNATI, CAN CONDUCT BUSINESS UNDER THIS NAME, ALSO WHETHER THIS COMPANY MAY LAWFULLY INVEST ITS CAPITAL IN STOCKS REFERRED TO.

COLUMBUS, OHIO, February 11, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Acknowledging receipt of yours of the 6th, I would say that I have considered the contents of same and the accompanying enclosures, being a copy of your departmental letter of October 10, 1903, to the Merchants & Manufacturers' Insurance Company, of Cincinnati, and the answer of Wm. H. Calvert, President, to you, under date of February 2, 1904. By consideration of the several acts relating to that insurance company, I find that by the Act of March 15, 1838 (30 O. L., 300), the name given to that corporation by special act was "The Manufacturers Insurance Company." The act contained the following provision, in Section 1 thereof: "Any future General Assembly may alter or amend this Act." There would be no necessity for such provision in the act if incorporated under the present Constitution, but under the Constitution of 1803, and in the light of the Dartmouth College case, such necessity is made apparent. By the above act it will be observed that the words "of Cincinnati" is and constitutes no portion of the name of the company.

2. This act was amended in an unimportant part, namely, as to the number of directors to be permitted to such corporation, under date of March 29, 1841.

3. By Act of January 31, 1844 (48 O. L., p. 27), the name of the above company was changed, as follows,

> "That from and after the 1st day of February, 1844, the body politic and corporate heretofore known by the name and style of The Manufacturers Insurance Company *of Cincinnati* shall be known by the name and style of *The Merchants and Manufacturers Mutual Insurance Company of Cincinnati.*" In Section 6 of that act it is provided, "that all parts of the act to which this is an amendment, which are inconsistent with this act, be and the same are hereby repealed and this act shall take effect and be in force so soon as the holders of the majority of the stock in said insurance company shall, in writing, approve this act, of which the directors shall give public notice."

4. On the 7th day of March, 1849, an act of the General Assembly was passed, with the following title:

> "An act to amend an act to incorporate The Manufacturers Insurance Company of Cincinnati, passed March 15, 1838." This provided that no certificate "shall be issued under the third section of January 31, 1844, unless claimed before January 1, 1850," and amended in other parts the act of March 15, 1838.
>
> Section 3, thereof provides,
>
> "That all parts of the act to which this is an amendment, *which are inconsistent with this act,* be, and the same are hereby, repealed; and the act to amend the act to incorporate the said insurance company, passed the 31st of January, 1844, is also hereby repealed."
>
> Section 4, thereof provides that the act entitled,

"An act to incorporate The Manufacturers Insurance Company of Cincinnati, passed March 15, 1838, together with the amendments thereto, except so much thereof as is inconsistent with this act, be, and the same are hereby, revived, and shall remain in force."

By consideration of the above legislation it is seen that the act of March 7, 1849, gives no new name to the corporation. That act unqualifiedly repealed the act of January 31, 1844, and it revived the original act of March 15, 1838, and the amendment thereto, except so much thereof as is inconsistent with the last act (1849).

None of the acts recited give the name to the corporation now used by it viz., "The Merchants & Manufacturers Insurance Company," for by the act of 1838 it was known as the Manufacturers Insurance Company; by act of 1844 it was changed to The Merchants & Manufacturers Mutual Insurance Company; as the act of 1849 unqualifiedly repealed the act of 1844, it repealed the name thereby given, and did not substitute any new name.

I am informed by these several communications that "The Merchants & Manufacturers Insurance Company" is a name that has been in use by the corporation since before the adoption of the Constitution of 1851. If so, it would be my conclusion that the corporation has acquired a new name, which can be done by usage or reputation.

(Smith v. Tallassee Plank Road Co., 30 Ala., 850)
(Knight v. Mayor of Wells, 1 Ld. Ray, 80.)
(Minot v. Curtis, 7 Mass., 441.)
(South School District v. Blakesley, 13 Conn., 227.)

"The identity of a corporation is no more affected by change of name than the identity of an individual." (Morawitz on Corp., Vol. 1, Sec. 354.)

A misnomer of a corporation has the same legal effect as a misnomer of an individual. A contract entered into by it under an assumed name may be enforced by either of the parties. These principles are fully sustained by the authorities.

My conclusion, therefore, is, with regard to first question proposed, "Whether the company may now lawfully conduct the business in the name of The Merchants & Manufacturers Insurance Company," that, having used that name for so long a time, it is beyond power of the State to question it, and as all its contracts are made in the name they can be enforced against it, therefore neither individuals nor the State could question its authority to use such name.

Your second question is whether this company may lawfully invest its capital in the stocks of corporations other than national bank stocks. My answer to that is, that, upon examination of the act of 1838, above referred to, pursuant to which this company was incorporated, shows the character of investments, stocks, bonds, etc., in which any part of the capital stock may be invested. Section 3637, R. S., contains limitations upon such company's power to invest its capital or any part thereof, as follows: U. S. bonds, Ohio State bonds, bonds of the county, township or municipal corporations in this State issued in conformity with law; bonds and mortgages on unincumbered real estate, within this State, worth double the amount loaned thereon, and the stock of any national bank located within this State, and the first mortgage bonds of railroads within this State on which default in the payment of the interest coupons has not been made within three years previous to the purchase thereof.

By Section 3628, R. S., limitation is placed upon the investment of funds accumulated in the course of business or surplus money over and above the capital stock of such company.

The statutes thus furnish one method of investment of the company's capital different from that which is provided for the investment of funds accumulated in the course of business and surplus money over and above the capital. It appears clear that from consideration of these acts the company has attempted to accept the benefits thereof, and it is governed in its investments by these sections, which are limitations upon the original act and accepted by the company. It is thereby authorized to invest its surplus funds in stocks of any solvent, dividend-paying institution, incorporated under the laws of this or any other State or of the United States, except its own stock, but when it comes to invest its capital it cannot invest it in any stocks except national bank stocks designated in Section 3637, but must follow strictly the direction to invest its capital in bonds of the nature therein described.

Yours truly,

WADE H. ELLIS,

Attorney General.

ADDITIONAL TO OPINION OF FEBRUARY 11, 1904.

COLUMBUS, OHIO, February 16, 1904.

HON. A. I. VORYS, *Sup't Insurance, Columbus, Ohio.*

DEAR SIR:—My attention having been called to your letter of January 6, regarding the Merchants and Manufacturers' Insurance Co., of Cincinnati, and my answer thereto under date of February 11, and you desiring more specific information as to the operation of Section 6789, R. S., as a limitation upon the right of your department to inquire as to the nature of investments of the capital and funds of fire insurance companies, I would state that, in my opinion, Section 6789 does not protect such corporations in the exercise of a power or franchise not granted in the charter of such company, which, in the case inquired about, regards the method of its investments, the particular acts complained being those performed within the period of twenty years, and at present being performed by such company.

In my opinion, the company cannot protect itself in such illegal investments by showing that it had made similar investments for more than twenty years.

I return herewith the original correspondence.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO THE CENTURY LIFE INSURANCE CLUB OF NEW YORK ACTING AS AGENTS FOR THE RELIANCE LIFE INSURANCE COMPANY OF PITTSBURG.

COLUMBUS, OHIO, March 17, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the 15th inst., enclosing therewith a circular-letter issued by "The Century Life Insurance Club of New York," exhibiting its method of operation on the "neighborhood

plan," also communications of The Reliance Life Insurance Company, of Pittsburg, and the opinion of its solicitor and of its actuary.

From these communications and enclosures I note that the subject of the contention between you is, that the so-called "The Century Life Insurance Club," or its individual members, are acting as *agents* of The Reliance Life Insurance Company of Pittsburg without being licensed by your department, in contravention of Section 283, R. S., and that its method of operation is further in violation of Section 3631-4, R. S., providing against discrimination between insurance of the same class, and offering inducements not contained in the policy of insurance.

I have given this matter a careful examination and, after reading the plan of business as set forth in the printed matter of "The Century Life Insurance Club," together with the opinions referred to, I have arrived at the following conclusion:

1. It is immaterial, from my point of view, whether you consider "The Century Life Insurance Club" as an organization independent from its individual members or merely consider the subject from the standpoint of the powers conferred upon the individual member. In either case we deduce the existence of an agency acting for The Reliance Life Insurance Company of Pittsburg. For this purpose we could treat as merely fictional the creation of its so-called "club," because, as frequently announced by our Supreme Court, the form of organization of any association or corporation can be brushed aside and the true intent and purpose of such organization or association be obtained, and the law would only support the existence of the association or organization for legal purposes, and never permit that to shield the individual members in the performance of illegal acts.

I note the proposition, as contained in the circular matter, that the individual who induces a friend to sign one of the blanks sent out by the club is to countersign the same and mail to the secretary of the club; and for every blank so sent the individual is to receive 25 cents in cash, "and this is only the beginning of the cash reward you will receive for the services which you thus render the club." If the individual, whose name is upon the blank thus secured, becomes a policyholder, the club will pay to the individual thus securing the name $1 for the first member; for the second member, $2; for the third member, $3; and for each member thereafter, the sum of $3. It will be conceded that "The Century Life Insurance Club" is not itself an insurance company, but by the circular matter handed me it is shown that a special arrangement exists between it and The Reliance Life Insurance Company, and the club becomes the conduit through which flow the applications made to the club into The Reliance Life Insurance Company, and it is the beneficiary of the business thus created.

For the purpose of a consideration of the questions arising under Section 283, R. S., it becomes immaterial to characterize such individuals as solicitors, agents, sub-agents, referees, or any other designation, for the name is immaterial when applied to such individuals for the substance of the inquiry is one of powers and the right to exercise the same, independent of the designation given to the person exercising such powers, because Section 283 provides:

> "It shall be unlawful for any person, company or corporation in this State either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of the State, or *in any manner to aid* in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the Superintendent of Insurance, in conformity to the provisions of this chapter."

On behalf of the company, it is contended that this section cannot include within its provisions "The Century Life Insurance Club" and the "neighborhood

plan" adopted by it, and from the letter of its solicitor, under date of March 11, 1904, I quote the following:

> "For the purpose of increasing its (The Reliance Life Iinsurance Company) business it enters into a contract with the individual or corporation of the State of New York, by which it agrees to accept from said individual or corporation all insurance which he may procure, and which is sent to the company in accordance with their rules for determining upon the advisability of assuming the risk; and to pay said individual or corporation for the business thus procured a compensation in commissions — the nature and amount of which are immaterial for the purpose of this discussion. Such contract being entered into, the interest of The Reliance Life Insurance Company in the said individual or corporation ceases other than to receive such insurance as he sends and to pay him such compensation as his contract calls for. If he sends no insurance, he receives no compensation; and the amount of insurance he sends, and the manner in which he procures it is a matter resting altogether with the said individual, or corporation, of New York."

I could not, in clearer language, define the relation of agent to principal than has been done in the quoted language above. A service is performed, for which the individual or corporation receives a compensation, and it is left to the insurance company to determine whether it shall accept or reject the business proffered. This is exactly the same relation which any individual sustains as agent or solicitor to the insurance company with whom he is engaged.

But reverting to Section 283, it will be observed that that act includes those who "in any manner aid in the transaction of the business of insurance." The qualifying phrase, thus added to the subjects preceding it, does not limit or confine the construction of the term to agents with full authority, but those who have any authority to act on behalf of the company.

It was held by the Supreme Court of Ohio, in the case of Insurance Company against Eshelmen et al., 30 O. S., 647, that,

> "A sub-agent of a life insurance company, appointed to represent it *in a particular branch of its business,* becomes, in reference thereto, the direct representative of the company * * * "

And on page 657 say,

> "Many foreign life insurance companies have established agencies in this State, having general and sub-agents in great number soliciting patronage from the people. Such corporations must not be surprised if they are held to strict accountability for the conduct of their agents here while acting in what appears to be the scope of their employment."

And in the case of Krumm v. Insurance Company, 40 O. S., 225, the court said:

> "Where an application has been made to such sub-agent, and such application has been sent to the office of the agent authorized to issue the policy, the company is liable for the loss occurring * * * "

And in a general sense an insurance agent is defined as "An agent employed by an insurer, usually an insurance company, to perform some act or acts in furtherance of the business of his principal. In a narrower and more familiar sense, the term is used to designate those agents employed to solicit risks and effect insurance."

I can but conclude from the character of the business to be performed by The Century Club that the members thereof, and the club itself, are included within the terms of Section 283, R. S., and that they do aid in the transaction of the business of insurance, and so doing they are required by said section first to be licensed by you before being legally authorized to act in such capacity.

2. But it is contended that the plan of business to be carried on by "The Century Club," being the neighborhood plan, is forbidden by Section 3631-4, R. S., and that such plan constitutes a discrimination between the insurants of the same class, and is allowing an inducement to insurance as is forbidden by such act. In so far as I have obtained information from the printed matter handed me, I cannot agree that the offer of membership in the so-called "Century Club," with the social features and entertainment promised to those who may come to the city of New York and enjoy the advantages thus offered, or that the payment of the amount specified for commissions on business secured through the influence of such members, is either a "discrimination" or a forbidden "inducement to insurance," as mentioned in such act. I observe that the individual who thus takes insurance under this "neighborhood plan" pays the same premium and obtains the same character of policy without any alteration or change therein; and whatever he receives is in the nature of compensation paid to him for services performed in obtaining the signatures of others and applications subsequently made, which fees will be paid him when such applicant becomes a policyholder in the company. There is nothing in the contractual relation between a policyholder and the company by reason of the policy issued to him that would forbid him performing other services for the company, such as provided for in the "neighborhood plan," and is not forbidden by the section in question. For in this plan, if I have read it aright, it does not become an inducement or reward for taking insurance by such plan, but merely as commissions or compensation for work performed as an agent for the company accepting the application.

Very truly yours,

WADE H. ELLIS,
Attorney General.

A BUILDING AND LOAN ASSOCIATION MAY NOT LOAN ITS FUNDS WITHOUT ANY OR FURTHER SECURITY THAN THE PROMISSORY NOTE OF THE BORROWER.

COLUMBUS, OHIO, March 28, 1904.

HON. A. I. VORYS, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge your communication of the 4th inst., accompanying the letter of Mr. H. M. Farnsworth, Secretary of the Brooklyn Building and Loan Association, with a brief upon the proposition involved in your letter, which proposition is as follows: Can a building and loan association loan its funds without any other or further security than the promissory note of the borrower? An answer to this question involves the construction of paragraphs 9 and 10 of Section 3836-3 R. S., being Section 3 of the act found in 88 vol. O. L., 469.

I have read with much interest the brief which has been prepared and filed with me contending for the authority which has been denied by your department. The major part of the brief is taken up with the definition of the word "security," being the word, which, according to Mr. Farnsworth should be susceptible of such construction as to insure the existence of the power. I note that in the main he employs the definitions of the word "securities" as used in connection with banks

and banking, which have been construed by the courts relative to the powers of such institutions, and contends that the definitions so used should be final of the question here presented. With this I cannot agree, for to determine the true construction of a word used in connection with one subject matter is not an absolute test when applied to the same word, used in connection with another subject matter. There is a wide distinction between banks and building and loan associations as defined by the statute of Ohio, and it should be borne in mind in arriving at the true solution of this question that the powers of these certain forms of corporations are separate and distinct from all others. For instance, Chapter 16, Title 2, R. S., embraces savings and loan associations, safe deposit and trust companies, collateral loan companies and bond and investment companies; Chapter 16*a*, Title 2, embraces banks of issue and the free banking act, so called; while Chapter 17 of the same Title, embraces building and loan associations and other companies and associations unnecessary to here consider.

These several characters of financial institutions each have their powers separately defined, no two of them having identical powers. And while a building and loan association is, in a certain sense, a financial institution, yet its powers are so circumscribed and limited that no one would contend that the definition of the word "securities" as used in Section 3806 R. S., 3821*d* R. S., 3821*g* R. S., 3821-69 R. S., should be used in identically the same sense as when used in the section cited from the building and loan association chapter, and yet this is the argument contended for in the brief advocating the construction for the power of the association.

I would employ that very plain rule of statutory construction which insists that "The policy which induced a law is to be considered if there is doubt as to its meaning," and that "The legislative policy in passing a statute may be regarded in deciding between conflicting constructions." And further: "The intention is to be deduced from a view of every part of the statute and when ascertained will prevail over the literal meaning of words." Considering the purpose of the organization of the building and loan associations as being different from that of a banking organization, and that the entire act governing such associations separates them into a different class from that of banks, I do not think it helps to a solution of the question to consult the adjudicated definitions of the word "security" in those cases involving banking powers.

In the case of State of Ohio ex rel. Attorney General against the Greenville Building and Savings Association, 29 O. S. 92, 101, the association was charged by the Attorney General in an action in Quo Warranto with "doing a general banking business with its funds; and that it had been and is now loaning its funds to persons other than its members and depositors, and discounting notes, orders, and securities for such other persons." And while the court there did not pass upon the exact question raised by your inquiry, the court discountenanced the employment of methods and loaning its funds similar to those of banking associations and said: "There is no countenance to be given to the idea that associations incorporated under the act above referred to can be used by capitalists as instrumentalities for obtaining more than the legal rate of interest on their money by depositing it with the association, and having it used in modes foreign to the declared purposes of their organization." The court did find and decree "That the defendant be ousted from the assumed right of using its funds in making loans to members or depositors upon their promissory notes, at rates greater than the legal rate of interest, in addition to the premium bid for the right of precedence, or in purchasing or discounting notes from such members or depositors at the usurious rates of interest; and also from using its funds in loaning the same to or in purchasing and discounting notes from persons other than its members or depositors upon any terms."

I cannot, with counsel, concede that forbidding the association from loaning upon promissory notes at a rate of interest greater than the legal rate, or in purchasing or discounting notes at usurious rates would have been sustained by the court if it had been done at the legal rate of interest.

It is necessary to have inserted in the constitution and by-laws of the association the terms, conditions and securities upon which the association will make loans. If the name of the member was the security contemplated in the statute it would not have used the term "release the securities" as used in the tenth paragraph of the act: it would also be possible to make gross discrimination between members in making loans. The provision in regard to securities must operate with uniformity and without discrimination. Endlich on Building Associations, Second Edition, Section 312, reads: "The mere personal responsibility of the borrower does not appear over or anywhere to have been regarded as a sufficient basis of a loan by the building association."

I further arrive at this construction by the uniform practice of the department since the enactment of the law for the organization of building and loan associations, and such practice adopted by the department should not be lightly disregarded. The power to draw an ordinary bank check against the deposit of a member is as well sustained by absence of express prohibition as to loan on individual notes without other security, and while in some instances such practice has been assumed by certain associations, and recognizing that such associations have only such powers as are expressly conferred upon them by law or necessarily implied to carry out the express powers, I am of the opinion that both are equally wrong as being in excess of the powers conferred, and should not be approved by the department.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO BOND OF UNITED STATES FIDELITY AND GUARANTY CO.

Aug. 18, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your communication bearing date of August 12th, 1904, enclosing bond of the United States Fidelity and Guaranty Company received. You inquire whether the conditions in said bond are in accordance with section 3631 R. S. and should be approved by you? In reply I beg to advise you that section 3631 of the Revised Statutes of Ohio expressly provides the conditions that are to be contained in the bonds required under said section, and in my opinion you would not be warranted in approving any bond that does not conform to the conditions therein provided. The conditions in The United States Fidelity and Guaranty Company's bond, enclosed by you, are not in conformity with said section and the same should not be approved.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ORGANIZATION OF THE OHIO MUTUAL LIFE INSURANCE COMPANY UNDER THE STIPULATED PREMIUM LAW.

October 31, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Acknowledging receipt of your communication accompanying a letter of B. F. Coan, secretary of the Ohio Mutual Life Insurance Company of Cin-

cinnati, I have given consideration to the question suggested by you, growing out of the plan of business contemplated by that company, as disclosed in his letter. The facts bearing upon the question proposed may be summarized as follows:

The Ohio Mutual Life Insurance Company is incorporated under the Stipulated Premium Law, found in 93 O. L., 343. It was organized without capital stock, and it has since been carrying on the business of life insurance strictly under the provisions of that act. That law was passed April 25, 1898, and was repealed April 22, 1904. (97 O. L., 161.) In the repealing section the following language is used:

> "The repeal of said act shall not affect corporations or companies now lawfully transacting the business of life insurance on the stipulated premium plan in this State, under authority of said act, and said companies and corporations now so transacting such business under authority of said act shall continue to be authorized and regulated by said act."

The letter of the secretary disclosed the intention of the company to capitalize on a small basis (the amount of the capital stock proposed is not given), for the purpose of acquiring funds to aid in increasing their business, and he assumes that it was contemplated in the law under which it was organized that such companies might have capital stock, if they so desire. The plan is submitted to your department for your consent, and the legality of such procedure is, by you, submitted to this department for answer.

The following questions are raised thereby as essential for determination:

1. Did the Stipulated Premium Law authorize the creatioh of companies, organized thereunder, with a capital stock?

2. If the law did so contemplate, can the incorporation be for less than $100,000?

Answering the first question suggested, upon examination of the law under consideration, it seems apparent to me that a stock company was not to be included within the Stipulated Premium plan. We arrive at this conclusion by the consideration of the law itself and, in addition thereto, the uniform practice of the department thereunder. The terms "stockholders" and "stocks" are not used in connection with the membership in any way, and the mutuality of the plan is plainly relied upon and the members thereof are designated as "policy holders," and the amount of the deposits made by such companies is designated by Section 2 of the act "to be held in trust for the benefit of the members of said corporation or their beneficiaries." The funds are to be collected from "members," and accumulated for the purposes specified in the act, and no provision is anywhere made contemplating or authorizing dividends or profits of any kind to stockholders. Under Section 6 of the act the policy holders are to make good any impairment of the reserve fund, and the members or policy holders may be assessed therefor.

Many other sections of the act, which may be cited, bear out this same general idea that the member or policy holder is considered and not the stockholder.

Again, it might be urged that since the repeal of the law under which this company is operating no additional or other powers should be extended to it by construction, and no construction should be adopted which would enlarge existing powers beyond those strictly contained within the limits of the act. In the repealing clause, heretofore referred to, the companies and incorporations now transacting business on the authority of that act "shall continue to be authorized and regulated by said act." The act in question forms the basis for a separate and distinct class of insurance from that conferred upon companies and corporations by other chapters and sub-divisions of chapters of the Revised Statutes. The Stipulated Premium plan is nowhere, so far as I have observed, considered as part of any other plan of life insurance, but stands unique in all its methods. The Supreme Court

has frequently held that the chapters and divisions of chapters of the Revised Statutes, providing for special forms of corporations, shall govern and control those special corporations to the exclusion of all general provisions; that the special provisions made withdraw such corporations exercising such powers from the general provisions conferring other separate and distinct powers. This is helpful to our conclusion that, in order to find authority for the issuing of capital stock by such companies as are organized under the law in question, we would have to resort to the assumption of powers conferred by other sections of the statute and not found within the Stipulated Premium Law.

Second. If it is contemplated issuing capital stock for less than $100,000, I am of the opinion that Section 3591, R. S., would forbid the organization of such company and likewise the issuing of a capital stock to a less amount than $100,000 paid up. It will be observed that Section 3, of the Stipulated Premium Law, provides that the provisions of Chapter 10, Title 2, Part 2, of the Revised Statutes, shall be applicable so far as the same are not inconsistent with the provisions of such act, and as that act does not mention any less amount of capital stock to be required (if it should be contended that it contemplates the issue of capital stock), it follows that Section 3591, R. S., which is part of the chapter, title and part of the Revised Statutes in question, governs the amount of the capital stock that may be issued by joint stock companies and does not permit the organization of a joint stock company with a less capital than $100,000.

Very truly yours,

WADE H. ELLIS,
Attorney General.

IN THE MATTER OF THE GRAND FRATERNITY.

November 2, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — In the matter of the Grand Fraternity submitted by you to this department upon the supplemental brief and statement of the Vice President of that Association, I beg to say that I have given careful consideration to the matter contained in his brief, and have again examined the entire question in the light of the modified certificates which the company proposes to issue to its members within this State, and my conclusions are the same as those expressed in my letter of August 3d, last.

I find no other authority, and nothing new in principle whereby the association had modified its form of certificate to obviate the objections made to the former ones. A portion of the opinion expressed in my letter of August 3d, has been by the association assumed as a guide for the drafting of a new form of certificate, which the association has hoped would remove all the objections entertained by this department to their old form of certificate. The part which it quotes is as follows:

> "If the certificate provided that the member was to receive after a stated period that which he had paid into the credit of the reserve fund, it would present a different question than is here presented. But there is an agreement to pay a specified withdrawal value, together with a return dividend from savings in death losses and expenses, etc., etc.

This objection is sought to be obviated in two ways. First, by representing "that the language to which the objection is made is no part of the constitution or the by-laws of the association, but merely an explanation upon the back of the

certificate, made upon the authority of the actuary who computes the rate and withdrawal tables." Second, by a modification of the language used in the certificates descriptive and explanatory of "withdrawal values, paid up certificates, return dividends" included in paragraph six, "for loan values" or "extended protection."

The supposed compliance with the suggestion made in the opinion of August 3d falls far short of the essentials demanded. The fundamental objection is not touched by the supposed modification of the plan or of the option features contained in the certificate. The objection I make to the form of the certificate has certainly not been overlooked by the learned counsel for the association, which is that the propositions made in the certificate are not authorized by the act regulating fraternal beneficiary associations of the State, and cannot provide, by what substantially amounts to the adoption of an endowment feature, for the payment to the member of any amount from the funds of the association independent of whether they are due to such person for *death benefits or benefits in case of temporary or permanent physical disability, either as a result of disease, accident or old age.* I hold in the former opinion that Section 5 of the fraternal act fixes the character of "benefits" which an association doing business under that chapter, can lawfully pay to its members. It is not every thing which constitutes a "benefit" that an association of this character is authorized to pay or do for its members. It would be a benefit (speaking in the broad, but not the statutory sense) to pay to a member an annual endowment; but such "benefit" would not be embraced within the definition of that term as used in Section 5 of the act in question. Such payment would not be predicated upon death or temporary or permanent physical disability, and therefore the payment of that character of benefits would not be authorized by the act regulating fraternal beneficiary associations, and the attempt to issue that form of certificate would be in excess of its powers.

Again in consideration of the proposition made by the counsel for the association, that the language used "is no part of either the constitution or the bylaws governing the certificate, but merely an explanation upon the back of the certificates, made upon the authority of the actuary" — we must insist that this cannot be taken seriously, for it is no part of the certificate, and if it is not authorized by the constitution or by-laws, it certainly does not serve any other purpose placed upon the back of the certificate than to decieve the member into believing that the propositions indorsed thereon, contain benefits which accrue to him by virtue of his membership. These several propositions are classified under the head of *"benefits"* in the certificate and arranged under the heading printed in large type as follows: "AN ABSTRACT OF BENEFITS GRANTED AND CONDITIONS GOVERNING THE ISSUE OF THIS CERTIFICATE, SET FORTH IN FULL AND AT LARGE IN THE CONSTITUTION AND BY-LAWS OF THE GRAND FRATERNITY, ETC."

I can only deduce from that language that the several propositions following it, are represented as being contained in the constitution and by-laws of the association and that they are benefits which are granted to the individual. For if it does not mean that, the definition of Talleyrand should be accepted, that the chief purpose of all language is to conceal our meaning.

Having given careful consideration to each and all of the propositions contended for in the brief of counsel for the association, I find nothing therein to change the opinion formerly expressed, that the character of business sought to be done by this association under favor of the Fraternal Act, is not authorized, and the same should not be approved by your department.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COMPANIES ORGANIZED IN ANOTHER STATE RECEIVING APPLICATIONS FOR INSURANCE WITHIN THIS STATE, ETC.

November 8, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 29th ult., containing a request for an opinion upon the following questions:

(1) Can an individual or corporation within the State of Ohio solicit or receive applications for fire insurance for companies organized under the laws of any other state or country which are not licensed within this State?

(2) Can an individual, a resident of the State of Ohio, make his application by mail for insurance direct to such company without violating any law of this State?

Considering the first question suggested, I refer you to Section 283, R. S., which is as follows:

> "It shall be unlawful for any person, company or corporation in this State, either to procure, receive or forward applications for insurance in any company or companies not organized under the laws of this State, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and unless duly licensed by the superintendent of insurance."

It will be observed by the foregoing section that the person or corporation is forbidden "to procure, receive or forward applications for insurance" in any company unless such person or corporation has been duly licensed by the Superintendent of Insurance. Prohibition in that section operates against the individual who seeks to thus represent the insurance company. Such person, before he can lawfully solicit applications for insurance in any such company, must be licensed by the Superintendent of Insurance, and if not licensed, the same is forbidden by such section. Not only is the individual forbidden by the section above cited from procuring, receiving or forwarding applications for insurance in any such company, but by Section 3656, R. S., the prohibition is made more definite and specific against any person acting as agent within the State of Ohio for any company not licensed within such State. In that section the following language is used:

> "Nor shall any person or corporation act as agent in this state for any company, association or partnership mentioned in this section, directly or indirectly, either in procuring applications for insurance, taking risks or in any manner transacting the business of insurance, until it procures from the Superintendent of Insurance a license so to do, stating that the company, association or partnership has complied with all the requirements of this chapter applicable to such company," etc., etc.

By Section 289, R. S., it is forbidden to any company to enter into any contract substantially amounting to insurance, etc., etc., unless such company or companies have complied with the laws of the State regulating the same. From that section we quote the following language:

> "And it is unlawful for any company, corporation, or association, whether organized in this State or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contract substantially amounting to insurance, or in any manner to aid therein, in this State or to engage in the business of guaranteeing against liability, loss or damage, unless the same is expressly authorized by the statutes of

this State, and such statutes and all the laws regulating the same and applicable thereto have been complied with," etc.

The denial of the right to represent a non-licensed company within the State of Ohio, and a denial of the right of such company to enter into any contract substantially amounting to insurance within this State, are thus definitely expressed.

In order to bring your question within the prohibitions contained in the foregoing sections, it is only necessary to determine whether a person designated by the company to receive applications for insurance in the manner suggested by the question, is or is not an "agent" of such company.

The insurance laws of the State of Ohio have defined an "agent" in the following language:

> "Sec. 3644. A person who solicits insurance and *procures the application therefor,* shall be held to be the agent of the party, company or association thereafter issuing a policy upon such application or renewal thereof, anything in the application or policy to the contrary notwithstanding."

The statute thus clearly defines that such person who "procures the application," or in the language of Section 283, "procure, receive or forward applications," becomes the agent of the insurance company.

In addition to the statute, which seems to be definite enough for all purposes, we cite the following decisions supporting the contention, that persons appointed to solicit insurance and receive applications, are held to be the agents of the company:

Insurance Co. v. Aickles, 23 O. C. C., 594.
Insurance Co. v. McGookey, 33 O. S., 555.
Insurance Co. v. Williams, 39 O. S., 584.
Insurance Co. v. Eshelman, 30 O. S., 647.
Insurance Co. v. Wilkinson, 13 Wall., 222.
Rowley v. Empire Ins. Co., 36 N. Y., 550.

Hence, I conclude, that the person who solicits or procures applications for insurance, is an agent of the company; and if such soliciting or procuring of applications, is for any such company as is not duly licensed by your department, such agent thereby violates the provisions of Sec. 283, R. S., and is subject to the penalties provided for in that chapter; and so far *as concerns the liability of the agent* acting within this State, to the penalty prescribed, it matters not where the contract of insurance is made. It is the act of the agent *within the State,* which is declared to be unlawful, and which is forbidden.

Pierce v. People, 106 Ill., 11.

Second. The second question eliminates from consideration the receiving or forwarding of applications by an agent of the company for such purposes, and presents the query as to whether an owner of property, in this State, can make his application direct to an insurance company organized under the laws of another state, or country, and which is not licensed to do business within the State of Ohio, without violating any law of the State?

The party who seeks insurance upon his property located within the State from a company without the State, in the method suggested, does not obtain it through an intermediary or agent within the State, but sends his application direct to such company, by mail, and receives from such company his policy of insurance. Does that amount to "doing business" within the State of Ohio?

The analysis of Sec. 289, R. S., compels us to emphasize the fact, that that which is forbidden to the unlicensed company is "to engage in the business of in-

surance or entering into any contract which substantially amounts to insurance," *in this State*. The statute has no extra-territorial effect. No statute of Ohio forbids a resident of this State obtaining his insurance elsewhere, than with the companies licensed to do business in this State; it does not assume to make void any contract of insurance made in another State, upon property in this State; and if it should attempt by act to forbid a citizen of this State to make a contract without the State, with a foreign company not having the right to do business here, such act would be void for want of power to so provide; for as was said by the Supreme Court of Illinois in Pierce v. The People, 106 Ill., 11-19:

> "It may be admitted that it was incompetent for the legislature, in endeavoring to accomplish this object, to say that a citizen of this State should not make a contract with a foreign company not having the right to do business here, for the insurance of property in this State."

Is then the forwarding of the application to a foreign company and acceptance of the policy, by mail, the "doing of business" *within the State?*

In the case of Hachney v. Leary, 12 Or., 40, the Supreme Court of that State said:

> "Taking an application for life insurance by an agent in Washington Ty., and forwarding to the insurance company in Kansas, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not "doing insurance business," in said Territory, within the meaning of the statute thereof."

See also:

Hyde v. Goodnow, 3 N. Y., 270.
Lamb v. Bowser, 7 Biss., 373.
Western v. Insurance Co., 12 N. Y., 261.
Taylor v. Insurance Co., 9 How., 400.

The Supreme Court of New Jersey in Insurance Company v. Kinyon, 37 N. J. L., p. 33, said:

> "A contract of insurance made out of this State on property here situated, is valid, and will be enforced here."

In the case of Hyde v. Goodnow (*Supra*) the Supreme Court of New York construed the Ohio statute, and held that where the contract was not made in Ohio, although on property in Ohio, the statute of Ohio had no effect, as it was not the doing of business within Ohio. Citing further:

People v. Imlay, 20 Barb., 68.
Huntley v. Merrill, 32 Barb., 627.
Williams v. Cheney, 3 Gray, 215.
Insurance C. v. Huron S. L. Co., 31 Mich., 346.

For the reason, that, under the circumstances stated in the question, the contract of insurance would be made in the foreign State, and not within the State of Ohio, I am of the opinion, that a resident of the State mailing his application direct to such company, and receiving from it a policy upon property situated within this State, does not violate any law of this State.

Yours truly,
WADE H. ELLIS,
Attorney General.

INSURANCE EXCHANGE COUPON CO. OF CLEVELAND, O.

November 9, 1904.

Hon. A. I. Vorys, *Superintendent of Insurance, Columbus, Ohio.*

Dear Sir:—I have yours of the 2nd inst. transmitting to me the literature, form of contract, coupons and other blanks used by the Insurance Exchange Coupon Company of Cleveland, Ohio, concerning which you request my advice as to the legality of the scheme therein presented.

In answer thereto I beg to say that, upon the examination of the enclosures mentioned, and especially the letter of the company itself, under date of August 1, 1904, the scheme or plan presented by the company is as follows:

The company sells to merchants, and others, coupons in book form of one hundred, more or less, of the nature and kind of those enclosed. The coupon upon its face bears the name of "The Insurance Exchange Coupon Company. Redeemable value, four mills." And on the back thereof the following:

> "The coupons of this company are issued at the rate of four per cent. upon the purchase price of your purchase, and upon compliance with the rules of this company are redeemable at the office of the company in payment for insurance. The Insurance Exchange Coupon Company. D. J. Brennan, General Manager."

Upon each and every cash purchase from the merchant holding the coupons, amounting to ten cents and upwards, that a customer may make, entitles such customer to one coupon or more, computed upon the amount of the sale; that when the customers have collected amounts aggregating ten, fifteen or twenty dollars they are supposed to be brought to the office of such company to be redeemed for insurance premiums written by insurance companies doing business within the State of Ohio, with the option to such holder of taking either life, fire, accident or health insurance, but before redeeming any of such coupons it becomes necessary for the customer presenting the same for redemption to become a member of the Merchants' Exchange Coupon Company upon payment of one dollar, which amount pays his membership for one year.

This, in brief, is the plan or scheme upon which the company operates, and for this purpose they have become incorporated under the laws of this state. The mere fact of its incorporation under the laws of the State of Ohio does not validate the scheme if it is, in any respect, violating the laws of the State.

I have not considered this plan or scheme in connection with the chapter of the Revised Statutes of Ohio governing bond and investment companies, to wit, Sections 3821r to 3821z, R. S., nor have I considered the same with reference to the insurance laws of the state as bearing upon the question of unlawfully soliciting or selling insurance of the various kinds embraced in the plan of the company, but for the purpose of your inquiry I think it fully answered by referring to the act of the General Assembly of the State of Ohio passed April 23, 1904, entitled: "An Act to control the issue and redemption of trading stamps and other devices." (97 O. L. pp. 277, 278.)

I am of the opinion that the scheme or plan of the Insurance Exchange Coupon Company, as disclosed by the literature of said company before me, is forbidden and made unlawful by the act above cited, and that such company, or any person, firm or corporation engaged in such business is subject to the penalties therein provided.

I herewith return to you the enclosures referred to.

Very truly yours,

Wade H. Ellis,

Attorney General.

IN MATTER OF INSURANCE EXCHANGE COUPON COMPANY OF CLEVELAND, OHIO.

December 6, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your favor of the 28th ult., containing copy of the letter received by you from Mr. Clifford Haskins, Attorney-at-Law, Cleveland, Ohio, referring to the opinion rendered by this department under date of Nov. 9th, regarding the Insurance Exchange Coupon Company of Cleveland.

The letter of Mr. Haskins asks for a further expression of opinion covering the particular respects in which the plan of the company is in violation of, or in conflict with the provisions of the act of April 23, 1904, (97 O. L., 277).

It will be noted in the opinion first expressed that I have not considered the plan or scheme of this company in the light of the statutes governing bond and investment companies, (Sections 3821*r*, 3821*s* R. S.), nor with reference to the insurance laws of this state as bearing upon the question of unlawfully soliciting or selling insurance without being first duly authorized by the department of insurance.

I thought it sufficient to refer to the act as being itself fully explanatory of what is required of all companies selling or issuing "any stamp, trading stamp, cash discount stamp, check ticket, coupon or other similar device, etc."

The first section of the act plainly requires all such coupons, etc., to be redeemable "in lawful money of the United States." It was sufficient in determining the illegality of such a scheme as was presented by the Insurance Exchange Coupon Company to point out that the coupon thus sold by it was not redeemable in lawful money of the United States; but independent of that fact, there are other and equally as serious objections to the same, as I think the law governing bond and investment companies, above referred to, would also prohibit the class of business engaged in by this company, if its business was otherwise lawful, unless the terms of the statutes governing such companies were fully complied with.

I trust the above is sufficiently definite to point out the objections urged to this character of business.

Very truly yours,

WADE H. ELLIS,

Attorney General.

THE POWER OF INSURANCE COMPANIES TO PLACE SURPLUS INSURANCE WITH OTHER COMPANIES.

December 13, 1904.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — Your communication presents for my consideration the following question:

Certain insurance companies, known as A, B and C, incorporated under the laws of this State have engaged in the following practice for more than twenty years: When a line of insurance is offered larger than it desires to carry, these companies place the surplus over and above what they desire to carry in other insurance companies in the following manner: An officer of the company will act as the duly licensed agent of such other insurance companies, and through him, as such agent of the other insurance companies, the surplus line of insurance is thus placed, but the business is conducted on the books of the A, B or C company as the

case may be. The premiums on the surplus lines are paid by the A, B or C company to such other insurance companies, and charged by the A, B or C company to its customer, the commissions thus being retained by the A, B or C company.

It is understood from the foregoing, that the A, B or C company does not issue its policy for the entire line, and then attempt to take for itself insurance in other companies to cover its excess of liability; but I assume it is meant that the company issues its own policy for only a certain per cent. of the entire line and secures through this plan, for the insured, policies in some other companies for the balance of the amount desired.

This is affected through an officer of the company acting as an agent for the other companies participating in the insurance, and through him, the agent, the surplus line is thus secured. The mere fact that the entire line is carried upon the books of the first company, does not raise any question of power so to do in such company. As to whether it rightfully belongs on the books of the company or should be otherwise accounted for by the officer thereof who is acting as such agent, may become a question of bookkeeping, but one in which the State cannot be interested, for no right or power is thereby exceeded.

It would be conceded that an agent, other than an officer of such company, could thus place the insurance among a given number of companies, so as to have the entire line carried; a practice which is quite common among individual agents. There is nothing in the law to prohibit the officer of one company acting as the agent of another company if he so desires, and he can thus lawfully accomplish the insurance of a large line as such agent, the same as any other individual could.

I am of the opinion that the powers vested in such corporation are not thereby exceeded, and so holding, the latter question as to the statute of limitation is of no practical importance.

Very truly yours,
WADE H. ELLIS.
Attorney General.

IN THE MATTER OF THE ECONOMY BUILDING & LOAN COMPANY OF CLEVELAND, OHIO.

December 19, 1904.

HON. A. I. VORYS, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—Your communication of the 7th inst., together with the printed matter enclosed by you, issued by the Economy Building and Loan Company, of Cleveland, Ohio, presents the following questions for solution:

> 1. "Can a building and loan company take chattel security, or pledge of chattels, to secure loans made by it to its members?"

A review of the acts of the General Assembly of Ohio, under which such corporations were created, discloses, among other powers conferred upon such associations, the following:

By an act of February 21, 1867, entitled "An act to enable associations of persons, for raising funds to loan among their members for building them homesteads and other purposes, to become bodies corporate," found in 64 O. L., p. 18, it was provided, among other things, that such associations might

> "Acquire, hold, encumber and convey all such real estate and *personal property* as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of its business."

The foregoing act was repealed by the act of May 5, 1868 (65 O. L., pp. 137, 138), and as to the power above mentioned the repealing act contained the following in lieu thereof:

> "Also, to acquire, hold, encumber and convey all such real estate and *personal property* as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of its business."

By the act of May 9, 1868 (65 O. L., pp. 173, 174), Sections 1 and 2 of the above-cited act were repealed, which sections contained the language in question. And Section 2 of the repealing act contains identically the same language conferring the power to "acquire, hold, encumber and convey all such real esate and personal property as may be legitimately pledged to it on such loans," etc.

By the act of May 8, 1886 (83 O. L., pp. 116, 117), Section 3833, R. S., containing the power above quoted, was repealed, and that section re-enacted the same language as that used in the original act, retaining the power therein quoted as an express power of building and loan associations.

By the act of May 1, 1891 (88 O. L., pp. 469, 477), the entire law regulating building and loan associations was amended, and in Section 3 of such act (*supra*, p. 470) the following language was retained therein as defining the powers of such associations in that regard:

> "To acquire, hold, encumber and convey such real estate and *personal property* as may be necessary for the transaction of its business or necessary to enforce or protect its securities. * * * To make loans to members and depositors on such terms, conditions and securities as may be provided in the constitution and by-laws."

The same language is retained in the statutes as they now exist (Bates' Annotated Ohio Statutes, 4th Edition), Sections 3836-3.

Section 7 of the by-laws of this association, as amended on the 30th of January, 1904, provides:

> "Section 7. Loans may be made to members on real and personal property,"

and I am of the opinion that the language used in all of the acts above cited, and retained in the statutes as now existing, defining the powers of such corporations, authorizes the board of directors of such associations to provide for loaning its moneys to members upon *personal property* as well as real estate, and that, if it is necessary to enforce or protect its securities, the association is authorized to take into its possession the personal property held as the security for any such loans.

The foregoing conclusion has been reached by consideration of the statute law alone, but the same seems to be abundantly sustained by the courts:

> "The authority to grant loans * * * to its members being given to the building association, the right *to take security* for the performance of the undertakings which form the lawful consideration, on the part of the recipients of such loans, follows by necessary implication."
>
> Massey v. B. & L. Assn., 22 Kan., 624.
>
> Endlich on Building Assns., par. 390.

> "The security usually required in building associations is that of bond (or note) and mortgage, accompanied by an assignment of the stock, upon the strength of which the advance is made, as collateral. But unless the statute or charter be unequivocal in its requirements that

the security taken shall be such, and none other, the *building association* has the right to take ansy security which in the ordinary transaction of business are customary."

Union B. &. L. Assn., "Masonic Hall Assn.," 29 N. J., Eq., 389.
Also Endlich, *supra,* 396.
North Hudson, etc., Assn. v. Bank, 79 Wis., 31.

2. Your communication and the literature of the company accompanying it presents a further question, growing out of the method of making loans proposed by this company. It is shown by the report of the examiners, filed in your department and submitted with your letter, that the following method is adopted in making loans to depositors:

> "A party wishing to borrow $25 makes application for a loan of $25. When the loan is granted, $25 is paid to the borrower, $3 is retained as loan fees; $2 is placed to the credit of the fee account and $1 is placed to the credit of the borrower *as a deposit. When the loan is repaid by the borrower the* $1 *placed to his credit as a deposit is transferred to the fee account.*"

In this connection I quote the following from the report of the examiners:

> "The company's books show the number of persons owning running stock to be 757. Only 47 of this number own stock which is shown to be worth more than $1. In both cases the stock credit consists of one payment of 50 cents, to which is added the dividends which have been declared thereon."

I also quote the following:

> "Prior to January 30, 1904, the by-laws only permitted loans to be made to members, and the application for loan on chattels contained the following clause:
>
> "'In making this application I also subscribe for one share of the installment stock of The Economy Building and Loan Company, and agree to pay for the same as provided in the by-laws of said company, and I hereby assign said stock as additional security for this loan, or any other indebtedness, either now or hereafter due or to become due to said company.'
>
> "In only a few instances has ever more than one payment of 50 cents been made on the shares of stock required to be taken by borrowers."

A consideration of these portions of the report of your examiners makes evident what seems to be a mere fiction of the company, so as to apparently comply with the law, which provides that loans can only be made to members and depositors.

From the earliest act regulating building and loan associations until the act of May 1, 1891, a provision was inserted by the General Assembly in each and all thereof, and especially in the title of the acts showing the purpose of such associations to be "for raising funds to be loaned among their members." In the last-named act the power of making loans was enlarged in the following language:

> "To make loans to *members* and *depositors* on such terms, conditions and securities as may be provided in the constitution and by-laws."

This language is preserved in Section 3836-3, R. S. (Bates' Annotated Ohio Statutes, 4th edition).

The theory upon which the powers of building and loan associations are sustained is the mutuality of the enterprise, that it is co-operative, that each person participating in the privileges thereof is a member, or, by the more recent enlargement of the powers, is a *member* or *depositor*, so that it is only this class of persons who are entitled to participate in the advantages of borrowing of such associations. The members and depositors must be so *bona fide*. Their membership in such association should not be colorable merely in order to afford them the privileges of such association. The facts appear, from the report of the examiners, sufficiently clear to justify the statement that in a great majority of instances cited in the report the relation of member or depositor is merely fictional. The report shows that only 47 out of 757 persons who own running stock have paid more than $1 thereon, and that in most of the cases the stock credit consists of one payment of 50 cents. Regarding depositors, of the 838 depositors shown by the company's books only one has more than $1 standing to his credit. The fictional character of this class is further made evident by the statement that, when the loan is repaid by the borrower, the $1 placed to his credit as a depositor is transferred to the fee account.

I am of the opinion that the statutes governing building and loan associations do not contemplate this form or method or procedure in acquiring the advantages of such associations.

It was said in the case of Bates v. The People,s, etc., Assn., 42 O. S., p. 65, that:

> "A person who applies to a building and loan association for a loan of money, and deposits therewith a sum of money, however small, for the purpose of making himself eligible as a borrower, and thereby receives a loan, is estopped, when sued for the money by the association, from denying that he was, in fact, a depositor of the association."

While the foregoing is true as between the association and the person obtaining the loan, yet it was said by the Supreme Court:

> "Whether this deposit would be considered as colorable merely, and an evasion of the suit, in an action by the State to punish the usurpation of the franchise not granted by the charter of the plaintiff, we need not now inquire."

In the case of State ex rel. v. Oberlin Building and Loan Assn., 35 O. S., 256, the Supreme Court laid emphasis upon the proposition that it could only be members who were entitled to loans. In the case of Bay State B. & L. Assn. v. Broad, 136 Cal., 525, the Supreme Court of that State said:

> "Whether a loan of its money by the plaintiff to one who is not one of its members or stockholders is an unauthorized exercise of corporate powers is a question which cannot be raised collaterally by individuals, but can be presented for determination only in a direct action by the State against the corporation."

The above case holds that the borrower is not at liberty to make the defense of lack of power, as he is estopped from setting up *ultra vires* in the corporation.

By the foregoing facts it is evident that the purpose of the organization of building and loan associations, to-wit, "to enable associations of persons to raise funds to be loaned among their members," etc., could never be accomplished if the practice was permitted whereby a member or depositor, so-called, could pay in 50 cents or $1 upon a share of stock and be granted a loan thereon and immediately assign the stock back to the association and close the account so far as

any payments made on the stock were concerned. Then, when the loan is repaid by the borrower, the amount placed to his credit, as a deposit, is transferred to the fee account and nothing is ever left to show the existence of that which is fundamental to his right to receive the loan, to-wit, that which constitutes him a member or depositor thereof. This is exercising banking privileges with the fiction of membership in the association to distinguish it therefrom.

3. The form of the contract made by the company with the borrower discloses the following provisions:

In the application for a loan on chattels is the following:

> "I agree to pay for the expenses of appraisement and *attorney fees*, etc., in the matter of said loan, the sum of $........ and interest on said loan at the rate of 8 per cent per annum, which premium, principal and interest I will pay in .... monthly installments of $........ each, commencing on the .... day of ...., 190.., and on the same day in each month thereafter, until all is paid," etc.

In the chattel mortgage taken by the company to secure the bond or note executed by the borrower, is the following provision:

> "And it is further expressly agreed that in case of any such default on the part of said grantor, said grantee, its assigns and successors, * * * may then sell said property, or as much as may be necessary to pay the amount due said company, the cost of appraisal, including charges of justice of the peace, attorney fees and cost of sale, at private sale," etc.

From the by-laws of the company I quote the following:

"PREMIUM ON STOCK."

> Section 5. The board of directors shall establish at the last regular meeting of June and December, each year, a premium which shall be charged on all stock that may be issued or subscribed for during the following six months, and which in no way shall be construed a payment on the stock. Said premiums shall be determined by an equal rate per cent that the contingent or reserve fund bears to the whole amount of stock at the time paid in.

CHARGES.

> Section 8. The executive committee shall fix a schedule of interest, premium, fines and other charges to be paid upon loans subject to the approval of the board of directors."

From the report of the examiners I quote what purports to be the action of the board of directors of such company in fixing the terms and charges to be made on all loans. (From minutes of meeting held January 26th, 1901.)

> "The executive committee reported the following terms and charges to be made on loans, which on motion, were approved:—

Loan Fees on all loans over $50.00	$3 50
Loan Fees on all loans under $50.00 and over $40.00	2 50
Loan Fees on all loans under $40.00	1 50
Loan Fees on all loans to borrowers who have previously had loans with this company	1 50
Premium on chattel mortgage loans	10 per cent. per annum.
Interest on chattel mortgage loans	8 per cent. per annum.

Fines on amounts overdue on chattel mortgage loans shall be at the rate of 1½ per cent. per month.

The amount borrowed, together with the premium and interest charged shall be paid back in equal monthly payments.

At a meeting of the board of directors April 26, 1902, the executive committee was authorized to reduce the rates charged on chattel loans to not less than 7 per cent. premium and 8 per cent. interest if the same was deemed advisable. This reduction has not been made, the charge still being 10 per cent premium and 8 per cent interest."

As evidence of the manner of entering the loans on the books of the company and also of the amount of interest, etc., paid by the borrower, we quote the following from the examiner's report:

"All loans on chattels are carried on the books of the company at an amount which includes the payment made to the borrower plus the fees retained. The mortgage taken to secure the payment of the same specifies an amount which covers the premium, interest, fees and loan. Taking a loan of $50.00 to be paid in six months as an example, we find the amount at which the company carries the loan as an asset to be $53.00, while the mortgage taken to secure its payment calls for $62.50, composed of the following amounts:

Loan	$50 00
Fees	3 00
Premium	5 30
Interest	4 24
Under date of November 5, 1904	$62 54

The foregoing presents the question as to whether the amount of $12.54 can lawfully be charged to a borrower upon a loan of $50.00. That part of Section 3836-3 R. S., authorizing Building and Loan Associations to charge borrowers for loans made by such associations, an amount in excess of the lawful rate of interest is as follows:

"Such dues, fines, premiums or other assessments shall not be deemed usury although in excess of the legal rate of interest."

This power being one in derogation of common right must be strictly construed. The evidence presented by the powers quoted from the mortgage and the application above presents the question as to whether an attorney fee could lawfully be charged to the borrower, as part of the assessments to be paid by him, although it would make the amount to be paid exceed the lawful interest. By the above practices engaged in by this company it is shown that for fees, premium and interest the borrower pays $12.54 annually, on an amount of $50.00, being somewhat in excess of 25 per cent thereon. and to this there is provided to be an attorney fee added. It was held in the case of Railroad Company v. Rosser, 53 O. S., 12, that a statute allowing $5.00 as an attorney fee, to be charged as part of the costs in a certain class of cases against the losing party was unconstitutional and void. Bradbury, J., said on page 23:

"A statute that imposes this restriction upon one citizen, or class of citizens, only, denies to him or them the equal protection of the law."

Likewise if an attorney fee may be permitted to be charged to a borrowing member upon foreclosure, by a building and loan association, when denied to

other corporations, it violates the first section of the Constitution which declares "government is instituted for their (the people) equal protection and benefit." We should not adopt a construction of a statute which would lead us to the conclusion that it was unconstitutional, unless absolutely necessary. An attorney fee would not be included within the words "other assessments." The reasoning adopted by our supreme court in Ohio ex rel. v. Greenville B. & L. Assn., 29 O. S. 92, leads to the same conclusion. No provision is made by statute for embracing within a decree of foreclosure such change as a part of the costs, or necessary fines and dues.

Risk v. Building Association, 31 O. S. 517.
Eversman & Schmitt, 53 O. S. 174.

Our supreme court in considering similar contracts have uniformly condemned the same. In the case of Hagerman v. Building Association, 25 O. S., quoting from page 203, the court said:

> "These associations were first authorized by statute in this state in the year 1867. and in the brief period of their existence they have grown to immense proportions both in number and in wealth. Already they embrace many thousands of members, and control millions of capital. If well regulated and managed within legitimate bounds, they are no doubt agencies well adapted to promote the welfare of those for whose benefit they are professedly organized. but when permitted to range wherever avarice and craft may lead them, they become instruments of oppression and fraud, like unto which there never has been a precedent in the history of this country. Hence, while they must be protected in all their rights, and in the lawful exercise of all their powers, it is very important that they also be denied powers which they do not possess, and restrained from abusing those they have.

Also in the case of Ohio ex rel. Attorney General v. B. & L. Assn., 29 O. S., quoting from page 97 the court said:

> "There is no countenance to be given to the idea that associations incorporated under the act above referred to can be used by capitalists as instrumentalities for obtaining more than the legal rate of interest on their money by depositing it with the association, and having it used in modes foreign to the declared purposes of their organization."

I, therefore, conclude that the powers sought to be exercised by The Economy Building and Loan Company in the particulars set forth, are without lawful authority and that it amounts to the exercise of a franchise by such corporation, not conferred by law.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE ECONOMY BUILDING & LOAN COMPANY OF CLEVELAND, OHIO.

December 23, 1904.

HON. A. I. VORYS, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR: — Your communication of the 7th inst., together with the printed matter enclosed therewith issued by The Economy Buliding and Loan Company, of Cleveland, Ohio, has received my consideration, and the following are my conclusions therec

The legislation authorizing the formation of building and loan associations, and that which now defines their powers, fully authorizes the board of directors of such associations to provide for loaning their moneys to members and depositors and take security in the form of mortgages upon personal property as well as upon real estate, and if it is necessary to enforce or protect its securities the association is authorized to take the personal property into its possession.

The report of the examination of this company, as made under the direction of your department, and the facts as therein disclosed, warrants the conclusion that the methods of business adopted by this company are not authorized by the laws governing building and loan associations and that it is exercising banking privileges which are not authorized by its charter.

It is further shown by the report of the examination made and by the form of application and mortgage which is used by this company in the transaction of its business, that it charges an attorney fee in addition to the dues, fines, premiums, interest and other charges made against the borrower; that in so doing it is violating the law under which it was created and is exercising a privilege not conferred by law.

Very truly yours,
WADE H. ELLIS,
Attorney General.

(To the State Board of Health)

APPOINTMENT OF HEALTH OFFICER IN VILLAGE OF UNIOPOLIS, UNDER SECTION 1536-723.

COLUMBUS, OHIO, April 7, 1904.

DR. C. O. PROBST, *Secretary of State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your letter of April 2 is received. You make the following statement of facts:

> "Under the provisions of Section 1536-723, R. S., the State Board of Health appointed a health officer for the village of Uniopolis, at a salary of $150 a year, and for a period of two years. The council of the village now propose, before the expiration of the term of the health officer appointed by the State Board, to pass an ordinance and appoint a health officer."

Upon this statement of facts you have asked whether the appointment made by the State Board of Health can be set aside by the action of the council of the village?

Section 1536-725, R. S., which is Section 187 of the New Municipal Code, provides, among other things, that 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.

In the case supposed, the village failed and refused to establish a board of health or to appoint a health officer, and the person appointed health officer by the State Board of Health is now serving the term for which he was appointed. I am of the opinion that the health officer appointed by the State Board of Health is entitled to hold until his term of two years expires.

Very truly yours,

WADE H. ELLIS,

Attorney General.

WHETHER STATE BOARD OF HEALTH CAN PROHIBIT INTERSTATE TRANSPORTATION OF DEAD BODIES UNLESS PREPARED BY AN EMBALMER, HOLDING LICENSE AFTER EXAMINATION.

June 14, 1904.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus.*

DEAR SIR:—I have received yours of the 13th inst. You inquire whether or not the State Board of Health has power to join with the State and Provincial Boards of Health of the United States and Canada in adopting and enforcing uniform rules and regulations providing that a dead body may be sent from one State to another only when it has been prepared for shipment by an embalmer licensed after examinations.

If the State Board of Health of Ohio has such power, it would arise from the broad authority conferred upon it by Section 409-25, Bates' Annotated Ohio Statutes. The question of whether this section does confer such authority is, however, not important, in view of the provisions of Section 6 of the Embalming

Act, passed April 30, 1902. This section is of later enactment than Section 409-25, above referred to, and in any case would govern the situation, for the reason that it expressly grants the right to pursue the occupation to all those who had been engaged in the practice of embalming for five years preceding April 30, 1902.

Your board has, therefore, no authority to restrict by interstate compact or otherwise the practice of embalming to those who have passed an examination to the exclusion of those who have equal rights by virtue of their five years' experience.

Very respectfully,

WADE H. ELLIS,
Attorney General.

POWER OF BOARD OF HEALTH TO REMOVE HEALTH OFFICER WITHOUT ASSIGNING CAUSE, ETC.

COLUMBUS, OHIO, June 28, 1904.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have received your communication under date of June 27, 1904, requesting an opinion as to the power of a Board of Health to remove a health officer, sanitary policeman, city physician and plumbing inspector without assigning cause therefor when appointments to these positions had been made for a definite period, and bond given for proper performance of duty during such time.

Since the decision in State ex rel., Attorney General vs. Craig, 69 O. S., 236, there is no doubt that a health officer is not an employee within the provisions of Section 189 of the Municipal Code, but is an appointee subject to removal at the pleasure of the board according to the provisions of Section 2115. It is clear also that ward or district physicians and sanitary policemen, whose appointments are provided for by the same Section (2115) are within the same classification and are subject to removal in the same manner.

As to the plumbing inspector, the statutes make no provision, and whatever he may be called, such appointee is, in effect, a sanitary policeman, and derives his power from Section 2115, and is likewise subject to removal at the pleasure of the board.

Since, however, it appears that in the particular case calling for this opinion, the incumbents mentioned were appointed after the enactment of the Municipal Code, Section 189 could not be invoked for their protection whether they were considered to be employees or not.

Very truly yours,

WADE H. ELLIS,
Attorney General.

WHETHER HEALTH OFFICER IS REQUIRED TO TAKE OATH OF OFFICE.

July 30, 1904.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—In answer to your request, under date of July 29, I have to say that, in my opinon, a health officer appointed under the provisions of Section 1536-729, Bates' Annotated Statutes, is an officer and as such is required to take the oath of office provided for by Section 1455.

Very truly yours,

WADE H. ELLIS,
Attorney General.

WHETHER HEALTH OFFICER MUST BE RESIDENT OF VILLAGE OR TOWNSHIP TO WHICH HE IS APPOINTED.

August 8, 1904.

C. O. Probst, *Secretary of State Board of Health, Columbus, Ohio.*

Dear Sir:—Your letter of August 6 received. You inquire whether it is necessary for the health officer of a village or a township to be a resident of the village or township in which he is appointed to serve.

I am of the opinion that the law contemplates that such officer should be a resident of the village or township in which he is to serve. A health officer, in some instances, performs legislative, quasi-judicial, as well as executive functions, and it is the probable intent of the legislature that such person should be a resident of the county or municipality in which he shall exercise such functions.

I would suggest, however, that there might be a possible case when the health officer is selected by the State Board of Health where such appointee might be selected outside of the municipality; for instance, where there was no one within the municipality willing and competent to serve,

Very respectfully,

George H. Jones,

Ass't Attorney General.

CONSTRUCTION OF SECTION 2433 RELATIVE TO POLLUTION OF WATER SUPPLY.

August 18, 1904.

Dr. C. O. Probst, *Secretary State Board of Health, Columbus, Ohio.*

Dear Sir: — I have your request under date of August 16, 1904, for a construction of Section 2433 as amended April 21, 1904. This section, in authorizing municipal corporations to prevent pollution of their water supply and to provide penalties therefor, does not change the general rule that all municipal legislation must proceed from the council. Neither the board of health, the board of public service, or board of public affairs, has any authority in the premises. The regulations contemplated must be by ordinance.

Very truly yours,

Wade H. Ellis,

Attorney General.

AUTHORITY OF BOARD OF HEALTH TO ADOPT AN ORDER REQUIRING CUTTING OF WEEDS, THE COST OF SAME TO BE ASSESSED AGAINST THE PROPERTY AS TAXES.

August 18, 1904.

Dr. C. O. Probst, *Secretary State Board of Health, Columbus, Ohio.*

Dear Sir: — I have received yours of August 16th requesting an opinion upon the power of the Board of Health to require the cutting of weeds. In my opinion Section 2118, Revised Statutes, authorizes the Board of Health to make orders requiring the cutting of weeds, if the public health would be served by such action. I find, however, no authority for a municipality entering upon property and cutting

weeds and charging same to the owner of the property as taxes. The only remedy the board has is through criminal proceedings under Section 2119 Revised Statutes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TOWNSHIP TRUSTEE CANNOT ACT AS HEALTH OFFICER.

September 24, 1904.

DR. C. O. PROBST, *Sec'y State Medical Board, Columbus, Ohio.*

DEAR SIR:— I have received your communication of September 22d, 1904. In answer thereto I advise you that in my opinion a township trustee cannot act as health officer of his township.

Very truly yours,

WADE H. ELLIS,
Attorney General.

POLLUTION OF WATER SUPPLY.

September 24, 1904.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have received your communication under date of September 22nd for a construction of Section 2433, R. S., as amended April 21, 1904.

Assuming that this act is constitutional, a municipal corporation has the power, by ordinance, to adopt and enforce regulations to prevent the pollution of its water supply, and can, by ordinance, regulate the construction of cess-pools along streams furnishing its water.

Very truly yours,

WADE H. ELLIS,
Attorney General.

(To the Adjutant General)

BOND OF MILITARY OFFICERS.

COLUMBUS, OHIO, May 23, 1904.

GEN. A. B. CRITCHFIELD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of yours of the 17th inst., containing enclosures from Col. Edward Vollrath, in which you request an opinion as to whether or not the officers of each regiment, who are required to give bonds with surety companies as surety thereon, could give the same in the form of a single bond, covering all of the officers of the regiment.

I have examined the various statutes under which military officers are required to give bonds, and I can see no legal objection to the bond being executed in sufficient amount by each of the officers of the regiment and by any duly authorized surety company, doing business in the State of Ohio, the penal amount of such bond to be fully adequate to cover the statutory amounts.

According to the enclosures, a great saving could thereby be effected upon the aggregate amount of the bond.

Yours very truly,

WADE H. ELLIS,
Attorney General.

ORGANIZATION OF MEDICAL DEPARTMENT OF OHIO NATIONAL GUARD.

COLUMBUS, OHIO, July 1, 1904.

GEN. A. B. CRITCHFIELD, *Adjutant-General, Columbus, Ohio.*

SIR:—Your letter of May 19 is received. You inquire whether "the medical department of the Ohio National Guard may be organized as a separate and distinct organization, and whether officers appointed to command companies of instruction in the medical department may exercise the power to enlist and discharge men?"

Section 3033, R. S., as amended, provides, among other things:

> Section 3033. "The organized militia, known as the Ohio National Guard, shall consist of * * * a medical department * * * to be organized the same as is now or may hereafter be prescribed for the regular and volunteer armies of the United States * * * and the Governor is authorized and empowered to change the tactical organization of the National Guard, or any part thereof, from time to time, to make it correspond with that prescribed for the regular and volunteer armies of the United States, etc."

Under the scheme of organization prescribed for the regular and volunteer armies of the United States, the medical department is essentially a staff department and is a separate and distinct organization, and the officers of such department have power to enlist and discharge men. I am therefore of the opinion that the medical department contemplated by Section 3033, R. S., is a staff department, and the officers thereof have power to enlist and discharge men in such department.

You also inquire who may appoint such medical officers, and how they may be discharged. Under Section 3, of Article IX, of the Constitution of the State of

Ohio, the Governor is empowered to appoint staff officers, and under Section 97, of the Regulations of the Ohio National Guard, he may remove them and appoint others in their place.

Very respectfully,
GEORGE H. JONES,
Ass't Attorney General.

PAYMENT OF MEMBERS OF NATIONAL GUARD FOR ATTENDANCE AT REGULAR DRILL.

October 4, 1904.

A. B. CRITCHFIELD, *Adjutant-General of Ohio, Columbus, Ohio.*

SIR:—Your communication dated October 4, 1904, relative to the payment of members of the national guard for their attendance upon regular weekly drills, is received.

In reply I beg to advise you that Section 1, of the act entitled "An act to provide for, maintain and encourage a more efficient national guard," passed by the last General Assembly, provides that:

> "Each regularly enlisted man in the organized militia of this State shall be paid twenty-five cents for attendance at drill for *each regular weekly drill attended,* not to exceed forty-eight weeks in one year, and shall be paid quarterly upon the presentation of the proper certified muster and payroll to the Adjutant-General, etc."

This provision applies only to the regular weekly drill, and in my opinion compensation is not to be had, under this act, for special drills or for any other than the one regular weekly drill. Very truly yours,

WADE H. ELLIS,
Attorney General.

(To the Commissioner of Common Schools)

FORMATION OF SPECIAL SCHOOL DISTRICT FROM TERRITORY IN CENTRALIZED SCHOOL DISTRICT.

COLUMBUS, OHIO, May 23, 1904.

HON. LEWIS D. BONEBRAKE, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your request of May 9, for my opinion upon the question as to the formation of a special school district from territory in a centralized school district is received. I submit the following opinion:

The provisions of Section 3928, Revised Statutes, operate as a bar against the formation of a special school district from territory embraced in a centralized school district, during the three years' limitation.

The word "exclusive" at the end of Section 3929 refers only to original jurisdiction, and does not affect the right of appeal or error to a higher court.

Respectfully submitted,

WADE H. ELLIS,
Attorney General.

RIGHT OF TEACHERS TO RECEIVE PAY FOR ATTENDING INSTITUTE.

COLUMBUS, OHIO, July 13, 1904.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of July 12, 1904, requesting a construction of Section 4091 of the New School Code relative to the right of teachers who are already employed to teach during the ensuing year, and who attend a teachers' institute which is held when the schools are not in session, to receive pay for said attendance, received.

On July 2, 1904, your predecessor in office, Hon. Lewis D. Bonebrake, made a similar request for a construction of Section 4074 concerning the renewal and recognition of teachers' certificates.

In reply I beg leave to say that Section 4091, which is as follows:

> "All teachers of the public schools within any county in which a county institute is held may dismiss their schools for one week for the purpose of attending such institute, and when such institute is held while the schools are in session the boards of education of all school districts are required to pay the teachers of their respective districts their regular salary for the week they attend the institute upon the teachers presenting a certificate of full regular daily attendance at said institute signed by the president and secretary thereof; the same to be paid as an addition to the first month's salary after said institute by the board of education by which said teacher is then employed, or in case he is unemployed at the time of the institute, then by the board next employing said teacher, provided the term of said employment begins within three months after said institute closes,"

makes provision for the payment of all teachers who attend teachers' institutes, provided that at the time of said attendance they hold a teacher's certificate, and their term of employment begins within three months after said institute closes.

Whether the institute is held during the session of school or in vaccation is immaterial.

That portion of Section 4074 which refers to the recognition or renewal of teachers' certificates is as follows:

> " * * * provided, that county boards of school examiners are authorized to recognize or renew at their discretion in the appropriate kind and for the same length of time any certificate or certificates, held by teachers who may apply for such recognition or renewal prior to the first day of September, 1905, etc."

It will be observed that under Section 4073 teachers' certificates are divided into two classes. Certificates granted for 1, 2 and 3 years are denominated provisional certificates. A provision is made in this section for the renewal of a two year provisional certificate, provided that the applicant has been continuously engaged in teaching in the same county for a period of five years last past, upon an examination in theory and practice. Certificates granted for five and eight years are denominated professional certificates, and shall be renewable without examination at the discretion of the examining board, etc.

Section 4074 also provides for a classification of teachers' certificates into three classes, which certificates may be styled respectively, "Teachers' Elementary School Certificate," "Teachers' High School Certificate" and "Teachers' Special Certificate," and that this classification shall be in effect from and after the first day of September, 1905. In the light of these provisions it follows that it is the duty of the County Board of School Examiners, prior to the first day of September, 1905, upon the application of a teacher for either the recognition or renewal of his or her certificate, to examine said certificate and determine whether under Section 4073 it is subject to renewal, and if so to which class, as provided in Section 4074, it belongs, and if it be determined that the certificate is renewable, and can be properly classified, said certificate shall be recognized or renewed. If the certificate is about to expire, a renewal for the same length of time as originally granted, would be proper, but if the certificate does not expire until after September 1, 1905, it should be recognized until the expiration of the time for which it was originally granted.

Very truly yours,

WADE H. ELLIS,

Attorney General.

THE ELECTION OF SCHOOL BOARDS.

October 17, 1904.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your communication bearing date October 12th, 1904, relative to the election of school boards in incorporated villages is received. In reply, I beg to say to you that the Harrison School Code in its classification of school districts makes provision for four kinds of school districts, viz.: City districts, village districts, township districts and special school districts.

Section 3884 defines a village school district, and is as follows:

> "Each incorporated village now existing or hereafter created, 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 village school district."

Section 3908 of said code provides that:

> "At the first municipal election held after the passage of this act there *shall* be a board of education elected in all village districts as provided herein," etc.

Section 3909 of the code provides that:

> "In all incorporated villages not now organized as school districts, and in all villages hereafter created, *there shall be a board of education elected* as provided for in Section 3908 of the Revised Statutes of Ohio," etc.

The provisions of the above sections would seem to be mandatory, and I am therefore of the opinion that school boards must be elected at the coming November election in the incorporated villages within this State. After such elections are held and after such village districts have been organized, there may be a transfer of territory from the village districts to the adjoining districts, or the village districts may be abandoned in accordance with the provisions of Sections 3894 and 3895 of the Revised Statutes of Ohio. Very truly yours,

WADE H. ELLIS,
Attorney General.

TERM OF EMPLOYMENT OF TEACHERS UNDER SECTION 4017, REVISED STATUTES.

November 7, 1904.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your communication bearing date of November 1, 1904, relative to the terms of employment of teachers, under Section 4017, R. S., is received. Section 4017 contains this provision:

> "But no person *shall be appointed* as a teacher for *a term longer* than *four school years* nor for a *less term than one year,* except to fill an unexpired term, the term to begin within four months of the date of the appointment," etc.

I am of the opinion that this provision is mandatory and is intended to prevent the practice, so frequently indulged in by boards of education, of changing teachers during the school year. There is no question that the efficiency of our public schools will be greatly increased by the enforcement of this provision.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RELATING TO TERM OF EMPLOYMENT OF TEACHERS IN CITY DISTRICTS.

November 18, 1904.

HON. E. A. JONES, *Commissioner of Schools, Columbus, Ohio.*

DEAR SIR:—In answer to your inquiry relating to the term for which teachers might be employed in city districts, under the new school code, I have to say that while 4017A limits the employment of a superintendent to a term not extending beyond August 31, 1905, I find no such limitation on the employment of teachers. Such employment is regulated by the preceding section, and is limited to four years. Very truly yours,

WADE H. ELLIS,
Attorney General.

RIGHT OF ONE PERSON TO HOLD OFFICE OF VILLAGE TREASURER AND MEMBER OF SCHOOL BOARD.

November 19, 1904.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry as to the right of one person to hold the two offices of village treasurer and member of the village school board. The statutory prohibitions upon the holding of more than one office by one person are few, and the case put by you does not come within them. The common-law right for one person to hold more than one office is limited to those offices whose duties are compatible.

Now, the board of education must pass upon the sufficiency of the treasurer's bond. It must determine when additional sureties will be required thereon, and must, for failure to comply with an order requiring additional sureties, declare the treasurer's office vacant. The board has also the power to modify the responsibilities of the treasurer by creating a depository. The relations between the board and the treasurer render the two offices incompatible, in my opinion, and one person cannot therefore legally accept both.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ELECTION OF SCHOOL BOARD.

December 2, 1904.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication dated Nov. 28, 1904, is received. You say that in many of the school districts no board of education was elected at the last November election, and you inquire whether the old board shall continue to serve until the next annual election, or whether a special election shall be held?

In reply I beg leave to say that the Harrison School Code makes but one provision for a special election.

Section 3909 of said Code does provide for the election of a school board at a special election held in a *newly created* village, but the sections that provide for the election of school boards in the existing school districts provide that said elections shall be held at the regular annual election.

Section 3 of Chapter 7 of the Harrison School Code provides that all existing officers of boards of education and school councils shall hold their respective offices until boards of education are elected and organized under the provisions of this act, etc.

I am of the opinion that this section will govern, and in all districts where the electors have failed to elect a board of education at the last November election the existing boards of education will hold their respective offices until the next general election, and until their successors are elected and qualified.

Very truly yours,

WADE H. ELLIS,

Attorney General.

(To the Fish and Game Commission)

DEPUTY WARDENS OF FISH AND GAME HAVE NO AUTHORITY TO APPOINT SUB-DEPUTY WARDENS. SECTIONS 409-409A.

COLUMBUS, OHIO, December 7, 1903.

HON. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio.*

DEAR SIR:—Your letter of December 1, 1903, is received. You ask this question:

"Have all duly appointed and commissioned wardens, under Section 409, the authority to appoint under them sub-deputy wardens for a stipulated term?"

Section 409, R. S., provides for the appointment by the Commissioners of Fish and Game of certain officers, viz., a chief warden, special wardens, deputy state wardens and special deputy state wardens, and the duties of such officers are prescribed by law. It will be observed that no such officers as "sub-deputy wardens" are mentioned in the statutes. It is an elementary principle that delegated authority may not be sub-delegated, without express provision of law.

There being no express authority of law for the appointment of "sub-deputy wardens," or for the delegation of power by "wardens," it necessarily follows that "deputy wardens" have no authority to appoint "sub-deputy wardens."

Under Section 409a, R. S., chief wardens, special wardens, etc., have the same right as "sheriffs to require aid in executing any process and in arresting without process any person found by them in the act of violating any of said laws."

In regard to the blank enclosed by you, I would say that I do not know under what circumstances this blank may be properly used, as the warden has no authority to appoint a deputy. If a case should arise under Section 409a where it is necessary to call for aid in making an arrest or in serving process, if the warden desires to go to the trouble of filling out a blank like this, he might do so, but there is no necessity for it, as the wardens are authorized to verbally call for aid and assistance in the cases above indicated.

Very respectfully,

GEORGE H. JONES,
Ass't Attorney General.

CONSTRUCTION OF SECTION 6966, R. S.

COLUMBUS, OHIO, December 7, 1903.

HON. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio.*

DEAR SIR:—Your letter of December 1 is received. You make five inquiries, based upon Section 6966, R. S.:

1. "Must a land owner, or his authorized agent, under all circumstances, sign the affidavit in cases of trespass under Section 6966?
2. Has a warden legal authority to file an affidavit when verbally instructed by the land owner, or his authorized agent, to do so?
3. Has a warden legal authority to file an affidavit when instructed in writing, signed by the land owner or his authorized agents?
4. Would it be necessary to have the owner, or his authorized agent, as witness to prove his instructions to the warden in both cases?

5. If the offense is not committed in the presence of the owner, or his authorized agent, but in the presence of the warden, has the warden authority to arrest on verbal or written instructions from the owner or authorized agent to do so?"

Section 6966, R. S., really has no place in what are generally known as the "fish and game laws." Its object seems to be to give to the private owner of lands, ponds, lakes, etc., an opportunity to inflict additional punishment upon trespassers in case they should trespass for the specific purpose mentioned in said Section 6966. This is made apparent from the fact that the section seems to contemplate that all prosecutions should be instituted by the owner of the land, pond, lake, etc. Of course, it would be unlawful during the "closed season" for persons to hunt or trap anywhere in the State of Ohio; and, in the "open season," persons generally have the right to hunt and trap, but have no right, either in the "closed" or "open season," to trespass upon private property.

In order that this section may be effective as a police regulation, and that the State may have the benefit of such regulation, such section as it stands should be construed so that any person may file the affidavit, regardless of any authorization from the owner of such lands, ponds, lakes, etc. And, in any event, no authorization from the owner to a third person would confer any power to prosecute under this section, which does not exist in such third person without such authorization.

I believe that this statement answers the inquiries you have made.

Very respectfully,

George H. Jones,
Ass't Attorney General.

FINES COLLECTED UNDER SECTION 6961, R. S., SHOULD BE PAID INTO COUNTY TREASURY.

Columbus, Ohio, December 18, 1903.

Hon. J. C. Porterfield, *Chief Game Warden, Columbus, Ohio.*

Dear Sir:—I beg to acknowledge receipt of yours of December 16, seeking an opinion from me as to whether fines collected for violating the provisions of Section 6961, R. S., making it unlawful for any person to "hunt, shoot, trap or have in possession, in the open air, for such purpose, any of the implements for hunting, shooting or trapping on Sunday," shall be paid into the county treasury, or, on the order of the Fish and Game Commission, be paid to any warden instituting the prosecution.

In my opinion, all fines collected for violation of the provisions of the statute above quoted should be paid into the county treasury, for the reason that the violation of the provisions of that portion of Section 6961, R. S., above quoted, is a violation of the Sunday laws and not a violation of the Fish and Game laws of the State.

It will be observed that the provisions of Section 6961, above referred to, makes it unlawful for any person to hunt, shoot or trap on Sunday, or have in his possession, in the open air, on Sunday, any of the implements for hunting, shooting or trapping. Hence, it follows that a person shooting at a mark on Sunday, a person who hunts or traps on Sunday animals that are not protected by the laws, or a person who hunts or traps on Sunday, whether in the open or closed season, or a person who has in his possession in the open air on Sunday, either in the open or closed season, any of the implements for hunting, shooting or trapping, is guilty

of a violation of this provision of the statute. It is thus seen that the enactment of this statute was not to make a closed season on Sunday for all birds, fish and game, but was to prohibit persons from desecrating the Sabbath day. Indeed, a law prohibiting these things on Monday, Tuesday, or any other day of the week, would be just as effectual to preserve birds, fish and game, as the law as it now stands. Surely making it unlawful to shoot on Sunday, which may be merely at a mark, has no tendency to protect birds, fish and game. Neither was it the purpose of the legislature to protect from the hunter or trapper on Sunday animals that are not protected by the law on other days of the year; nor was it the purpose of the legislature to make every Sunday a closed season. If a person were charged with hunting during the closed season, and it turned out that he was hunting during the open season, though on Sunday, he could not be convicted of that charge, but could only be convicted of the charge of hunting on Sunday. And, again, if a person were found hunting on Sunday during the closed season, he would be guilty of two offenses, one hunting on Sunday and the other hunting during the closed season.

From these considerations, it is clearly my opinion, as already suggested, that the fine collected for hunting on Sunday should be paid into the county treasury.

Very truly yours,

J. M. SHEETS,
Attorney General.

SALE OF AIGRETTE FEATHERS.

COLUMBUS, OHIO, January 5, 1904.

HON. J. C. PORTERFIELD, *Chief Game Warden, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry seeking an opinion from me as to whether, under the Game Laws of the State, the sale of Aigrette feathers is prohibited.

In my opinion, the answer to this question depends entirely upon the question as to whether the bird from which these feathers are taken is at present an existing species of the birds of Ohio, i. e., whether such birds are natives of this State and are still to be found within its borders, so that in reasonable contemplation of law it was the purpose of the legislature to protect these birds as an existing species of the native birds of the State. If so, then the sale of these feathers is prohibited, otherwise they are not.

Very truly yours,

J. M. SHEETS,
Attorney General.

AUTHORITY OF COUNTY COMMISSIONERS TO RELEASE A PERSON FROM JAIL COMMITTED THERETO UNDER SECTION 10 OF FISH AND GAME LAWS.

COLUMBUS, OHIO, May 27, 1904

HON. J. L. RODGERS, *Pres. Fish and Game Commission, Columbus, Ohio.*

DEAR SIR:—Your letter of May 24, in which you ask for an opinion upon the subject matter inquired about in a letter from D. W. Green, M. D. of Dayton, Ohio, addressed to you, received. The inquiry made in the letter referred to, is whether the County Commissioners have authority to release from jail a per-

son committed thereto under Sec. 10 of the Fish and Game Law as amended at the last session of the legislature.

In reply I would say that the provisions of Section 10 are explicit that a person committed to jail under said section must serve the full term and shall not be discharged or released by any board or officer except upon payment of the fines and costs or upon the order of the Commissioners of Fish and Game. The County Commissioners therefore, under Sec. 10, would have no authority to release a person until he had served out his full term or had paid the fines and costs in full.

Very truly yours,

WADE H. ELLIS,

Attorney General.

WHETHER GUNS, NETS, BOATS UNLAWFULLY USED BY PERSONS WITHOUT CONSENT OF OWNER MAY BE SEIZED.

COLUMBUS, OHIO, June 7, 1904.

HON. J. C. PORTERFIELD, *Chief Warden, Columbus, Ohio.*

DEAR SIR:—Your letter of June 6th received. You inquire whether guns, nets, boats, etc., may be lawfully condemned under Sections 7 and 8 of the Fish and Game act, when being unlawfully used by persons who have obtained possession of such guns, nets, boats, etc., without the knowledge or consent of the owner?

Section 7 of the Fish and Game act provides among other things, that any gun, net, sein, boat or other device whatever used in the unlawful taking, catching or killing of birds, fish or game, is hereby declared to be a public nuisance, and it shall be the duty of every warden or other police officer to seize any such property and institute proceedings for its forfeiture as provided in Section 8 of this act.

Section 7 also provides that when any such gun, net, boat, etc., is seized and condemned, the cost of such proceeding shall be adjudged against the owner or user, which judgment shall be the first lien upon the property.

Section 8 of this act provides, that it shall be the duty of the warden or other officer seizing the gun, net, boat, etc., to institute proceedings for their condemnation and forfeiture. An affidavit is required to be filed describing the property, setting out the unlawful use to which it was found put, giving the time and place of seizure, and setting out the name of the person owning or using the same. Upon the trial if the court or jury finds that the property, at the time of its seizure, was being used in violation of law, the court shall adjudge the property forfeited, and shall render judgment against the owner or user for the costs, etc.

From an inspection of these sections, it seems to be contemplated that the boat, gun, etc., unlawfully used is to be forfeited to the state, and the person using the same and his property are subject to pay the costs.

So that in the case you suppose, I am of the opinion that the guns, nets or boats may be condemned notwithstanding they are used unlawfully by persons other than the owner, and that the courts may adjudge the costs against the user of the boat or gun, and collect the same out of any property he may have without the right of exemption upon his part: but in the case supposed, notice must be given to the owner as well as the user.

Very respectfully,

WADE H. ELLIS,

Attorney General.

CONSTRUCTION OF LATE GAME LAWS IN REGARD TO FISHING.

COLUMBUS, OHIO, June 24, 1904.

HON. J. C. PORTERFIELD, *Chief Warden, Columbus, Ohio.*

DEAR SIR:—Your letter of June 21 received. You make several inquiries, which I will answer in the order asked.

> 1. "In accordance with Section 23, of the late game law, can the owner of land legally transfer his right to fish with trot lines, bob lines, set lines, float lines, or by spearing, to another by any contract or agreement other than a deed?"

Section 23 of the fish and game law referred to provides, amongst other things, that:

> "No person shall take or catch in any of the rivers, lakes or ponds, or in any of the reservoirs of the State, any fish with what are known as trot lines, bob lines, set lines or float lines, or by spearing, except in that part of streams bordering on or running through his own lands."

This section evidently contemplates that the right of taking fish in the manner indicated is attached to the ownership and control of the lands through which the stream may run; and the owner of lands under said section is not authorized to transfer to any other person the privilege of taking fish in the manner indicated, unless by some conveyance by which such transferee would have dominion over the lands.

> 2. "Are joint owners or property entitled to fish with trot lines, bob lines, set lines, float lines, or by spearing?"

In reply to this inquiry it is only necessary to say that in streams passing through property of joint owners such joint owners are entitled to take fish in the manner indicated in Section 23.

> 3. "Are all the owners of stock in an incorporated company, or a stock company, entitled to fish with trot lines, bob lines, set lines, float lines, or by spearing, when such company holds legal title to the land?"

All the members of an incorporated company, or a stock company, are entitled to fish in the manner indicated in streams flowing through the land owned by such company.

> 4. "Would any member of a club, leasing land for the fishing privileges, be entitled to use trot lines, bob lines, set lines, float lines or spear?"

I have already indicated, in answer to your first inquiry, that where the land is conveyed so that the person receiving such conveyance has dominion over the land such person would have the right of fishing in the manner indicated in Section 23, and in the situation covered by this inquiry the owner of land may not convey the fishing privilege to any other person except to such person to whom he may convey or lease the land itself. In other words, there is no such thing as leasing the privilege to fish in the manner inquired about, but if the owner of the land should, by proper conveyance, whether in fee simple, or for life or for a term of years, convey to a club dominion over the land through which a stream passes, then

the members of such club would be entitled to fish in the manner indicated in this inquiry, but not otherwise.

Very truly yours,
WADE H. ELLIS,
Attorney General.

AUTHORITY OF FISH AND GAME COMMISSION TO ISSUE CERTAIN PERMITS.

COLUMBUS, OHIO, July 7, 1904.

HON. J. L. RODGERS, *President Fish and Game Commission, Columbus, Ohio.*

DEAR SIR:—Your communication under date of July 6, enclosing a letter from C. Judson Herrick, received.

Section 13 of the Fish and Game Laws makes provision for the obtaining of a permit to take birds or their nests and eggs for scientific purposes, but there is no provision authorizing your commission to grant a permit to take fish for scientific purposes, and while, as suggested by Professor Herrick, the spirit of the law might be that such privilege could be granted, yet your commission can only act under the express authority of the law.

Very truly yours.
WADE H. ELLIS,
Attorney General

PS. — I return letter of Professor Herrick.

IN REGARD TO HUNTER'S LICENSE.

Aug. 30, 1904.

COL. J. L. RODGERS, *President Fish and Game Com., Columbus, Ohio.*

DEAR SIR:—Your letter of Aug. 29th, enclosing a letter from Hon. J. C. Heinlein, is received. You request that we give an opinion upon the question asked by Mr. Heinlein.

He asks whether, if a non-resident takes out a license to hunt in this state in one county, he will be authorized thereunder to hunt in any other country in the state under such license.

Section 22, of the Game law (so called) provides, among other things:

> "Any person who is a non-resident of the state of Ohio, and who desires to hunt in said state, shall make application for a hunter's license to the clerk of the court of the county in which he desires to hunt. * * * Every such license * * * shall entitle the person to whom it is issued to hunt within this state at such time and in such manner as may be lawful until the expiration of his license."

While it possibly may have been the intention of the legislature to extend the privilege of hunting to non-residents to any portion of the state, yet the letter of the law limits such non-resident hunter to the county in which he makes his application for such license. You will observe that the non-resident shall make application to the clerk of the court of the county in which he desires to hunt. So that the terms of the license itself circumscribe the area over which the non-resident may hunt.

I am therefore of the opinion that by the letter of the statute the non-resident hunter is confined to the territory over which his license by its terms extends; that is, to the county in which he makes application.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

AS TO SHOOTING TURTLE OR MOURNING DOVES.

September 9, 1904.

HON. J. C. PORTERFIELD, *Chief Warden, Columbus, Ohio.*

DEAR SIR:—Your letter of September 7 received. You inquire whether it is a violation of the game laws of this State to shoot the turtle or mourning dove from September 1 to December 1. Your inquiry, as I understand it, includes the presumption that the Carolina dove and the turtle or mourning dove are the same bird.

Section 12 of the fish and game laws provides, among other things, that,

> "It is unlawful, at any time, to catch, kill, injure, pursue or have in possession, either dead or alive, or purchase or expose for sale, transport or ship, within or without the State, any turtle or mourning dove, etc."

Section 15 of the fish and game laws provides, among other things, that,

> "No person shall within this State catch, kill, injure or pursue, with such intent, any Carolina dove, except from the 1st day of September to the 1st day of December."

Construing Section 12 alone, it would seem that the prohibition against killing, injuring, etc., of turtle or mourning doves is absolute at all times. But Section 15 of the same act ((upon the presumption that the Carolina dove is the same as the mourning or turtle dove) provides an open season for the killing of such birds, extending from the 1st day of September to the 1st day of December of each year. Construing the said sections so that both may be given effect, I am of the opinion that the effect of Section 15, in so far as it creates an open season for the shooting of doves, should be construed as an exception to the general provisions of Section 12, and that it is lawful in the State of Ohio to catch, kill, injure or pursue Carolina doves between the 1st day of September and the 1st day of December.

Very truly yours,
GEORGE H. JONES,
Ass't Attorney General.

WITH REFERENCE TO SUIT BROUGHT AGAINST FREIBURG & WORKUM FOR POLLUTING WATERS OF THE LITTLE MIAMI RIVER.

November 1, 1904.

MR. THOMAS B. PAXTON, *Member Fish and Game Commission, Cincinnati, Ohio.*

DEAR SIR: — Your communication addressed to J. L. Rodgers, Esq., President of the Fish and Game Commission, under date of October 22d, 1904, relative to the suit brought against Freiburg & Workum by your deputy, Mr. Giddings, in Brown county, has been referred to this department for consideration. I have given it as

careful attention as the time will permit, in view of the fact that the opinion of this department is desired in advance of the 4th inst.

The first question considered is the jurisdiction of the Fish and Game Commission over the subject matter of this suit, namely, the pollution of the waters of the East Fork of the Little Miami river. It is clear that the Fish and Game Commission can have only such jurisdiction as is expressly conferred by statute, and I find but one section of the fish and game laws touching upon this question. Section 24 of said laws provides that:

> "Whoever shall trespass upon the lands, or rights in lands, located within this state, belonging to any person, and lying in or bordering upon any natural or artificial pond or brook less than ten miles in length, into which have been introduced brook trout, speckled trout, brown trout, landlocked salmon, California salmon, or any other fish, by the means known as artificial propagation, or by actual importation from other waters, for the purpose of fishing for, or catching, or killing fish, * * * or whoever shall wilfully place any poison or other substance injurious to the health of fish, in any pond or brook, described in this section, for the purpose of capturing or harming any fish therein, shall be deemed guilty of a misdemeanor," etc.

The East Fork of the Little Miami river is neither a private pond nor brook, nor is it less than ten miles in length, and does not come within the provisions of this section. The Fish and Game Commission is, therefore, without jurisdiction in this matter and the suit begun by its deputy, Mr. Giddings, should be dismissed.

If immediate action is required in this matter criminal proceedings could be instituted under Section 6919, and succeeding sections, of the Revised Statutes. This department, however, is without any authority to institute such proceedings. Former Attorney General J. M. Sheets rendered L. H. Reutinger, of Athens, Ohio, under date of July 30, 1901, an opinion relating to the pollution of the streams of the State of Ohio by turning refuse from strawboard factories into them and thus causing the death of fish. In that opinion the Attorney General said:

> "This is a matter which belongs to the prosecuting attorneys of the respective counties. * * * I have no jurisdiction over the question and can do nothing more than call the prosecuting attorney's attention to the matter."

At that time there was a case pending in the Supreme Court of Ohio, begun by the prosecuting attorney of Seneca county, in which the American Strawboard Company was plaintiff in error, having been tried and convicted for polluting the waters of the Sandusky river. This case has since been decided by the Supreme Court and the conviction sustained, and is reported in 70 O S., at page 140.

I am of the opinion, however, that the State Board of Health is the proper authority to take charge of this matter, and I have requested the board to make a thorough investigation as to the conditions of the Freiburg & Workum plant, and of the waters of the East Fork of the Little Miami river. Conforming to this request the State Board of Health has sent an inspector to make a personal investigation. The inspector reports that the distillery, operated by Freiburg & Workum, is not now in operation, and, he is informed, will not resume operations, for some months to come. The State Board of Health has instructed the inspector to make another inspection when the distillery resumes operations and the Board will, at that time, prescribe necessary regulations to prevent the pollution of the waters of said stream, and will see that they are enforced.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AUTHORITY OF GAME COMMISSION IN GRANTING APPLICATION FOR PERMISSION TO FISH FOR CARP.

November 9, 1904.

COL. J. L. RODGERS, *President Fish and Game Commission, Columbus, Ohio.*

DEAR SIR:—Your letter received. You make three inquiries:

> First: "Has the Ohio Fish and Game Commission any authority, direct or implied, to limit the Lake Erie territory for carp fishing; that is, can we do otherwise than to grant to an applicant of proven or supposed good character a permit to fish for German carp in Lake Erie waters, and in the waters connected therewith as defined by law?"

Sub-division 7 of Section 6968-4, R. S., provides, amongst other things, that:

> "Nothing herein shall apply to the catching of German carp in any of the bays, marshes, estuaries or inlets bordering upon, flowing into, or in any manner connected with Lake Erie, which may be caught at any time, with any net, seine or trap, provided written permission to take German carp shall be granted to any person who shall make application and satisfy the commissioners that if granted such privilege he will not in any manner violate any law enacted for the protection of fish, which permission may be revoked by the said commissioners upon the conviction of the holder thereof for the taking of fish under his permit in violation of law."

I am of the opinion that the permission referred to in the above section must be granted to the applicant provided such applicant is a proper person within the judgment of the commissioners to receive such permit. This section evidently contemplates the exercise of discretion by your Board, and the action of the Board in refusing a permit would not be reviewed unless in a case of willful abuse by such Board of the discretion reposed in it. I do not think that the fact that the person is of general good character would conclude the Board, but the Board should be satisfied in the particular case that the applicant is a proper person to exercise the privilege to be conferred upon him.

> "Second: Can we extend these prescribed limits for carp fishing (if they are such) to the waters of rivers tributary to the lake itself, or to its bays, marshes or inlets, or is all fishing in such rivers to be governed and regulated by the laws relating to inland water fishing?"

The portion of Sec. 6968-4, R. S., we have already quoted specifically provides that the regulation as to the catching of German carp, which we are considering, extends to the "bays, marshes, estuaries or inlets bordering upon, flowing into, or in any manner connected with Lake Erie." This language so used seems to exclude rivers, and the jurisdiction of the Board under such section is confined to the specific bodies of water named in the statute.

> Third: "Has the Ohio Fish and Game Commission any discretionary powers in the matter of carp fishing in the waters described in the paragraph cited other than those relating to the character of the applicants and the revocation of permits for violation of law?"

This inquiry has been substantially answered already in this opinion, but I am inclined to say further that if a state of facts exists in any of the bodies of water mentioned in the Statute where the necessary result of a permit and action thereunder by the applicant would cause an unreasonable destruction or interference

with fish other than those mentioned in this section, your Board might take such condition into consideration in granting or refusing a permit to the applicant, and if, in the opinion of the Board, it is satisfied that to grant such a permit in the case supposed would interfere with the preservation or propagation of food fish, I am of the opinion that your Board would be justified in refusing such permission.

Very truly yours,

WADE H. ELLIS,

Attorney General.

(To the Prosecuting Attorneys)

STENOGRAPHER NOT ENTITLED TO PAY OUT OF COUNTY TREASURY FOR GOING BEFORE GRAND JURY AND TAKING SHORTHAND NOTES UNDER SECTION 7195.

COLUMBUS, OHIO, November 23, 1903.

LEE STROUP, ESQ., *Elyria, Ohio.*

MY DEAR SIR:—Yours of November 21 at hand, and contents noted. You inquire whether, in my opinion, the stenographer, who, under the provisions of Section 7195, R. S., is required to accompany the Prosecuting Attorney to the Grand Jury room, take short-hand notes of the testimony and furnish transcript thereof, if requested, to the Prosecuting Attorney, is entitled to compensation out of the county treasury for such services?

In view of the fact that the statute makes no provision for payment out of the county treasury for such services, it is entirely clear that the stenographer must perform such services without receiving additional compensation therefor.

In has been held by the Supreme Court of the State, so frequently that it is hardly necessary to cite authorities, that to warrant the payment of fees or compensation out of the county treasury it must appear that such payment is authorized by statute. See, however, Clark v. Commissioners, 58 O. S., 107, and cases cited.

Very truly yours,

J. M. SHEETS,
Attorney General.

COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES REQUIRED TO BUILD APPROACHES TO COUNTY BRIDGES, UNDER SECTION 4940, WHEN COST DOES NOT EXCEED $50.00.

COLUMBUS, OHIO, November 23, 1903.

F. W. WOODS, ESQ., *Medina, Ohio.*

DEAR SIR:—Yours of November 19, inquiring whether county commissioners or township trustees must build approaches to county bridges, when the cost does not exceed $50, duly received.

According to the provisions of Section 4940, R. S., as amended by the last legislature, it is quite clear that the township trustees are required only to build "and keep in repair all bridges and culverts, except upon improved and free turnpike roads, when the cost of construction does not exceed $50, and shall keep in repair all bridges constructed by the commissioners; provided, however, that such repair by such trustees of any such bridge in any year shall not exceed $10."

Section 861, R. S., in so far as it is in apparent conflict with this provision must give way to it. Section 4940, as amended, is a later enactment than Section, 861.

Very truly yours,

J. M. SHEETS,
Attorney General.

JUSTICE OF PEACE HAS FINAL JURISDICTION IN INFRACTIONS OF THE PURE FOOD LAWS.

COLUMBUS, OHIO, November 23, 1903.

JOHN B. McGREW, *Prosecuting Attorney, Springfield, Ohio.*

MY DEAR MR. McGREW:—I have just examined the case referred to by you in your telephone message, holding that where imprisonment is no part of the punishment prescribed, a justice of the peace has final jurisdiction in cases of infractions of the pure food laws. The Court held that there was no statutory provision requiring a justice of the peace to call a jury. That being the case, and as the statute gives him jurisdiction of such cases, it was his duty to hear and determine the case without calling a jury. It follows the case of Innwood v. The State, 42 O. S., 186.

From the argument of the Court in the case, I should judge that had the statute made any provision for calling a jury for the trial of such misdemeanors before a justice of the peace it would have been his duty to do so. As ample provision is made for the calling of juries in the court of common pleas in cases of misdemeanors, I judge that this case would have no application to misdemeanors tried in the court of common pleas.

Very truly,

J. M. SHEETS,
Attorney General.

PROSECUTING ATTORNEY ENTITLED TO TEN PER CENT OF FINES AND COSTS COLLECTED WHERE HE PERFORMS ANY SERVICE IN CONNECTION WITH THE COLLECTION OF SAME.

COLUMBUS, OHIO, December 1, 1903.

GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Yours of November 30 at hand, and contents noted. In answer to your first inquiry as to whether the prosecuting attorney must present to the commissioners an itemized account for advice given, I beg to refer you to an opinion of this office, dated December 10, 1901, addressed to C. A. Reid, Prosecuting Attorney of Fayette County. This opinion will be found in the annual volume of the opinions of this office for the year 1901, page 167, et seq. Assuming that you have this report, I give you merely the result of that investigatioin, and that is that an itemized statement is not required by law.

In answer to your second inquiry, as to whether the prosecuting attorney is entitled to ten per cent on all fines and costs collected, even though the defendant pay them voluntarily, I beg to state that, in my opinion, he is if he performs any service in or about the collection of the costs. I do not believe that it is necessary for the prosecuting attorney to issue execution and follow up the collection in that way in order to earn his ten per cent under the provisions of this act. If the costs are paid voluntarily to him, and he handles the money, I think he is entitled to his ten per cent. If, however, he has absolutely nothing to do with the collection of the costs in any manner, and renders no service with reference thereto, I am of the opinion that under the rule laid down in the case of State ex rel. Pugh v. Brewster, 44 O. S., 249, he will not be entitled to the ten per cent under such circumstances.

The allowance of such compensation must always be made by the commissioners; the amount of money collected must be determined by the commissioners,

and the amount of compensation to be allowed, of course, depends upon the amount of money collected. Somebody must estimate the amount of money collected in order to determine the amount of compensation due the prosecuting attorney. It is a case in which the rate of compensation is fixed by law, but the amount is not. That depends entirely upon the extent of the services rendered. Such being the case, the commissioners must always approve such bills.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO FILLING VACANCY IN COUNTY SURVEYOR'S OFFICE.

COLUMBUS, OHIO, December 8, 1903.

FRANK W. KETTERER, ESQ., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Yours of December 5 at hand, and contents noted. Your letter requires an answer to the following questions:

1. Where a vacancy is created in the office of County Surveyor, have the commissioners the power to appoint for the unexpired term?

2. If they have not, and a successor is elected, does he take his office for the unexpired term or for the full term, and when does his term commence?

It is clear that your first inquiry must be answered in the negative. Section 11 of the Revised Statutes provides that, "when an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy."

An answer to your second inquiry involves a construction of Section 1163 of the Revised Statutes. This section provides that the term of office of County Surveyor shall be three years, beginning on the first Monday of September next after his election. By Section 11 of the Revised Statutes above quoted, he is required to be elected at the November election, which was done in this instance. There is no provision in any of the statutes that I have been able to find providing for the election of a county surveyor to fill an unexpired term, as there is in the case of commissioner or infirmary director. There are three commissioners and three infiramry directors, and it is the purpose of the law to have one elected each and every year for a full term, hence it becomes necessary where there is a vacancy, either in the office of County Commissioner or Infirmary Director, to have a person elected or appointed for the unexpired term.

I am also of the opinion that his term commences on the first Monday of September after his election. As already suggested, he is elected for a full term of three years, and the statute requires his term to commence at that time.

It is true that Section 1163, R. S., would have been declared unconstitutional by the Supreme Court if the question had been presented within the proper time, but that time has gone by. See State ex rel. v. Brown, 60 O. S., 499.

It follows from the above suggestions that the appointee will hold until the first Monday of September, and the person elected at that time will take his office for three years.

Very truly yours,

J. M. SHEETS,
Attorney General.

BANKER, AFTER MAKING SUCCESSFUL BIDS FOR COUNTY DEPOSITS MAY BE PERMITTED TO CHANGE NAME OF SURETY.

COLUMBUS, OHIO, December 9, 1903.

G. RAY CRAIG, ESQ., *Prosecuting Attorney, Norwalk, Ohio.*

MY DEAR SIR:—Yours of December 7 at hand, and contents noted. Your inquiry involves an answer to the following question, Whether, where a banker who bids for the county deposits states in his bid the security he proposes to give, may, after becoming the successful bidder, change the name of the security from that named in his bid.

In my opinion, he may. Providing, of course, the security finally offered is sufficient. While the bidder must state in his bid the security he proposes to offer, yet I do not understand that the law contemplates that under no circumstances can this security be changed. A statement of the security he proposes to offer is required more as proof of good faith in the bidder. Hence where, for any good reason after the bid is made, the successful bidder desires to change the name of the surety offered to another equally good, I think the Commissioners are entirely justified in permitting the change.

Very truly yours,

J. M. SHEETS,
Attorney General.

WITH REFERENCE TO PAYMENT OF COSTS IN SUITS INSTITUTED FOR THE COLLECTION OF DELINQUENT TAXES.

COLUMBUS, OHIO, December 22, 1903.

GEORGE W. RISSER, *Prosecuting Attorney, Ottawa, Ohio.*

MY DEAR SIR:—Yours of December 19, making inquiry as to whether, in my opinion, where a person is employed under the provisions of Section 1104, Revised Statutes, to collect delinquent taxes, the costs of suit that may be incurred where he sues to collect the taxes are included in the expenses of collection which must be borne by the person entering into the contract with the county treasurer to make the collection.

In my opinion, they are not. Section 1104 provides, where suit is brought to foreclose the tax lien upon lands, the amount of the taxes due the county an[illegible] State shall first be paid; second, the costs; third, the balance shall be distributed [illegible] may be just. From this provision it is apparent that the costs are charged aga[illegible] the delinquent tax payer, and under no circumstances is the county boun[illegible] the costs.

The purpose of this provision, as I understand it, was to cut off a [illegible] that had grown up in some parts of the State of employing some person [illegible] delinquent taxes and paying him a certain compensation therefor, w[illegible] would employ an attorney to sue therefor. The attorney fees would [illegible] to the county commissioners as a claim against the county, in additi[illegible] allowed the tax collector; also, in many instances, suits were brou[illegible] was no reasonable prospect of ever collecting a sufficient amount of [illegible] the costs. A bill for costs would thereupon be presented to the co[illegible] ance and payment.

I think it is contemplated by the provisions of this section th[illegible]

shall the county be subjected to any expenses for the collection of delinquent taxes over and above the twenty-five per cent.

As to whether the person who has the contract for collecting delinquent taxes might not be liable to the officers for their costs in case of suit, and in case of failure to collect from the delinquent the amount of costs, I am not just at this moment able to state, but am inclined to the view that costs are not included in the term "expenses," and that the officers cannot look to the person having the contract for the payment of their costs.

Very truly,

J. M. SHEETS,
Attorney General.

ALLOWANCE OF FEES TO CONSTABLE IN STATE CASES.

COLUMBUS, OHIO, December 22, 1903.

I. M. FOSTER, *Posecuting Attorney, Athens, Ohio.*

MY DEAR SIR:—Yours of November 19, making inquiry as to whether the county commissioners have power to allow a constable more than one hundred dollars per year fees, which he has earned in felonies where the State fails to convict, and in misdemeanors where the defendant proves insolvent, duly received.

In my opinion, they cannot. Section 1309, of the Revised Statutes, expressly limits the total amount to be allowed in any one year to the sum of one hundred dollars. There is no authority to go beyond this sum.

You also inquire whether, in my opinion, where a person has been found guilty of a misdemeanor and sent to the workhouse and works out the fine and costs, whether that is a case which comes within the provision "where the defendant proves insolvent."

I am very clearly of the opinion that it does. The costs, in a case of this kind, have not been collected; the money has not been paid into court; the constable has not received his fees, and the purpose of this statute was to make some provision for the services of the constable, where, without this provision, he would lose his fees.

Very truly,

J. M. SHEETS,
Attorney General.

CONSTRUCTION OF SECTION 1136-5, R. S.

COLUMBUS, OHIO, December 28, 1903.

[illegible]. RAY CRAIG, *Norwalk, Ohio.*

[illegible]R SIR:—Answering your inquiry, made by 'phone to-day, relative to the [illegible]n of Section 1136-5, of the Revised Statutes, I would say, if the award [illegible] it has been legally made to a bank conformable to the preceding sections [illegible] depositary act, and the bank has failed by reason of some informality [illegible]ing to fully comply with the requirements made by the Commission[illegible] days from the time the award is made, that of itself does not [illegible]y way render illegal the award, and it does not operate to compel [illegible]ers to award the money to any other bank whose written proposal [illegible] rate of interest therefor; but the County Commissioners may extend [illegible] purpose of giving the bank an opportunity to comply with the

requirements of the law and of the award in the matter of the execution of a legal and satisfactory undertaking. I do not consider it mandatory in any sense, but it is optional with the Commissioners.

Very truly yours,

J. M. Sheets,
Attorney General.

WHETHER COUNTY COMMISSIONERS OF DARKE COUNTY ENTITLED TO DRAW FEES UNDER SECTION 4506 R. S.

Columbus, Ohio, January 15, 1904.

H. L. Yount, Esq., *Prosecuting Attorney, Greenville, Ohio.*

Dear Sir:—Your letter of January 13, 1904, is received. You inquire "whether the county commissioners of Darke County, Ohio, are entitled to draw fees under Section 4506 of the Revised Statutes of Ohio in addition to the salary and expenses as provided in Year Book 90, page 206?"

The act passed April 20, 1893, entitled an "Act supplementary to Section 897 of the Revised Statutes as amended April 8, 1886," is clearly obnoxious to Section 26, Article II of the Constitution of the State, which provides "All laws of a general nature shall have a uniform operation throughout the State." The county commissioners of Darke County, Ohio, therefore are not entitled to any salary or expenses by virtue of the act passed April 20, 1893 (90 O. L. page 206), but such commissioners are entitled to draw fees under Section 4506 of the Revised Statutes of Ohio.

Very respectfully,

Wade H. Ellis,
Attorney General.

COUNTY COMMISSIONERS ARE NOT AUTHORIZED TO ALLOW AUDITOR FOR POSTAGE; ALSO AS TO ALLOWING OTHER BILLS.

Columbus, Ohio, January 19, 1904.

B. A. Unverferth, Esq., *Prosecuting Attorney, Ottawa, Ohio.*

Dear Sir:—Your letter of the 15th inst., is received. You make three inquiries:

First:—Have the county commissioners the right to allow postage to the different officers of the county, used in sending out official matter. For instance, the auditor sends out blanks each year, under the law, to the different justices of the peace and township clerks for reports, are the commissioners authorized in any way to allow bills in payment of the postage stamps used for that kind of work?

In reply to this inquiry I would say that under Section 719 R. S., a probate judge in certain cases is allowed for postage. I have been unable to find any other statute allowing postage to county officers, and am of the opinion that the auditor may neither charge nor the commissioners allow the auditor for postage.

Judge Pugsley, of the Common Pleas Court of Lucas County, in passing upon this question of postage said:

> "It is sufficient to say that no provision is made by law for reimbursing the auditor for money so expended by him."

This was a case in which the charge for postage by the auditor had been allowed by the county commissioners and was disallowed by the Court.

Second inquiry:—What stationery, if any, are the commissioners allowed to purchase for the county officers?

It is solely in the power of the commissioners to purchase stationery for county officers, unless the statute otherwise expressly provides. You will notice in the case of the clerk of court, he may purchase stationery, but in that event his action is subject to review by the county commissioners in so far as the price paid is concerned.

In all other cases the stationery may legally be purchased only by the county commissioners, and for this reason the commissioners alone are empowered to levy tax on the people, and it is the policy of the law to confine the power of incurring expenses for county purposes to them solely who alone can levy tax to pay them.

Third inquiry:—Have the commissioners any right to allow bills for telephones used in the court house by the different officers; and have they any right to allow for electric lighting of the offices?

In reply to this I would say, that the commissioners have power to allow reasonable bills for the purposes indicated by your inquiry.

Very respectfully,
WADE H. ELLIS,
Attorney General.

SECTION 4451*a*. CAN COUNTY AUDITOR DRAW FEES FOR ALL DITCH NOTICES?

COLUMBUS, OHIO, January 19, 1904.

HON. H. L. YOUNT, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your letter of January 16th received. Several days ago I answered your inquiry in regard to fees of county commissioners under Section 4506 R. S., and under the special act applying to Darke County, Ohio, and you have no doubt received my letter.

You now ask for an interpretation of the entire Section 4506 R. S., and you especially inquire whether the county auditor is entitled to draw fees for all ditch notices.

In answer to your special inquiry I would refer you to Section 4451*a* R. S. You will observe by the provisions of this section that it is the duty of the auditor to prepare and deliver to the petitioners, or any one for them, a notice in writing. There is no provision requiring the auditor to make copies of such notice, therefore he may not charge for such service.

In regard to the interpretation of the entire Section 4506, I would say that I prefer to answer specific inquiries based upon existing circumstances, calling for an interpretation.

Very respectfully,
WADE H. ELLIS,
Attorney General.

MAYOR AND POLICE OFFICERS ENTITLED TO FEES IN STATE CASES WHEN COLLECTED.

COLUMBUS, OHIO, January 22, 1904.

CHARLES GEARHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your letter of January 14th received. This office has heretofore passed upon the question submitted in your letter and has held, that the mayor and police officers are entitled to their fees, if collected, in State cases, but in no case shall the city be liable to such officers for services in State cases.

Very respectfully,

WADE H. ELLIS,
Attorney General.

WHO LIABLE FOR EXPENSE OF QUARANTINE IN CERTAIN CASE IN BROWN COUNTY.

COLUMBUS, OHIO, January 25, 1904.

JOHN Q. WATERS, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter of January 20th is received. You state that "A" a former resident of Adams County moved with his family to Brown County, and occupied property of his own in Brown County, intending to make Brown County his home; that after residing in Brown County for a period of thirty days the family were stricken with smallpox and the family and premises put under quarantine by the township board of health. Upon this state of facts you make this inquiry:

> "Can Huntington Township, Brown County recover the expense of the quarantine, furnishing medical attention etc., from Adams County, "A" being unable to pay it?"

In reply I would say that upon your statement of the facts "A" was a bonafide and legal resident of Brown County at the time the expense was incurred, and consequently no recovery for such expense may be had against Adams County.

Very respectfully,

WADE H. ELLIS,
Attorney General.

AS TO EXPENSES OF COUNTY SURVEYOR, COUNTY COMMISSIONERS, AND POWER OF COUNTY COMMISSIONERS TO COMPROMISE JUDGMENT FOR COSTS IN CRIMINAL CASES.

COLUMBUS, OHIO, January 28, 1904.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Acknowledging receipt of yours of the 26th inst., I beg to say that the County Surveyor is not entitled to charge his personal expenses or those of his assistant for services performed under the law found in 95 O. L., page 154.

Answering your second inquiry as to the construction of Section 897-5, providing for the allowance to a county commissioner reasonable and necessary

expenses, actually paid in the discharge of his official duty, I would say that this department has heretofore construed said section by the rules laid down in Jones, Auditor, v. Commissioners of Lucas County, 57 O. S., 189, and Richards v. State ex rel. Prosecuting Attorney, 66 O. S., 108, and advised that the claims for distinctively personal expenses of the county commissioners, such as hotel, meals, horse feed, and all such like expenses, be not allowed as payable to such officers.

Answering your third inquiry, relating to the power of the county commissioners to compromise a judgment rendered for costs in a criminal case, I would say, that, pursuant to the powers conferred by Section 855, R. S., that if any part of the costs are due to the county or for the use thereof, the county commissioners may compound and release the same, but all fines payable in State cases are not capable of being compounded or released by the county commissioners.

Very truly yours,

WADE H. ELLIS,
Attorney General.

AS TO COLLATERAL INHERITANCE TAX.

COLUMBUS, OHIO, February 8, 1904.

MR. T. B. MATEER, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your letters of February 1 and 3 received. You submit the following statement of facts: Albert Truax died on the 1st day of May, 1902, testate. By his will he bequeathed to one Tillie Wright all his estate, real and personal. At the time of the death of the testator he was indebted to said Tillie Wright in the sum of $1,000. Upon this statement of facts, you make the following inquiries:

> *First Inquiry:* Can the one thousand dollar indebtedness to Tillie Wright be deducted from the amount of the appraised value of the estate, and the balance certified to the auditor?

In answer to this inquiry, I would say that the indebtedness may properly be deducted, and the balance certified to the auditor.

> *Second Inquiry:* Is this tax a debt of the estate, and, as such, a preferred claim?

Such collateral inheritance tax is a tax upon the privilege of succeeding to property, and is a preferred claim as against the interest to which the person succeeds.

> *Third Inquiry:* Is the 5 per cent referred to in the collateral inheritance tax law to be estimated upon the appraised value of the estate, or upon the value of the estate less the debts and valid claims against said estate?

In reply to this inquiry, I would say that the tax computed is not on the aggregate valuation of the whole estate of the decedent, but upon the value of the separate interests into which it is divided by the will or by the laws of the State, so that it is necessary first to determine what interest the person succeeds to, and it is upon such interest that the tax is computed.

Very respectfully,

WADE H. ELLIS,
Attorney General.

BOYS' INDUSTRIAL SCHOOL AND WORKHOUSE ARE STATE PRISONS WITHIN MEANING OF ACT PROVIDING NOT FOR SENDING TO INTERMEDIATE PRISON AT MANSFIELD, OHIO.

COLUMBUS, OHIO, February 11, 1904.

ROBERT H. DAY, ESQ., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your letter of February 9 received. You inquire whether:

> "The Reform School, at Lancaster, Ohio (Boys' Industrial School), or the workhouse at Canton, Ohio, is a State prison within the terms of the act providing for the sending to the intermediate penitentiary at Mansfield persons pleading guilty or convicted, who were under twenty-one and over sixteen years of age?"

In reply, I would say that, in my opinion, neither the Reform School at Lancaster (Boys' Industrial School), nor the workhouse is a State prison within the meaning of the act referred to.

Very respectfully,

WADE H. ELLIS,
Attorney General.

COUNTY COMMISSIONERS NOT ENTITLED TO PER DIEM AND MILEAGE FOR ATTENDING COMMISSIONERS CONVENTION AT COLUMBUS.

COLUMBUS, OHIO, February 12, 1904.

JOHN A. EYLAR, ESQ., *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letter of February 9 is received. You inquire whether county commissioners are entitled to draw per diem and mileage while at Columbus attending the gathering of the county commissioners of the State.

I am not aware of any provision of the statute authorizing the commissioners to draw either per diem or mileage for such purposes, and such charge may not be legally approved by you.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COSTS IN CASES OF FELONIES WHERE STATE FAILS.

COLUMBUS, OHIO, March 2, 1904.

HON. T. A. CONWAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your letter of February 29th is received.

You inquire First. Whether the provisions of Section 1308 R. S., are mandatory or whether it is a matter of discretion with the commissioners to allow any of the costs in cases of felonies where the state fails?

You will observe that this section provides that the fees of witnesses shall be paid upon the allowance of the commissioners out of the county treasury on

the certificate of such officer, notwithstanding the state has failed. This certificate referred to evidently is the certificate of the justice, mayor, etc., and in my opinion, such section is mandatory in its effect.

You inquire Second. Is it mandatory upon the commissioners to allow costs in any case wherein the offense charged is only a misdemeanor? If so in what cases to what officers, or persons must such costs be paid?

Sections 1309, 1311 and 1312 should be examined to determine the answer to your inquiry.

Section 1309 provides substantially, that the county commissioners may, at any regular session make an allowance to any of such officers in lieu of fees * * * in misdemeanors wherein the defendant proves insolvent.

Section 1311 provides among other things that, in ascertaining the amount of fees taxed by the officers referred to, it must appear that in the cases where such officer was authorized to take security for costs, that he has exercised reasonable care in taking such security, and when satisfied by the certificate of such officer or by other proof, that in the case presented, the prosecuting witness was indigent, the officer's fee in such cases should not be included in ascertaining the amount to be allowed by the commissioners.

Section 1312 provides substantially, that where such officer takes security for costs that is insufficient at the time he takes it, the fees in the case presented shall not be taken into account by the commissioners in making the allowance.

From these provisions I conclude, that in cases of misdemeanors, whether the state fails or not, under the restrictions provided in Sections 1311 and 1312, the officers referred to, that is, justices of the peace, mayor or police judge or justice, are entitled to the allowance provided for in Section 1309, with the limitation that the aggregate amount allowed to either of them in any year, shall not exceed $100.00.

Very respectfully,
WADE H. ELLIS,
Attorney General.

CONSTRUCTION OF 871 R. S.

COLUMBUS, OHIO, March 2, 1904.

WILLIAM T. DEVOR, ESQ., *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Answering yours of the 29th ult., relative to the power of the county commissioners to borrow money and issue the bonds of the county therefor for the purpose of constructing and repairing bridges I would say that pursuant to Section 871 R. S. they are authorized to borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed 6% per annum, and issue bonds of the county to secure the payment of the principle and interest thereof; but the power as therein conferred is limited by Section 2825 R. S. which, if the amount exceeds $10.000 requires such proposition to be first submitted to the voters of the county.

Yours truly,
WADE H. ELLIS,
Attorney General.

RELATIVE TO THE MANNER OF HOLDING ELECTIONS IN TOWNSHIPS.

COLUMBUS, OHIO, March 11, 1904.

HON. C. C. LEMERT, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of yours of the 5th inst., relative to the time and manner of holding elections in townships, villages and cities. The act becomes effective at once, and among others affected thereby are township officers, the provision being that on the first Tuesday after the first Monday of November the election of all township officers and Justices of the Peace shall be had; and further, that all township officers hereafter elected shall begin their respective terms on the first Monday of January after their election. There will therefore be no election of such officers in the month of April, as heretofore.

Yours very truly,

WADE H. ELLIS,

Attorney General.

AS TO TERM OF OFFICE OF CLERK OF COURT AND INFIRMARY DIRECTOR WHERE APPOINTED—FINES ASSESSED BY MAYOR UNDER SECTION 4364-20G TO BE PAID INTO TREASURY MUNICIPAL CORPORATION.

COLUMBUS, OHIO, March 14, 1904.

MR. G. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Answering your several inquiries in the order presented, I would say:

1. If the clerk of the Court of Common Pleas was elected at the November election, 1902, for a term of three years from the first Monday in August, 1903, and was removed by the court for cause February 27, 1904, the appointee will serve until August, 1905. His successor should be elected in November, 1904, and take his office in August, 1905.

2. If the infirmary director was elected at the November election, 1903, for a term of three years from the first Monday in January, 1904, and qualified at the regular time, and resigned on the 5th day of February, 1904, the vacancy can be filled by the county commissioners under the authority conferred upon them by Section 959, R. S. They may oppoint his successor until January, 1905, but the successor should be elected at the November election, 1904, and take his office on the first Monday of January, 1905.

3. When you say that the village mayor assessed a fine under the Revised Statutes for violation of the liquor laws of the State I assume that such fine was assessed under Title 5, Chapter 7, and that under Section 4364-20g, R. S., the money collected under the provisions of that act should be paid into the treasury of the municipal corporation wherein such fine was imposed. This section is preserved by the new municipal code by express reference thereto in Section 1536-1000, par. 5.

I beg to remain,

Very truly yours,

WADE H. ELLIS,

Attorney General.

PROSECUTING ATTORNEY IS NOT REQUIRED TO REPRESENT SUPERINTENDENT OF WORKHOUSE IN HABEAS CORPUS CASES; ALSO WHETHER COUNTY RECORDER IS ALLOWED BILL FOR POSTAGE.

COLUMBUS, OHIO, March 15, 1904.

MR. CHARLES T. HOWARD, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your letter of March 8 received. You make inquiry:

First: Whether you, as prosecuting attorney, are required to represent the superintendent of the workhouse in habeas corpus cases under your general duties as fixed by the statute, and as to whether you are entitled to compensation in case you do appear and represent such superintendent.

A prosecuting attorney, under the provisions of Section 1273, R. S., must act for the county in the prosecution of all criminal cases in the Probate, Common Pleas and Circuit Courts, and under the provisions of Section 1274 he is the adviser of all county officers. I nowhere find it the duty of a prosecuting attorney, as such, to represent the superintendent of workhouse in habeas corpus proceeding. I am therefore of the opinion that when the superintendent of the work house employs a prosecuting attorney he is entitled to reasonable compensation for his services, and in thus appearing for such superintendent the prosecutor is not acting in his official capacity.

Second: Whether the county recorder is entitled to be allowed his bill for postage, that is, for postage stamps used by him principally in mailing mortgages and deeds to the persons entitled. This department on January 19, 1904, in reply to an inquiry as to whether county commissioners may allow and pay the county auditor for postage, concluded:

> "Have the county commissioners the right to allow postage to the different officers of the county, used in sending out official matter?
>
> In reply to this inquiry I would say that under Section 719, R. S., a probate judge, in certain cases, is allowed for postage. I have been unable to find any other statute allowing postage to county officers, and am of the opinion that the auditor may neither charge, nor the commissioners allow, the auditor for postage."

It will be seen by the foregoing opinion that, in the judgment of this department, an allowance may not legally be made to the county recorder for postage.

Very truly yours,

WADE H. ELLIS,
Attorney General.

INTERPRETATION OF SECTION 4364-15, R. S., AND WHAT IS COMPETENT PROOF UNDER THAT SECTION.

COLUMBUS, OHIO, March 15, 1904.

MR. JOHN Q. WATERS, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter of March 14 received. In reply I would say that Section 4364-15, R. S., does provide that the fact that a person against whom suit is brought to enforce the collection of the assessment (Dow tax) has paid the special tax required by the laws of the United States for engaging in the sale of intoxicating liquors, as shown by the public records in the offices of internal revenue department, may be offered in evidence and shall be prima facie evidence.

There are several ways by which the fact that such special revenue tax is paid may be shown to the court. In the first place, I would suggest that in your answer to the petition of the person charged with the assessment you allege the fact that such person has paid the special revenue tax. In reply to your answer it becomes necessary for the plaintiff to either admit the fact that such special tax has been paid or else possibly subject him to perjury in case he denies the fact of such payment.

In the second place, a stranger may examine the public records in collector of internal revenue office, and then testify as to what such record shows, after your first having shown that it is the only means of procuring the evidence sought.

In the third place, you may, upon cross examination, ask the plaintiff the fact whether or not he has paid such special tax to the United States government; and you may also show that such plaintiff has a special tax stamp conspicuously displayed at his place of business, as required by the statutes of the United States. Having established the fact that the plaintiff has paid such special tax the fact becomes of as much force as though it were proven direct by the public records in the office of the internal revenue department.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CONSTRUCTION OF 919 R. S.

COLUMBUS, OHIO, March 15, 1904.

MR. FRED E. GUTHERY, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your letter of March 4 is received. You ask for a construction of Section 919, R. S., based upon the following facts:

> 'The horse of a Mr. Kennedy was stolen during the year 1903. Mr. Kennedy assisted in looking up the thief, and upon Kennedy's evidence the horse thief was apprehended. The accused was convicted and sentenced to the penitentiary. Mr. Kennedy now presents a bill to the board of county commissioners for the allowance of his expenses incurred in apprehending the thief."

You desire an opinion as to whether, under Section 919, R. S., Mr. Kennedy is entitled to be reimbursed for his expenses incurred in apprehending the horse thief.

You will observe that the section referred to empowers the county commissioners, when they deem it expedient, to offer a reward or employ detectives for the purpose of apprehending any person charged with horse stealing, etc., and upon conviction of such person may pay such reward, or other compensation, out of the county treasury, but in no case shall the owner of the stolen horse or horses be entitled to any of said reward.

This section, 919, R. S., therefore confines the power of the commissioners to grant *compensation* (other than the reward duly offered) to persons employed by them as detectives. It not appearing that Mr. Kennedy was employed by the commissioners, there is no authority in Section 919, R. S., for the commissioners to make him any allowance.

Very respectfully,

WADE H. ELLIS,

Attorney General.

AS TO ASSESSORS HOLDING OFFICE.

COLUMBUS, OHIO, March 24, 1904.

MR. E. E. CORN, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your letter of March 22 received. You inquire, First, whether assessors elected last year shall hold their offices until their successors are elected?

Section 4, Article X, of the Constitution of the State of Ohio, provides that "all township officers shall be elected and shall hold their offices until their successors are elected and qualified."

A township assessor who was lelected last year will hold his office, therefore, until his successor is elected in November, 1904, and has qualified.

Second. You inquire how a vacancy should be filled in the office of township assessor, where the person elected has died, resigned or removed?

In such case the township trustees should fill the vacancy.

Very truly yours,

WADE H. ELLIS,
Attorney General.

A BRIDGE MAY BE BUILT, PURSUANT TO SECTION 2825, R. S., WITHOUT A VOTE OF THE ELECTORS.

COLUMBUS, OHIO, March 24, 1904.

HON. J. F. GREENE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of yours of the 19th inst., with your request for an opinion upon the state of facts set forth by you relating to the erection of a bridge over the Tuscarawas River, in Canal Dover, your county. You have stated that the preliminary steps have been taken condemning the bridge in question, looking to the restoration thereof by the commissioners of your county, and your inquiry is, Can the bridge be constructed pursuant to the authority contained in Section 2825, R. S., without having a vote of the electors thereon?

The chief difficulty mentioned in your letter is, as you have stated, in the amount it will be necessary to pay for the construction of such bridge, and as you say the levy authorized by the section of the statutes in question is limited to two-tenth mills per annum, and that this "renders it almost impracticable because the duplicate valuation of this county is only $19,000,000, and the amount raised by such a levy would only be a little more than sufficient to pay the interest on the bonds issued for such purpose."

There may be some mistake in the figures you have thus given, for, if my computation be correct, two-tenths of one per cent on $19,000,000 would be $38,000, and would be fully adequate to pay off and discharge the amount of obligations necessary to issue for such a structure; therefore, I cannot see that that should be considered an obstacle. And looking into the requirements of Section 2825, the latter part of the section seems to be an exception to that which precedes it, whereby the county commissioners are not required to submit to a vote the proposition of building such a bridge when the conditions therein set forth are complied with.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE EQUIPMENT OF A COUNTY SURVEYOR'S OFFICE.

COLUMBUS, OHIO, March 24, 1904.

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Answering yours of the 21st inst., I beg to say that in my opinion Section 1181, R. S., in speaking of the equipment of the office of the county surveyor, using the language quoted, "all necessary cases and other suitable articles" includes transits and chains for the surveyor's field work, as well as necessary articles for his office work.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE ORIGINAL BONDS OF THE MUNICIPAL, TOWNSHIP OR SCHOOL OFFICERS WILL NOT COVER EXTENDED TERM PROVIDED BY THE CHAPMAN BILL.

COLUMBUS, OHIO, March 24, 1904.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Acknowledging receipt of yours of the 19th, and answering your queries in the order suggested, I beg to say that in my opinion the wording of the official bonds referred to would control my answer as to whether or not the old bonds given would cover the extension of term of the municipal, township and school officers, provided by the Chapman Bill; but if the condition of the bonds would not contemplate any further or other liability than the then existing term of office, I am satisfied that a new bond would have to be given in order to cover the extended term, because the surety could stand upon the strict letter of the obligation which he had signed, and his liability would not be increased, nor the term of his liability extended without his consent. This question is not covered by any remedial legislation applying to bonds such as that contained in Title 1, Division 1 of the Revised Statutes, and the general principles regarding obligations of this character would govern. So far as the adjudicated cases bear upon this proposition, they seem to indicate the necessity of the giving of a new bond.

2. Nominations for offices under a call issued for that purpose, to be filled and voted upon at the spring election, if regular in every way, would not disqualify the candidates thus nominated from being placed upon the ticket or other respective offices at the coming November election. The enactment of the Chapman law did not affect the question of the nomination of candidates.

3. The passage of the so-called Chapman law, abolishing spring elections, also included members of the school-boards of special school districts and township school districts, even though those members were to be elected upon the second Monday of April, in such districts, instead of at the regular time for electing other township and municipal officers under the law as heretofore existing. Such officers will also be elected in the November following.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COUNTY NOT REQUIRED TO PAY FOR BURIAL OF DEPENDENT FATHER OF SOLDIER.

COLUMBUS, OHIO, March 24, 1904.

HON. JOHN S. DAVIDSON, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your letter of March 24th is received. You inquire whether under Sections 3107-45 and 3107-46 R. S., the county must pay for the burial of a dependent father?

Section 3107-45 provides that the county commissioners shall "appoint three suitable persons in each township and ward in their respective counties * * * whose duty it shall be to look after and cause to be interred * * * the dead body of any honorably discharged soldier, sailor or marine having at any time served in the army or navy of the United States, their mothers, wives or widows * * * at a cost not to exceed fifty dollars."

Section 3107-46 provides among other things that the persons appointed under Section 3107-45 shall satisfy themselves by careful inquiry that the family of such soldier, wife, widow or mother and dependent father is unable to defray the expense of such funeral or burial. This section then provides, that if such persons appointed, find such inability upon the part of the family above referred to, then the persons appointed by the county commissioners shall cause to be buried such soldier, sailor or marine, their wives, widows or mothers as provided in Section 3107-45.

It may have been the intention to place a dependent father in the same category with the wife, widow or mother, but as appears by the statute being considered, no provision is made for the burial of the dependent father at the expense of the county.

Very respectfully yours,
WADE H. ELLIS,
Attorney General.

AS TO LEVY FOR BRIDGE PURPOSES.

COLUMBUS, OHIO, March 25, 1904.

HON. J. F. GREENE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—A revision of the computation of the amount that would be raised by a levy of two-tenths of a mill upon the duplicate of your county shows that the amount would thus be raised for bridge purposes when constructed under Section 2825 Revised Statutes, would be but $3,800.00. The purpose for which you seek to apply that statute cannot be affected as the payment for the bridge cannot be made without recourse to a greater levy. I am of the opinion that the limitation of two-tenths of a mill is a limitation upon the power of the county commissioners to restore a bridge at a price exceeding ten thousand dollars without a vote of the electors thereon, and that if the construction of the bridge requires a greater levy than that mentioned in Section 2825 it necessarily requires the submission of the question of the construction to the electors of the county.

Very truly yours,
WADE H. ELLIS,
Attorney General.

REGARDING TRANSFER OF FUNDS FOR TEMPORARY PURPOSES FROM THE INFIRMARY TO CHILDRENS' HOME FUND, AND WHETHER THE CHILDRENS' HOME IS ENTITLED TO ANNUAL APPORTIONMENTS FROM THE DOW TAX SET APART FOR THE COUNTY POOR FUND.

COLUMBUS, OHIO, March 25, 1904.

HON. J. F. GREENE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Yours of recent date at hand containing the letter of the auditor of your county regarding the transfer of funds for temporary purposes from the Infirmary to the Childrens' Home fund; and the further query as to whether the Childrens' Home is entitled to annual apportionments from the Dow tax set apart for the county poor fund. You do not say whether the home located in your county is a district home, or a distinctively county home organized under Section 929, but I assume, for the purpose of this opinion, that it is a home of the latter character.

A consideration of the sections governing the maintenance of County Childrens' Homes show that they are to be maintained, in so far as they are maintained by public funds, by a special levy distinguished as "Childrens' Home Fund" or similar designation, it seems to be required that this be separate and distinct from the Infirmary or poor fund of the county.

Under Section 4364-17 R. S. governing the distribution of the tax upon the liquor traffic two-tenths part thereof, together with all other revenues resulting from said law in the county, shall be passed to the credit of the poor fund of the county. I find no authority for the maintenance of the Childrens' Home from such fund. But, as you say in your letter, the purpose is that of temporary relief to be derived from such fund to replenish the fund for the maintenance of the Childrens' Home, which, as you explain, is exhausted.

To determine that question we should examine the authority by which transfer of funds may be made by the county commissioners, and this is governed by the method prescribed in Section 22*b*-3, Bates' Statutes, 4th Edition (95 O. L., 371), and also by Section 876 R. S. The latter section being the one which is more commonly applied would seem to offer such authority in the following language:

> "In case there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the time fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed, temporarily, to such other fund as is exhausted, and reimburse such special fund out of the taxes levied for such other fund, as soon as the same are collected."

I think this section should be construed liberally to accomplish the purposes for which it was enacted, and am therefore of the opinion that the Childrens' Home Fund may be temporarily replenished from the Infirmary or Poor Fund, but that such fund should be reimbursed as soon as the taxes are collected for the purpose of the maintenance of the home.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO COUNTY TREASURERS EMPLOYING COUNSEL TO BRING SUITS TO COLLECT DELINQUENT TAXES UNDER SECTION 2859 R. S. AND PAY THEM OUT OF COUNTY TREASURY, AND PER CENT. RECEIVED ON AMOUNT COLLECTED.

COLUMBUS, OHIO, March 28, 1904.

MR. CHARLES GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your letter of the 16th inst. is received, but on account of pressure of business in this office I have not been able to take it up until this time. You make two inquiries.

> First. "Can a county treasurer employ counsel to prosecute suits for the recovery of delinquent taxes under Section 2859 R. S., and have them paid for their services, so rendered, out of the county treasury?"

In reply to this inquiry I would say that I find no provision of law allowing to the county treasurer under Section 2859 any counsel fees.

> Second. "Can collectors of taxes employed pursuant to Section 2858 R. S., by the treasurer bring an action in the name of the treasurer under Section 2859 R. S., and upon recovery in any such action, receive such per cent., out of the amount collected when the taxes are on the delinquent list pursuant to Section 2855 R. S., as their contract provides?"

The case of Hamilton Co. v. Arnold, 66 O. S., 479, to which you refer in your letter fully analyzes Section 2858. The compensation of the collector under such Section must be definitely fixed by the County Commissioners.

The remedy of the treasurer under Section 2859 is additional to the other remedies provided by statute for the collection of delinquent personal taxes, and Sections 2858 and 2859 must be construed independently. In whatever manner the collectors under Section 2858 may proceed, their compensation is fixed, as has been said, by the commissioners, and while the Supreme Court of the State has not as yet held that under said Section 2858 the collector may bring suit, yet such has been the understanding of the departments of state connected with the levy and collection of taxes. Very truly yours,

WADE H. ELLIS,
Attorney General.

EXPENSE OF WITNESS IN STATE CASE FROM CALIFORNIA TO HARDIN COUNTY.

COLUMBUS, OHIO, March 30, 1904.

MR. HAMILTON E. HOGE, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your letter of March 22d in which you inquire whether expenses paid to a witness for the prosecution, in a criminal case, from the State of California to Hardin County can be collected from the state is received.

In reply to your inquiry I would say that the costs in a criminal case for which the state is chargeable in case of conviction, are those costs which are made in pursuance of the statutes of the state. The process of the state reaches only to its territorial limits and consequently the expenses you refer to would not be a legal charge against the state. Very truly yours,

WADE H. ELLIS,
Attorney General.

AS TO EXPIRATION OF TERM OF JUSTICE OF PEACE, AND ALSO AS TO RENEWAL OF BOND.

COLUMBUS, OHIO, April 1, 1904.

MR. CHARLES H. GRAVES, *Prosecuting Attorney, Oak Harbor, Ohio.*

DEAR SIR:—Yours of March 31st at hand. Justices of the Peace whose commissions expire this spring will not continue to hold their offices beyond the terms expressed in their commissions, but the vacancies arising between the expiration of their commissions and the next election will be filled by appointment by the Township Trustees.

If their bonds read that the sureties are bound until their successors are elected and qualified, they would not be required to give new bonds, but if, as is usual, their bonds are for the term for which they are elected, the sureties cannot be bound without their consent beyond the expiration of that particular term, and therefore a new bond would be required.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CITIES ARE ENTITLED TO THEIR PROPORTION OF BRIDGE FUND COLLECTED ON PROPERTY WITHIN THE CITY, UNDER SECTION 2824 R. S.—TO WHOM THE CLAIM FOR COMPENSATION OF PROSECUTING ATTORNEY FOR DEFENDING SUPERINTENDENT OF WORKHOUSE IN HABEAS CORPUS PROCEEDING, SHOULD BE PRESENTED.

COLUMBUS, OHIO, April 1, 1904.

HON. CHARLES F. HOWARD, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Acknowledging receipt of yours of the 29th inst., it is my view that Section 2824 R. S., and kindred sections, authorizes the municipal authorities in the cities therein described to have their proportion of the taxes collected as a bridge fund upon the property within the city set apart to them. I have no knowledge of this class of power ever having been denied, and would not assure, in advance of the supreme court so declaring, that the same was unconstitutional.

You make this further inquiry: Whether the claim for compensation of a prosecuting attorney for defending a superintendent of the workhouse in habeas corpus proceeding should be made to the county commissioner, or to the boar of workhouse directors? In reply I would say that the employment of the prosecuting attorney, in the case referred to, is just the same as though the employment was of any other attorney, and you should look, in the case supposed, to the superintendent of the workhouse for your fees.

Yours very truly,

WADE H. ELLIS,

Attorney General.

COMPENSATION OF TAX COLLECTOR WHERE TAX PAID DIRECT TO COUNTY TREASURER.

COLUMBUS, OHIO, April 1, 1904.

MICHAEL CAHILL, ESQ., *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your letter of March 30 received. You inquire whether a tax collector employed by the treasurer and county commissioners, presumably under

Section 2858, at a certain per centum of the amount collected from delinquent personal taxes, is entitled to such per centum upon amounts paid to the treasurer direct?

In reply I would say that such collector is not entitled to his per centum upon collections made by the treasurer. This is true under Section 2858.

You further ask whether the deputy tax collector appointed under Section 1104, at a compensation of 20 per cent on the amount collected, is entitled to his per centum upon amounts collected by the county treasurer and not by such collector.

The collector referred to is only entitled to his twenty per centum upon the amounts collected by him, and is not entitled to anything upon the amounts collected by the treasurer himself.

Very respectfully yours,
WADE H. ELLIS,
Attorney General.

COMPENSATION OF MEMBERS OF BOARD OF EQUALIZATION.

COLUMBUS, OHIO, April 4, 1904.

HON. FRANK A. ZIMMER, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—Your letter of March 29 is received. You inquire what compensation the members of the Board of Equalization are entitled to receive, who were appointed under the act of the legislature passed April 4, 1900 (94 O. L., pages 96 to 100).

An inspection of the act referred to fails to disclose any provision for the payment to the equalizing board of any compensation for the services they are called upon to perform under the provisions of the act. It is a well settled principle that where no compensation is provided by law for the performance of an act there exists no authority to allow or pay compensation. There are other road laws which provide in particular cases how much, and the manner in which compensation may be paid to the persons discharging the duties under such road laws. But this particular road law which you are inquiring about seems to be silent upon the question of compensation.

I am, therefore, of the opinion that there is no provision of law either fixing the compensation of such board of equalization or empowering any person or body to fix or pay the same.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RIGHT OF COUNTY COMMISSIONERS TO ALLOW COUNSEL FEES FOR LEGAL SERVICES TO INDIGENT PRISONER IN CIRCUIT AND SUPREME COURTS.

COLUMBUS, OHIO, April 7, 1904.

HON. W. G. ULERY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter of April 5 is received. You make the following inquiry:

First. Have the commissioners any authority to pay an attorney for services rendered to an indigent prisoner in the Circuit and Supreme Court?

You state in your letter that the attorneys were appointed by the court to defend Albert Wade, who was indicted for murder in the first degree. These attorneys performed services in the Common Pleas, Circuit and Supreme Court. Wade was convicted under the indictment. The court has already approved an allowance to counsel of $200.

Section 7246, R. S., provides that counsel assigned to defend an indigent prisoner charged with murder in the first or second degree may receive such compensation as the court may approve.

I am of the opinion that the court, under the section referred to, may approve and the commissioners allow, a reasonable compensation to the assigned counsel and do not think that the total amount of $400 would be either unreasonable or excessive.

In answer to your second inquiry, I would say that compensation allowed and paid by the commissioners to counsel assigned to defend indigent prisoners cannot be recovered by the county from the State.

Very respectfully yours,

WADE H. ELLIS,
Attorney General.

AS TO VIOLATION OF SECTION 4402-5, FAILING TO HAVE PROPER ENDORSEMENT ON STATE LICENSE.

COLUMBUS, OHIO, April 8, 1904.

HON. GEORGE H. BAYLISS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—Your letter of April 6 is received. I understand from the statements in your letter that you desire to know whether D. Endleman, or his representative, J. H. Dyer, is liable to prosecution for violation of Section 4402-5, R. S., for failing to have proper indorsements made on the State license at the time such person procured the local license to sell a "stock of clothing" at Paulding, Ohio?

Section 4402-5, R. S., provides, among other things, that any failure to obtain a local license and have proper indorsements made on the State license shall subject the person offending to the same penalty as though no license had been issued.

Section 4402-3, R. S., provides the penalty for failure to procure a state license. I am unable to determine from the statement in your letter whether Dyer or Endleman made any sales in Paulding, Ohio. In fact, I gather from your letter that the license which had been issued by the local authorities was revoked prior to the time such sale was commenced.

Section 4402-5, already referred to, I think, contemplates the prosecution of the person procuring the local license who makes sales ostensibly under such license.

Section 4402-6 provides a penalty in case of false statements made in the application, but even in such cases I think the penalty referred to would not be inflicted unless the applicant for the license proceeded to sell the goods. I am not prepared to say, however, that under the state of facts you submit, there is not a technical violation of the law.

You ask in your letter for an opinion as to what the chances of conviction may be in the case you suppose. You, being on the ground and acquainted, certainly must be better able to judge of the probabilities of conviction.

As I have said, upon your statement, if the law has been violated, as far as the sections referred to are concerned it has been a technical violation.

Very truly yours,

WADE H. ELLIS,
Attorney General.

EXPENSES OF COUNTY COMMISSIONERS UNDER SECTION 897-5, R. S.

COLUMBUS, OHIO, April 13, 1904.

HON. J. H. PLATT, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your letter of April 11th has been referred to me by the Attorney General.

You inquire what expenses a county commissioner may legally charge under Section 897-5 R. S.?

In the case of Richardson v. The State, 66 O. S. 108, the Supreme Court in construing the last clause of Section 897 R. S., held that "official expenses" as therein defined may be charged by a commissioner against the county, but said that such expenses did not include those incurred by the commissioner for his personal comforts and necessities.

Section 897-5 was enacted after the decision of the Supreme Court just referred to, and whatever may have been the intention of the person who prepared the amendment, there is nothing in the law to indicate that any other expenses than those allowed under Section 897 R. S., may be legally charged against the county by a commissioner. In fact Section 897-5 by its terms seems to simply limit the amount of the official expenses to the sum of $200.00.

The Bureau of Uniform Accounting is somewhat more liberal in its construction of the sections referred to, but I am of the opinion that the rule as laid down in 66 O. S., supra, is still the true rule as to what are official expenses.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER SECTION 897, R. S., AMENDED APRIL 23, 1904, APPLIES TO COUNTY COMMISSIONERS NOW SERVING THEIR TERMS OF OFFICE.

COLUMBUS, OHIO, May 20, 1904.

HON. E. E. EUBANKS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your letter of May 19 received. You inquire whether the opinions given by me to the Bureau of Inspection and Supervision of Public Offices, construing Section 897, R. S., as amended April 23, 1904, applies to county commissioners now serving their terms of office? And you call my attention to Section 20, of Article II, of the Constitution, and the case of State ex rel. v. Raine, 49 O. S., 580.

Section 897, R. S., as amended April 23, 1904, took effect upon its approval by the Governor of the State, and applies to county commissioners now in office. Prior to the passage of said amended Section 897, R. S., county commissioners in the several counties of the State were not paid a salary, but a per diem compensation, depending upon the number of days they might be engaged in the business of the county.

The term "salary," as found in Section 20, of Article II, of the Constitution of the State, is used in a limited and not in a general sense, and such term, as so used, does not apply to the per diem compensation heretofore allowed county commissioners; therefore, the present amendment to Section 897, R. S., may take effect immediately without contravening the provisions of Section 20, of Article II, of the

Constitution. In the case of Gobrecht v. Cincinnati, 51 O. S., page 68, the case of State ex rel. v. Raine, supra, is distinguished as not being in conflict with the principle I have already stated. In the Gobrecht case, which practically covers the situation as to county commissioners at this time, clearly distinguishes between salary and per diem compensation and establishes the law upon the subject you inquire about.

Very truly yours,

WADE H. ELLIS,
Attorney General.

EMPLOYMENT OF CLERK BY BOARD OF COUNTY COMMISSIONERS.

COLUMBUS, OHIO, May 20, 1904.

HON. E. L. TAYLOR, JR., *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of May 16, enclosing copy of the opinion given by you to the county commissioners of Franklin County, Ohio, on May 7, 1904, is received.

In your opinion you construe Section 845, R. S., as amended April 23, 1904, also Section 850, R. S., and substantially hold that in case the board of county commissioners, under Section 845, R. S., as amended, first "find it necessary for the clerk to devote his entire time to the discharge of the duties of such position," and such finding is recorded upon the minutes of said board, that then such board may employ a clerk at such compensation as may be fixed by such board of county commissioners; and that such clerk shall keep the records of the commissioners and the general index thereof, and perform all of the duties prescribed by Section 850, of the Revised Statutes; and that the cost of indexing theretofore allowed the county auditor shall cease, and the compensation fixed for the clerk by said board of commissioners shall be in lieu of all fees for indexing and other duties prescribed by Section 850, R. S.

I am of the opinion that your construction of the sections above referred to is correct.

Very truly yours,

WADE H. ELLIS,
Attorney General.

LEVYING OF SPECIAL TAX BY COUNTY COMMISSIONERS TO REBUILD OR REPAIR COUNTY BRIDGES, ETC.

COLUMBUS, OHIO, May 20, 1904.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your letter of May 11 received. You inquire whether, in case more than one important bridge belonging to or maintained by any county has been destroyed, or become dangerous to public travel, and the restoration thereof is deemed necessary for public accommodation, the county commissioners may levy a special tax to rebuild or repair such bridge not exceeding one and five-tenths mills for each bridge. I am of the opinion that Section 2824, R. S., admits of a levy not exceeding one and five-tenths mills for each important bridge destroyed, or which has become dangerous to public travel.

In regard to the matter of appointing attorneys to present bill of exceptions taken by a prosecuting attorney in a criminal case, and which is desired to be filed

in the Supreme Court of the State, I would say that this department is not authorized to appoint an attorney for that purpose and there is no provision of law by which persons so appointed may be compensated.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE EXPENSE OF SURETY BOND GIVEN BY BANK AS COUNTY DEPOSITORY SHALL BE BORNE BY THE BANK.

COLUMBUS, OHIO, May 23, 1904.

HON. JOHN B. MCGREW, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your letter of May 21 received. You state that the board of county commissioners, of your county, selected a bank as county depository, under Section 1136-1 to 1136-13, R. S. The bank insists that the bond to be given by it as such depository must be a surety bond and that the county, under Section 3641c, R. S., as recently amended, should pay the expense of such bond, and you ask for an opinion as to whether such expense must be borne by the county.

It is my opinion that such expense is not a proper charge against the county, but that the bond to be given should be furnished by the bank as depository without cost to the county.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONCERNING THE RIGHT OF PROSECUTING ATTORNEY TO ACT AS MEMBER OF SCHOOL BOARD.

COLUMBUS, OHIO, May 25, 1904.

HON. H. E. PARKER, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your inquiry of May 24, concerning the right of a prosecuting attorney to act as a member of a school board, received. While it is not the duty of this department, under Section 208, to advise prosecuting attorneys in such matters as this, yet I would refer you to Section 3977 R. S. as enacted in the new school code, which in express terms, prohibits any prosecuting attorney from acting as a member of any school board.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COUNTY COMMISSIONERS' AUTHORITY TO PAY CLAIM FOR PERSONAL INJURY CAUSED BY DEFECTIVE BRIDGE OUT OF BRIDGE FUND.

COLUMBUS, OHIO, May 31, 1904.

HON. ROBERT S. WOODRUFF, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Your communication of the 27th inst., concerning a claim for damages for personal injury caused by a defective bridge received.

After an investigation of the question, I find as you say, that there is no statute authorizing the commissioners to pay this claim out of the bridge fund. On the contrary the concluding part of Section 2824, which is as follows:

> "And shall be collected in money and *expended* except as may be otherwise provided by law, under the directions of the commissioners in *building bridges and culverts or in repairing the same*"

in express terms precludes the commissioners from paying the claim from the bridge fund. I am of the opinion that the claim for damages, if allowed by the commissioners, must be paid out of the county fund.

Very truly yours,
WADE H. ELLIS,
Attorney General.

FEES FOR PROBATE JUDGE AND WITNESSES IN BLIND INQUESTS.

COLUMBUS, OHIO, June 3, 1904.

HON. L. A. EDWARDS, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Your request of May 31, for an opinion as to the provisions of H. B. No. 211, received. I have this to say, that the county must furnish the necessary books and blanks for the use of the probate judge in making and keeping a record of blind inquests. The statute, however, is silent as to any fees for witnesses, or for the services of the probate judge, and while it may work a hardship yet it is a well settled rule that where the statute makes no provision for the compensation of county officers in performing statutory duties said officers are presumed to perform such duties gratuitously.

Very truly yours,
WADE H. ELLIS,
Attorney General.

BONDS OF COUNTY OFFICERS.

COLUMBUS, OHIO, June 3, 1904.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication of May 28, received and in reply bey leave to say:

1. There has been no change as to the amount of bonds to be given by county officers.
2. I am of the opinion that your County Treasurer having given a bond, and the same being approved by the board of county commissioners previous to the amendment to Section 3641*c*, that said bond is sufficient.
3. Section 1080 provides that the county treasurer, previous to entering upon the duties of his office, shall give bond with four or more freehold securities to the acceptance of the county commissioners and in such sum as the commissioners direct, thereby leaving the amount entirely discretionary with the board of county commissioners.
4. County officers are not required to give bond in double the amount of liability, therefore, under the amendment to Section 3641*c* a surety company bonding a county officer could not charge in excess of one-half of one percent.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHETHER NECESSARY TO REORGANIZE BOARD UNDER THE NEW LAW FOR ROAD DISTRICTS.

COLUMBUS, OHIO, June 3, 1904.

HON. F. W. WOODS, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Your communication of May 31st relative to the new law for road districts, received. There is nothing in the amended sections that makes it necessary to reorganize your board; the amendments affect only their method of procedure. Your old board will still exist, but will operate under the amended sections.

Very truly yours,
WADE H. ELLIS,
Attorney General.

COMPENSATION OF PROBATE JUDGE AND WITNESSES UNDER H. B. NO. 211.

COLUMBUS, OHIO, June 3, 1904.

HON. J. E. POWELL, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Your letter of May 31st in reference to H. B. No. 211 received. This statute is silent as to any provisions for compensation to the probate judge and witnesses. The rule is well settled in Ohio that unless the statute makes provision for compensation the duty is presumed to be performed gratuitously. I realize the hardship that will inure from this apparent oversight on the part of the legislature, however, there is no recourse until the law is amended.

Concerning the amendment to Section 3641*c* affecting the bond of the county treasurer the amendment provides that an individual bond be given unless an affidavit is first made that the bonding company refuses, or has rejected, the application for bond.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING BOND OF COUNTY TREASURER UNDER CRAFT'S LAW.

COLUMBUS, OHIO, June 8, 1904.

HON. WM. T. DEVOR, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Replying to your letter of June 7th, inquiring about the new Craft's law, I beg to advise you that, in my judgment, it would be best for your newly elected county treasurer to give a surety company bond. I have not critically examined this law to determine the question of its constitutionality, since no inquiry on that subject has come to this department from any state officer, but since all acts of the legislature must be assumed to be constitutional until the contrary appears it would seem the better practice to so regard this law unless your county treasurer desires himself to test its validity.

If the American Surety Company will not issue bonds to county treasurer, your county treasurer might apply to some other surety company, and if he is

unable to secure a surety company bond the new law clearly points out the course to be pursued.

This act provides that the cost of the bond shall be paid out of the public funds.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHETHER ROAD COMMISSIONERS QUALIFIED UNDER OLD LAW SHOULD GIVE BOND UNDER AMENDMENT TO SECTION 7.

COLUMBUS, OHIO, June 9, 1904.

HON. F. W. WOODS, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In reply to your letter of the 7th inst., the amendment to Section 7 of this law provides that a bond shall be given to the approval of the county commissioners in the sum of $1,500.00, payable to the State of Ohio. I would suggest you advise your road commissioners to comply with the amendment to this section.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING COMPENSATION TO COUNTY AUDITOR FOR FURNISHING BLANKS, ADVISING AND INSTRUCTING ASSESSORS, UNDER SECTION 1029 R. S.

COLUMBUS, OHIO, June 9, 1904.

HON. JOHN A. EYLAR, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—In reply to your communication of the 6th inst., cincerning compensation to county auditor for "furnishing blanks, advising and instructing assessors," I beg leave to say it has been held by one of our circuit courts that the auditor is entitled to compensation for preparing and supplying the assessors necessary blanks as provided in Section 1029 R. S.

I am of the opinion that the auditor is not entitled to any compensation under Section 1528, as that section provides particularly for the payment for necessary blanks, etc.

Very truly yours,
WADE H. ELLIS,
Attorney General.

COLLATERAL INHERITANCE TAX.—WILL OF SOPHIA HUNTINGTON PARKER.

COLUMBUS, OHIO, June 9, 1904.

MR. F. W. WOODS, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In answer to your inquiries regarding the collection of collateral inheritance tax upon legacies and bequests under the will of Sophia A. Huntington Parker, I would say, that Item 3 of said will provides for the setting apart of $1,000.00 to be used in the purchasing of a suitable lot in Springgrove Cemetery and for the erection of a monument to certain persons named in said item. While

it is not entirely clear that such legacy is chargeable with the collateral inheritance tax, I am inclined to the opinion that the following cases support the proposition that such legacy is chargeable with the tax:

> In Re Walters estate, 3 Pa. St. Rep., 447.
> Hurst v. Cemetery Associatiôn, 1st Lancaster Law Rev., p. 60.

This office contended in a case that was pending in Madison County, this state, that a legacy of this kind was subject to the tax, but the Common Pleas Court held otherwise.

Item 4 bequeaths the sum of $500.00 to be used in the erection of a Parish House for St. Paul's Episcopal Church, Medina, Ohio.

Such Parish House is not attached to the Church edifice but is to be used for residence purposes.

In Gerke etc. v. Purcell, 25 O. S. 230, the Supreme Court held that:

> "A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. * * * The exemption is not of such house as may be used for the support of public worship, but of houses used exclusively as a place of public worship."

I am therefore of the opinion that the bequest in Item 4 is subject to the collateral inheritance tax.

There is a further bequest of $500 in Item 4 to be used in purchasing a memorial window to be placed in said parish house. I am of the opinion that such bequest is liable to the collateral inheritance tax for the reason already stated.

In Item 7 there is a bequest to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church, to be paid to the treasurer of said society at New York, to be used in building a chapel or school building in some needy place in the foreign field.

Foreign corporations cannot claim any exemption unless specifically granted to them.

> "A college incorporated in another state is liable to taxation upon a legacy given by the will of a resident of this state, although by its charter it is exempt from taxation." Trinity College Case, 113 New York, 133.
>
> See In Est., Prime 136 N. Y., 356-360, for a full discussion of this doctrine.

The general doctrine as laid down by the courts is that "when the local law provides for exemption of corporations or associations from taxation, it means to include domestic only and not foreign corporations or associations, and this applies to all foreign corporations, whether charitable, religious or otherwise."

> Dos Pasos on Inheritance Tax Law, 2d Ed. 36, and the authorities cited in note 182 to said Section.

In the case of In Re Isabella Brown, deceased, 47 Ohio Law Bulletin, page 168, the Common Pleas Court of Hamilton County (Judge Hollister) said:

> "The purpose of the exemption in the collateral inheritance tax law, Section 2731-1 R. S. (94 O. L., 101), contained in the words 'or to or for the use of any institution in said state for purposes of purely public charity or for other exclusive public purpose,' is to exempt from taxation charitable bequests and devises when made to permanent organizations in the state, corporate or otherwise, capable of holding property,

and also to exempt charitable bequests or devises when the property so devised or bequeathed is actually located in this State and used here permanently for the charitable purposes for which it is given."

"Laws exempting from taxation must be strictly construed, it being the policy of the state that all property bear its share of taxation. Hence bequests made to Boards of the Presbyterian Church, incorporated under the laws of the states other than Ohio, and under the supervision and control of the General Assembly of that church, such bequests to be used in carrying on the charitable work of the church, a part to be expended in Ohio, but the major portion to be expended elsewhere did not constitute a permanent and fixed fund to be used in Ohio for the benefit of the inhabitants of this state, and did not fall within the exemption of the collateral inheritance tax prescribed by Section 2731 Revised Statutes."

In Humphrey Exr. v. The State of Ohio, in Hamilton County Circuit Court, 1st Circuit Court Rep., page 1, the court in arming the opinion of Judge Hollister, just referred to, said:

"The exemption in the Collateral Inheritance Tax Law of all bequests for the use of institutions of purely public charity should be limited to bequests to purely Ohio institutions. Denominational corporations organized under the laws of other states are not a care of the state of Ohio and bequests to such institutions are not entitled to exemption, notwithstanding they are organized for purely charitable purposes, and some portion of such bequest may be used in Ohio."

Item 7 which we are now discussing, shows upon its face that the money or property bequeathed is to be used entirely outside of the State of Ohio and in foreign fields, and I conclude from the name of the society to which it is bequeathed that it is an organization outside of the State of Ohio.

I am therefore of the opinion that such legacy or bequest being to a foreign corporation, for use in foreign lands, is not exempt from the collateral inheritance tax.

Item 8 of the will devises and bequeathes to the executor certain moneys and real estate for the purpose of an Old Ladies' Home. The collateral inheritance law provides for certain exemptions, for instance legacies or bequests to or for the use of any institution in said state for purposes of purely public charity. It is somewhat difficult to determine whether this bequest or devise is exempt, because we have no information as to the manner of organization or of the conduct of such institution. If charges are to be made for entrance to such home, the institution would not be for "purely public charity." It appears by said item that if such home is not established that the money and property referred to in said item shall vest in certain trustees for the purpose of a summer or outing home for the use of poor children. If the money and property are to be so used as to afford to all poor children without any charge an opportunity to enjoy the benefits of such home, I am inclined to think that the property would be exempt from taxation while so used.

Item eight still further provides that in the event that the money and property referred to in said item are not used for either of the purposes above specified, then such money and the proceeds of the property which shall be sold, are to be invested at interest and the interest to be used for the support of the Rector of St. Paul's or be applied upon the church or rectory fund as needed. I am of the opinion that money bequeathed for the support of a minister is not exempt from taxation under the collateral inheritance tax law, and I am inclined

to the opinion that the principal of the moneys referred to in item 8 would be liable to the collateral inheritance tax.

Item eight further provides that the principal of the money therein referred to shall ever remain unused so long as St. Paul's church shall stand in Medina and after that it may be devoted to the object mentioned in Item 7.

Item seven I have already considered and held that the bequest under said item is taxable under the collateral inheritance tax law.

I believe I have substantially answered your inquiries in regard to the will of Sophia A. Huntington Parker, and I herewith return copy of said will.

Very truly yours,

WADE H. ELLIS,

Attorney General.

EXPENSES OF COUNTY COMMISSIONERS.

COLUMBUS, OHIO, June 30, 1904.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your communication, under date of June 28, 1904, received. In reply I beg leave to say that under old Section 897, R. S., county commissioners were allowed their reasonable and necessary expenses actually paid in the discharge of official duty outside of the county. This section, however, was amended by the last legislature and the provision for these expenses was not incorporated in the amendment.

County commissioners are not entitled to mileage and expenses while traveling outside of the county on official business.

Section 897 as amended provides, in addition to the salary of county commissioners, they shall receive $3 per day for the time they are actually employed in ditch work. The total amount so received for such ditch work not to exceed the sum of $300 in any one year.

The provision in Section 4506, R. S., allowing the county commissioners $3 per day for services rendered in and about county ditches is superseded by amended Section 897 just referred to, and therefore county commissioners for the time they are actually employed in ditch work are not entitled to either mileage or expenses, but simply the sum of $3 per day while they are engaged in such work.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AUTHORITY OF BOARD OF EDUCATION TO ISSUE BONDS.

COLUMBUS, OHIO, July 1, 1904.

HON. ELBERT F. BLAKELY, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Your communication of June 11, concerning the authority of boards of education to issue bonds under Section 3994, received. In reply will say that Section 3994 makes no provision for an election upon the bond question. These bonds are issued on the sole authority of the board of education.

Very truly yours,

WADE H. ELLIS,

Attorney General

AUTHORITY TO ISSUE SCHOOL BONDS UNDER SECTION 3994, R. S.

COLUMBUS, OHIO, July 2, 1904.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication, under date of June 28, 1904, concerning the authority of a township school board to issue bonds without an election, when the rate of taxation necessary to meet the bonds is 10 mills, is received.

Section 3994, R. S., provides that a board of education is authorized to issue bonds, without submitting the question to a vote in any one year, in a sum not to exceed the rate of 2 mills on the tax valuation of the district, and that such issue may be continued from year to year until such a time as the tax rate of the district, providing for the payment of all ordinary school expenses and also for the payment of the bonds and interest, as provided for in Section 3970-1, shall equal 12 mills. If the action of the school board in question contemplates the issuance of bonds equal to 10 mills on the tax valuation in one year such action would exceed the authority provided in this section.

Very truly yours,

WADE H. ELLIS,
Attorney General

POWER OF COUNTY COMMISSIONERS TO EMPLOY OTHER COUNSEL THAN THE PROSECUTING ATTORNEY.

COLUMBUS, OHIO, July 6, 1904.

HON. CHARLES GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your communication, under date of July 1, 1904, is received. In reply to the same will say that the act, as passed by the last legislature, conferring power upon county commissioners to employ legal counsel, etc., does not in itself or by implication repeal Section 1274, R. S. So long as the county commissioners do not act under Section 845, as now amended, the prosecuting attorney is the legal adviser of the county commissioners and county officers. The authority given the county commissioners under this new law is a discretionary power. If they see fit they may employ counsel, and by so doing they take from the prosecutor's office what is commonly known as the civil business. As you suggest in your communication, this law was passed to make provision for a county solicitor in Cincinnati and Cleveland, and it is not contemplated that county commissioners, although they have the power, will exercise it in the counties where, heretofore, it has been the custom for the prosecuting attorney to take care of the civil business. I hardly anticipate any departure from the ordinary procedure by county commissioners in general.

Very truly yours,

WADE H. ELLIS,
Attorney General.

FILLING VACANCY IN BOARD OF INFIRMARY DIRECTORS.

COLUMBUS, OHIO, July 13, 1904.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your communication under date of July 11, 1904, received. In reply will say that Section 959 of the Revised Statutes of Ohio provides that the

county commissioners shall fill a vacancy occurring in the board of infirmary directors. This section, however, makes no provision as to the time such appointee shall serve.

Section 11 of the Revised Statutes of Ohio is as follows:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor be elected at the first proper election that is held, not more than thirty days after the occurrence of the vacancy; etc."

In the case of State v. Barbee, 45 O. S., 347, the court has given a construction to the words "first proper election." Under this construction the successor to Wertz, who was appointed to fill the vacancy, should be elected for the unexpired term of Warren, deceased, at the coming November election.

Very truly yours,

WADE H. ELLIS,

Attorney General.

FILING WILL UNDER SECTION 533-1.

COLUMBUS, OHIO, July 13, 1904.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your communication, bearing date of July 11, 1904, received.

Section 533-1, referred to, provides that,

> "All pleadings, accounts, vouchers and other papers on file in the Probate Court of such county, in each estate, trust, assignment, guardianship or other proceeding exparte or adversary, begun or commenced prior to the first day of May, 1898, shall be kept separate, etc."

The words "case" or "cause" are construed in Section 533-2 to include all proceedings in the settlement of estates, guardianship or assignment, as the case may be.

Under these provisions, a will would be a part of a case in an estate, and should not be filed separate and apart from the papers in the settlement of such estate. The Probate Judge is not entitled to additional compensation for services to be performed under Section 533-3.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CRAFT BONDING ACT. RIGHT OF COUNTY TREASURER TO PLACE COUNTY FUNDS IN DEPOSITARY. SECTION 4091 OF HARRISON SCHOOL CODE.

COLUMBUS, OHIO, July 19, 1904.

HON. HARRY E. PARKER, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter bearing date of July 16, 1904, is received. In reply will say that I have not critically examined the "Craft's Bonding Act" to determine the question of its constitutionality, since no inquiry on that subject has come to this department from any state officer; but since all acts of the legislature

must be assumed to be constitutional until the contrary appears, it would seem to be the better practice to so regard this law until such time as its constitutionality may be determined by a court of competent jurisdiction.

This act provides that the bonds of all public officers must be executed with a surety company, duly authorized to do business in Ohio, as surety thereon.

Concerning the right of a county treasurer to place the county funds in a bank or depositary when no provision has been made by the county commissioners for a depositary, as provided in Section 1136-1 of the Revised Statutes of Ohio, I would refer you to Section 1034 R. S., which provides that a county treasurer shall, at all times keep the public money in the county treasury.

Section 1114 R. S., provides a forfeit of from one hundred to five hundred dollars if a county treasurer shall loan any money belonging to the county, either with or without interest.

Under Section 4091 of the Harrison School Code, all teachers are to receive compensation for attending a teachers' institute for one week, provided they hold teachers' certificates at the time of said attendance, and their term of employment begins within three months after said institute closes. Whether the contract for employment was entered into before the institute convened or after, is not material. Said employment, however, must be subsequent to the passage and approval of this act.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING THE RIGHT OF A COUNTY TREASURER TO INSTITUTE PROCEEDINGS IMMEDIATELY AFTER THE 20TH OF DECEMBER AND 20TH OF JUNE TO COLLECT DELINQUENT TAXES.

COLUMBUS, OHIO, July 21, 1904.

HON. WM. G. ULERY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter dated July 16, 1904, concerning the right of a county treasurer to institute proceedings to collect taxes immediately after the 20th of June and the 20th of December, received. In reply I beg to refer you to Section 1094 of the Revised Statutes of Ohio which provide as follows:

> "When one-half of the taxes, as aforesaid, charged against any entry, on the tax duplicate in the hands of a county treasurer, is not paid on or before the twentieth day of December next, after the same has been so charged, or when the remainder of such taxes is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect the same by distress or otherwise," etc.

Under the provisions of this section it would seem that a county treasurer has authority to proceed at once, by an action at law, to collect the delinquent taxes with the penalty. I cite you State ex rel. v. County Commissioners, 26 O. S., 364.

I think there can be no question as to the right of the treasurer to employ an attorney to prosecute such an action and that it is the duty of the county commissioners to allow compensation to said attorney to be paid out of the county treasury.

Very truly yours,
WADE H. ELLIS,
Attorney General.

AS TO THE EMPLOYMENT OF THE PRESIDENT OF OHIO UNIVERSITY.

COLUMBUS, OHIO, July 21, 1904.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Your letter of July 18th relative to Dr. Alston Ellis' employment as President of the Ohio University, is received.

I have carefully examined the statement of facts contained in your letter and am of the opinion that your board and Dr. Ellis have power to make any contract you desire. However, if the president of your institution is to be regarded as a state officer and if the public have such an interest in his contract of employment as would prohibit your board from altering a contract already made, then the action taken in 1903, was null and void and Dr. Ellis' term of employment under the original contract expires in July, 1904. Under all circumstances, therefore, whether the action of your board in June 1903 was valid or invalid, the safest course to pursue is to pass a resolution rescinding your action of one year ago and then, the term of Dr. Ellis having expired under the original contract, you can proceed to re-elect him for such period as you desire and fix his salary at any amount you may determine to be proper.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TRANSPORTATION OF PUPILS TO AND FROM COUNTRY SCHOOLS UNDER HARRISON SCHOOL CODE.

August 1, 1904.

HON. F. W. WOODS, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Your letter bearing date of July 30, 1904, relative to the transportation of pupils to and from school, received. In reply I beg leave to advise you that the law providing for the centralization of township schools, passed April 16, 1900, and amended May 12, 1902, made provision for the transportation of pupils. This law, however, has been repealed, but the Harrison School Code has a like provision. There is no material difference between the Harrison School Code, as enacted by the last legislature, and the old centralization school law in regard to the transportation of pupils.

Very truly yours,

WADE H. ELLIS,
Attorney General.

REDUCTION OF VALUATION OF COAL LANDS UNDER SECTION 2792, R. S.

August 1, 1904.

HON. A. R. McBROOM, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Your letter bearing date of July 29, 1904, relative to the reduction of the valuation of coal lands in your county under Section 2792, R. S., received. I agree with you in your construction of this section and, under the statement contained in your letter, that "these lands were never appraised as mineral lands," the coal companies are certainly not entitled to the reduction provided for in this section.

Very truly yours,

WADE H. ELLIS,
Attorney General.

WHETHER ALL INMATES OF THE GIRLS' INDUSTRIAL HOME MUST BE MAINTAINED BY THE COUNTY.

COLUMBUS, OHIO, August 2, 1904.

W. E. KING, ESQ., *Third Asst. Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of the 25th addressed to the Attorney General, is received. You inquire:

> "Whether or not all inmates of the Girls' Industrial Home from this county must be maintained by the county, or whether the state must provide for those who are not able to provide for themselves and have no parent or guardian in charge?"

Section 631 R. S., provides substantially that persons admitted in any institution shall be maintained at the expense of the state, subject only to the requirement that they shall be neatly and comfortably clothed and their travelling and incidental expenses paid by themselves, or those having them in charge.

Section 632 R. S. provides that in case of a failure to pay incidental expenses or furnish the necessary clothing, the steward or other financial officer of the institution is authorized to pay such expenses and furnish the requisite clothing, and pay for the same out of the appropriation for current expenses of the institution, that such charges are then to be paid by the county from which the person came.

The statutes above referred to have been repeatedly construed by this department to mean that the State shall be at the expense of maintaining the inmates of the institution, but that the clothing used by such inmate shall be a charge against the county from which he or she may be sent, ultimately chargeable against the relatives of the inmate; that the term "incidental expenses" does not include medical attendance, school books, postage stamps, etc.; in other words, the county may be properly charged with the expense of clothing the inmate, the actual traveling expenses and the incidental expenses incurred in taking the inmate to the institution.

Very respectfully,
GEORGE H. JONES,
Ass't Attorney General.

COUNTY TREASURER MAY GIVE BOND WITH PERSONAL SECURITY UNDER CRAFT'S BONDING ACT.

August 3, 1904.

HON. MICHAEL CAHILL, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication, bearing date of August 2, 1904, received. You inquire if your county treasurer, after having made application to a surety company to become surety on his official bond and said company has refused, can give a bond with personal security? The Crafts' bonding act provides that:

> "If any person required to give any such bond or undertaking shall make affidavit that he has applied to any such company or companies, as the case may be, for such bond or undertaking, and that the same has been refused by such company or companies * * * upon filing such affidavit with such head of department, court, judge or officer, such person may give such bond or undertaking with such personal surety or sureties and such justification of sureties as would be required by law, except for the passage of this act."

Under this provision, upon the making and filing of such an affidavit, your county treasurer is warranted in presenting a bond with personal security to your county commissioners for their approval.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHO ENTITLED TO RELIEF UNDER THE ACT TO PROVIDE RELIEF FOR WORTHY BLIND.

August 6, 1904.

HON. T. B. MATEER, *Prosecuting Attorney, Mt. Gilead Ohio.*

DEAR SIR:—In your letter of August 5, just received, you make two inquiries of this department:

> First. "Question: Whether a lady totally blind, over seventy years old, having no property in her own name, but whose husband, although aged and feeble, is the owner of 120 acres of land and is legally bound to support his wife, is entitled to relief under the act of the legislature passed at its last session, entitled "An Act to provide for worthy blind?"
>
> I am of the opinion that such person is not entitled to relief under said act.
>
> Second. "Question: Whether a person, twenty-one years of age, single and totally blind, but whose parents are amply able to support, is entitled to relief under the act above referred to?."
>
> I am of the opinion that such person is not entitled to relief under said act.

Very respectfully,
WADE H. ELLIS,
Attorney General.

CRAFT'S BONDING ACT.

August 8, 1904.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your communication, bearing date of August 5, 1904, relative to the Craft's Bonding Act, received. In reply, I beg leave to advise you that the following provision in said act is mandatory:

> "And the execution or guaranteeing, as surety, of all bonds and undertakings for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes * * * is hereby required to be by such company or companies."
>
> This act further provides, however, that,
>
> "If any person required to give any such bond or undertaking shall make affidavit that he has applied to any such company or companies, as the case may be, for such bond or undertaking, and that the same has been refused by such company or companies * * * upon filing such affidavit with such head of department, court, judge or officer, such person may give such bond or undertaking with such personal surety or sureties and such justification of sureties as would be required by law, except for the passage of this act."

Under this provision, upon the making and filing of such affidavit, your county treasurer is warranted in presenting a bond with personal security to your county commissioners for their approval.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHO SHOULD BE MADE PARTY PLAINTIFF IN AN ACTION TO COLLECT INHERITANCE TAX.

August 15, 1904.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication, dated August 13, 1904, received. In reply to your first inquiry as to who should be made party plaintiff in an action to collect collateral inheritance tax under Section 2731-4 of the Revised Statutes, I beg to advise you that the action should be brought by the treasurer of the county, as plaintiff, in his official capacity.

In reply to your second inquiry as to defendant's right to claim an exemption from this tax under the provisions of the will, as stated in your letter, I would advise that under Section 2731-1 the bequest is subject to the collateral inheritance tax.

Very truly yours,
WADE H. ELLIS,
Attorney General.

BURIAL OF UNCLAIMED DEAD.

August 8, 1904.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR: — Your communication under date of August 6th, 1904, relative to the burial of unclaimed dead as provided for in Section 1500-A received. In reply, I beg to advise you that under the provisions of this Section, the burial of unclaimed dead devolves upon the township trustees unless, as is provided in said section, said trustees shall notify the infirmary directors; then the infirmary directors shall cause the body to be buried at the expense of the county.

Very truly yours,
WADE H. ELLIS,
Attorney General.

AUTHORITY OF COUNTY COMMISSIONERS TO EMPLOY AN ENGINEER OR ARCHITECT TO MAKE PLANS FOR A BRIDGE.

August 9, 1904.

HON. C. L. TAYLOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your communication bearing date of August 4, 1904, relating to the authority of the county commissioners to employ an engineer to make plans and specifications for a bridge over Ashtabula river, received. Under Section 795, Revised Statutes of Ohio, it is provided that:

"In all cases where it becomes necessary for the commissioners of and county to erect or cause to be erected any public building, or any sub-structures for a bridge or bridges, * * * before entering into any contract for the erection, alteration or repair thereof, or for the supply of any materials therefor, shall make, or *may procure* some competent architect or civil engineer to make full, complete and accurate plans therefor," etc.

In my opinion this provision authorizes your county commissioners to employ a competent engineer as suggested in your letter. While the above provision provides only for "sub-structures for a bridge or bridges," I believe there is no question but that this authority extends to all work necessary in the construction of any bridge. This construction is supported by the decision of Day, J., in Ginn v. The Commissioners of Logan County, et al., 11 Circuit Court Report, p. 397.

Very truly yours,

WADE H. ELLIS,
Attorney General.

APPLICATION OF INHERITANCE TAX.

COLUMBUS, OHIO, August 9, 1904.

HON. B. W. ROWLAND, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR: — Your letter of August 8th, inquiring whether the inheritance law applies to estates where decedent died previous to passage of law, but estate not settled nor distribution made at the time of passage of the law, received. The Auditor of State is charged with the collection of taxes under the inheritance tax law. He holds that estates in process of administration at the time of the passage of the act are subject to the tax. This will, no doubt, be his holding unless the matter is otherwise determined by the court.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ELIGIBILITY OF COUNTY SCHOOL EXAMINER TEACHING OUTSIDE OF COUNTY.

August 17, 1904.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — Your letter bearing date of August 16, 1904, is received. You inquire whether a man serving as county school examiner, who leaves the county and takes charge of a school in another county, would be eligible to serve and be re-appointed, provided his family remain in the county where he is to serve as such examiner?

I concur in the opinion given by you to the Probate Court of your county that, so long as the examiner does not take up his residence in the other county except to go and perform his duties as teacher and has his family in your county, he is eligible.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE DUTY OF TOWNSHIP TRUSTEES AND BOARDS OF INFIRMARY DIRECTORS AS TO BURIAL OF DECEASED POOR.

August 17, 1904.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR: — Your communication bearing date of August 12th, 1904, is received. In reply I beg leave to say that in your letter of August 6th I understood that you merely desired a construction of Section 1500-a as to the relative duties of township trustees and boards of infirmary directors in the "burial of unclaimed dead." You now inquire as to the duty of township trustees and boards of infirmary directors relative to the burial of the deceased poor, generally. There is no express provision in the statutes touching upon this question. As you suggest, township trustees are authorized to furnish temporary relief to the poor of the township, yet the infirmary board has the power, and does, contract and pay for medical attendance and medicine for the residential poor in the various townships in the county, and I can see no reason why the infirmary board should not also pay the expenses of the burial of such persons.

Very truly yours,

WADE H. ELLIS,

Attorney General.

WHETHER TRUSTEES AND JUSTICES OF THE PEACE, WHOSE TERMS EXPIRE IN APRIL NEXT, SHALL BE ELECTED THIS FALL.

Aug. 22, 1904.

HON. J. E. POWELL, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Your letter of August 18th received. You inquire whether trustees and justices of the peace, whose terms expire in April next, shall be elected this fall. Section 581, R. S., provides among other things, that successors of justices of the peace, whose commissions expire within twelve months after the first day of November following the first day of September of each year, shall be elected at the next regular November election thereafter. Section 1442, R. S., as amended March 31st, 1904, provides that township officers, as well as justices of the peace, shall be elected on the first Tuesday after the first Monday of November, annually, in the manner provided by law, and that all township officers hereafter elected shall begin their respective terms on the first Monday in January after their election, and all township officers now holding office and those hereafter elected shall hold their offices until their successors are elected and qualified.

Very truly yours,

WADE H. ELLIS,

Attorney General.

LOCATION OF VOTING PLACES FOR COUNTY PRECINCTS.

August 24, 1904.

HON. WM. KLINGER, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Your letter of August 23rd received. You inquire whether, under section 2923, R. S., 97 O. L. 191, 192, the township or country precincts can have

their voting places in a village located in the same township when the village itself constitutes a separate voting precinct? I am of the opinion, from the examination of the statutes, that it contemplates the voting places for electors of a precinct should be within the precinct lines established by the proper authorities.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

CHARGE MADE BY SURETY COMPANY FOR OFFICIAL BONDS.

August 24, 1904.

HON. EDWARD GAUDERN, *Bryan, Ohio.*

DEAR SIR:—Your letter of August 23rd received. You inquire whether, under the new law relating to official bonds, the charge made by the surety company for furnishing the bond can be properly paid out of the county treasury.

Section 3641c, R. S., as amended April 22nd, 1904, provides that the prêmiums to be paid to any such (surety) company shall be paid out of the general funds of the divisions of government by or for which the person giving such bond or undertaking was appointed or elected. Under this provision I am of the opinion that the charge referred to, that is, the premium, may be properly paid out of the county treasury because such county is the division of government for which the person giving such bond was appointed or elected.

You also inquire whether attorneys employed by the county commissioners to defend an action brought against them may be properly paid out of the county treasury. I am inclined to the opinion that even under the law as it stood prior to the act of the last legislature, county commissioners, under state of facts presented by you, have authority to employ attorneys to defend themselves when suit is brought against them, and having so employed such attorneys their charges should be paid out of the county treasury.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

TOWNSHIP CONTINGENT FUND.

Aug. 25, 1904.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your letter of Aug. 24th, in relation to the contingent fund of the Township Board of Education received. Where such fund has been exhausted it cannot be replenished by drafts upon the tuition fund, for the statute expressly limits the uses of the tuition fund.

It is my opinion, therefore, that where the contingent fund has been exhausted bills properly chargeable thereto cannot be paid until after the next distribution of taxes.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

CONSTRUCTION OF SECTION 3922, HARRISON SCHOOL CODE.

September 1, 1904.

HON. LEE STROUP, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication bearing date August 31, 1904, is received. You inquire if, under Section 3922 of the Harrison School Code, a township board of education, having suspended two sub-district schools, and there being a special school in the township, may convey the pupils in the suspended sub-districts to a public school in an adjoining township?

Section 3922 provides,

> "For the conveyance of pupils residing in such sub-district or sub-districts to a public school in said township district, or to a public school in another district, the cost of such conveyance to be paid out of the funds of the township school district, etc."

I am of the opinion that under this provision the public school in said township district or the public school in another district must be located within the township. The only distinction is that the pupils must be conveyed to either a sub-district school or to some other district school within the township.

Very truly yours,

WADE H. ELLIS,

Attorney General.

RELIEF OF WORTHY BLIND, HOUSE BILL NO. 211.

September 26, 1904.

HON. LEE STROUP, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication bearing date of September 22, 1904, relative to House Bill No. 211 to provide relief for worthy blind is received.

You inquire, first, Can a person who is not totally blind, but incapacitated from performing ordinary labor, and has no means of support, receive the benefits of this act?

Your second inquiry calls for a construction of the word "blind."

In answer to these two inquiries, I beg to advise you that, in my opinion, in the construction of the word "blind" it is not material whether it be a total or partial blindness. The evident intent of the legislature in the passage of this act was to provide for the worthy blind who, by reason of that disability, were incapacitated from earning a living. In my judgment a court should be guided by this rule, "Is an applicant, whether totally or partially blind, incapable of self-support by reason of said disability?"

Your third inquiry, as to the meaning of the words "worthy blind" rests entirely in the discretion of the probate judge. The court will determine whether or not an applicant is worthy as provided in this act.

Your fourth inquiry is as to the construction to be given the words "and have no property or means with which to support themselves."

In answer to this inquiry, in my opinion these words should be construed to mean that the applicant has not sufficient property or means for self-support.

Your fifth inquiry, as to the determination of the amount to be paid not to exceed $25, the law provides that the applicant "shall be entitled to, and receive, not more than $25 per capita quarterly, and that the probate judge shall authorize the auditor to issue warrants for the amounts due such persons."

Under these provisions it is the duty of the probate court to fix the amount each applicant is to receive, not to exceed $25 per quarter.

Very truly yours,
WADE H. ELLIS,
Attorney General.

NOTE: The above view is sustained by the Circuit Court of the Seventh Circuit in Cambridge v. Smallwood, April term, 1905; W. L. B., Vol. 50, p. 302.

DUTY OF COUNTY AUDITOR IN MATTER OF DITCH IMPROVEMENTS.

September 27, 1904.

HON. M. W. HUNT, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Your communication bearing date September 19, 1904, relative to indexing ditch petitions by the county auditor, is received.

In reply I beg to advise you that it is the duty of the county auditor, under Section 850 of the Revised Statutes of Ohio, to act as clerk to the county commissioners and to keep journal entries of all their proceedings. In respect to ditch improvements, all actions taken by the county commissioners relating to the improvement should be placed on the journal. It is not necessary that the petition be spread upon the journal, but an entry to the effect that the petition was filed is all that need go on the commissioners' journal. The county auditor would not be entitled to pay for spreading the petition on the journal of the commissioners and indexing the separate names of the petitioners. This, I understand, is the holding of the Bureau of Inspection and Supervision of Public Accounts, and, in my opinion, is in accordance with the statute governing such cases.

Very truly yours,
WADE H. ELLIS,
Attorney General.

ELECTION OF TOWNSHIP TREASURER AND TOWNSHIP CLERK.

September 29, 1904.

HON. C. J. FISHER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Your communication bearing date of September 26, 1904, relative to the election of a township treasurer under Section 1448 of the Revised Statutes of Ohio, as amended April 23, 1904, is received.

In reply I beg to advise you that the provisions contained in said section, "that at the next annual election after the passage of this act, and at the first election of any new township, a treasurer shall be elected for one year and a clerk for two years, and thereafter, a township treasurer and clerk shall not be elected at the same annual election," is the same provision contained in the old statute and was an amendment to the original Section 1448, Revised Statutes.

This department has held that said amendment does not apply to the election of a treasurer and clerk at the coming November election, but that the language is to be construed to apply only to the succeeding election after the original enactment of this amendment. The intent of this amendment was plainly to prevent township

clerks and township treasurers being elected at the same annual election, and in all cases where the office of township clerk and township treasurer alternate, the election of a treasurer at this coming election is unnecessary.

Very truly yours,

WADE H. ELLIS,

Attorney General.

COSTS OF SHERIFFS, MARSHALS, CHIEF OF POLICE AND CONSTABLES.

September 30, 1904.

HON. D. F. OFENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication bearing date September 14, 1904, in which you make several inquiries concerning the allowance of costs to sheriffs, marshals, chief of police and constables is received.

In reply, I beg to advise you that I have taken up the several inquiries with the Bureau of Inspection and Supervision of Public Offices, and am informed that said bureau has made a ruling upon all of these questions, and, after a careful examination of the different sections of the statutes under which these rulings have been made, I am of the opinion that they are in each instance correct.

The Bureau of Inspection and Supervision of Public Offices have made the following rulings covering your inquiries:

1. "Does the allowance to the sheriff, under Section 1231, cover cases or services rendered by him in any other than the Common Pleas Court, and, if so, what courts?"

Ans. The costs allowed under Section 1231, Revised Statutes, covers the sheriff's services rendered in all courts.

2. "Is the sheriff entitled to the same consideration and fees from the county, under Section 1309, as marshal, chief of police, or constable, when acting in their capacity, or is he recompensed by the allowance made under Section 1231?"

Ans. Sheriffs are not entitled to fees under Section 1309, Revised Statutes, their only compensation is under Section 1231, Revised Statutes.

3. "Is the degree of crime (felony or misdemeanor), under Sections 1306 and 1308, determined by the charge made in the complaint filed before the justice or mayor, or by the return of the indictment under said charge by the grand jury?"

Ans. Under Section 1306, Revised Statutes, the degree of crime is determined by the return of the indictment. Under Section 1308, Revised Statutes, by the charge made in the complaint before the justice or mayor.

4. "In case a felony was charged in the complaint before the justice of the peace or mayor, and the grand jury returns an indictment thereunder for a misdemeanor, would the fees of witnesses before said justice of the peace or mayor be such as would come under Section 1308?"

Ans. The complaint filed with the justice of the peace or mayor will govern the offense, and the fees of witnesses should be paid under Section 1308, Revised Statutes.

5. "Does the allowance, under Section 1309, apply where a felony is charged in the complaint before the justice of the peace or mayor, and an indictment for a misdemeanor thereunder is returned by the grand jury?"

Ans. Yes.

6. "Is the sheriff, constable, marshal or chief of police entitled to fees of $1 for attending trial where the accused waives hearing or examination or pleads guilty, and asks to be bound over without trial or hearing before the justice of the peace or mayor?"

Ans. Said officers are not entitled to the fee of $1 for their attendance upon the trial, unless a defense is interposed.

7. "Is the justice of the peace or mayor entitled to a fee of $1 for attending trial in cases where accused either pleads guilty, waives hearing or examination, and is bound over?"

Ans. Same ruling is in sixth inquiry.

8. "Is the justice of the peace, mayor, sheriff, constable or chief of police entitled to the benefits of Sectiion 1309 in cases where a felony is charged before a mayor or justice of the peace, and complaint is dismissed before the grand jury?"

Ans. Justices of the peace, marshal or constable is entitled to the benefits of Section 1309; sheriff is compensated under Section 1231, Revised Statutes?"

9. "Is the sheriff entitled to the benefit of Section 1309, where a misdemeanor is charged in complaint before probate court, or any other court?"

Ans. Sheriff is entitled to no allowance for lost costs other than that provided in Section 1231, Revised Statutes. Very truly yours,

WADE H. ELLIS,
Attorney General.

FILLING VACANCY IN BOARD OF COUNTY COMMISSIONERS.

September 30, 1904.

HON. GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your letter dated September 16, 1904, concerning an appointment to fill the vacancy in the office of county commissioner of your county is received.

You state that your county commissioner died after he had been elected, but before the expiration of his first term, and that an appointment was made under Section 842, Revised Statutes of Ohio, to fill the vacancy; that the expiration of the first term would occur on the third Monday of September this year, and that a commissioner is to be elected at the coming November election.

You inquire whether or not the appointee will continue to hold under his appointment until his successor is elected. Section 841 of the Revised Statutes of Ohio provides for the *election* of a commissioner to fill a vacancy occasioned by death, resignation or removal. Section 842, Revised Statutes of Ohio, provides for the ***appointment*** of a commissioner to fill the vacancy. Under this section the present appointee holds his office and can only hold under such appointment until the expiration of the first term.

The vacancy in the second term caused by the death of the commissioner elect is to be filled by an election under Section 842, Revised Statutes of Ohio, at the next general election, and it will be necessary that the probate judge, auditor and recorder of the county make an appointment to fill the vacancy ensuing after the third Monday in September, until a commissioner is elected in November.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONSTRUCTION OF SECTION 2923, R. S.

October 3, 1904.

HON. B. W. ROWLAND, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Your communication bearing date September 24, 1904, relative to the construction placed upon Section 2923, R. S., by the Secretary of State is received.

In reply I beg to advise you that the Secretary of State has construed the words "unless such township is divided, according to law, into precincts" to mean that where a township contains a municipality, by virtue of the Chapman law, the municipality becomes a voting precinct and the law in itself changes the precincts in the township. If the territory outside of the municipality contains the required number of voters, then the election board may make a further division of voting precincts. In any townships in which there are no municipalities the precincts are to remain as they were prior to the passage of the Chapman law.

The construction placed upon this section by the Secretary of State is, in my opinion, correct.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AUTHORITY OF SUPERINTENDENT OF OHIO INSTITUTION FOR FEEBLE MINDED YOUTH TO REQUIRE APPROVAL OF PROBATE JUDGE FOR EACH APPLICATION.

COLUMBUS, OHIO, October 6, 1904.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — Answering yours of the 28th ult. relative to the ruling of the Superintendent of the Ohio Institution for Feeble Minded Youth, as to requiring the approval of the probate judge of the county to each application before the admission of any applicant to that institution, I would say that we have recently tried a hotly contested case brought by one of the inmates against the superintendent of the institution for false imprisonment, in which a verdict was rendered against the superintendent, judgment rendered on the verdict, and is now pending in the circuit court of this county. In that action the court of common pleas laid great stress upon the point that there was no approval of the application made by the probate judge before admission of the plaintiff to that institution, and under several authorities that were cited to the court, and which ruling he followed, the superintendent was not protected by the law from such actions for damages, although the court said he would have been so protected if a judicial certificate had been made, and the fact determined by a court of record that the applicant was a fit person to be admitted to the institution.

Acting on this suggestion I have advised Dr. Doren to admit no applicants to the institution unless they can produce a certificate of the probate judge that an application had been regularly made, and that the party is an imbecile, not capable of receiving instruction in the common schools.

The same fees should be allowed for services in this regard as are allowed for services performed under Section 674f, R. S.

Very truly yours,

WADE H. ELLIS,

Attorney General.

PUBLICATION OF ANNUAL REPORT OF BOARD OF COUNTY VISITORS.

October 12, 1904.

HON. A. R. MCBROOM, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR: — In answer to your letter dated October 6th, 1904, in regard to the payment, out of the county treasury, for publication in newspapers of the annual

report of the Board of County Visitors, I have this to say: Section 633-17 provides that the Board of County Visitors shall each year prepare and file a report of their proceedings, and shall file the same with the Clerk of the Court of Common Pleas of the county or on before the 15th of November, and shall forward a copy of the same to the Board of State Charities at Columbus. There is no statutory provision for the publication in any newspaper of this report, and your county commissioners are unauthorized to allow any bill presented for such publication.

Very truly yours,
WADE H. ELLIS,
Attorney General.

COMPENSATION OF SHERIFFS FOR TRANSPORTATION OF YOUTHS TO BOYS' INDUSTRIAL SCHOOL.

October 25, 1904.

HON. ROBERT THOMPSON, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Your communication bearing date of October 22nd, 1904, relative to the compensation to sheriffs for transportation of youths to The Boys' Industrial School is received. In reply I beg leave to say that Section 759 of the Revised Statutes of Ohio, as amended by the last legislature and found in the Ohio Session Laws at page 319, provides that:

> "The *expense* incurred in the transportation of a youth to The Boys' Industrial School shall be paid by the county from which he is committed to the officer or person delivering him, upon the presentation of his sworn statement of accounts of such expenses, and such officer shall receive as *compensation* five cents per mile each way from his home to The Boys' Industrial School by the nearest route."

Under this section your sheriff is entitled to the actual expenses incurred and, also, as compensation, mileage at the rate of five cents per mile, each way.

Very truly yours,
WADE H. ELLIS,
Attorney General.

DUTIES OF THE COMMITTEE APPOINTED TO EXAMINE COMMISSIONERS' REPORT.

October 31, 1904.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Your communication dated October 27, 1904, relative to the duties of the committee appointed to examine commissioners' report, is received. In reply I beg leave to say that, under Section 917, of the Revised Statutes of Ohio, the committee is only authorized to investigate and examine the transactions of the board of county commissioners as set out in their report. They have no authority to make any examination or investigation of the auditor's or treasurer's office to ascertain whether bills allowed by the county commissioners have been paid. Their duties end with the allowance of the bills.

Very truly yours,
WADE H. ELLIS,
Attorney General.

LIMITATION PLACED UPON COUNTY COMMISSIONERS IN THE LEVYING OF TAXES FOR COUNTY PURPOSES.

November 7, 1904.

HON. W. G. ULERY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — Your communication bearing date of November 3, 1904, relative to the limitation placed upon the county commissioners in the levying of taxes for county purposes, under Section 2823, as amended, is received. In reply I beg leave to say that the three mills provided for in this section is to cover all the taxes raised for county purposes other than the exceptions provided for in said section. The limitation in this section, however, does not apply to levies provided for by other sections, such as relief of indigent soldiers, judicial purposes, roads and bridges, etc.

I know of no provision of the statutes authorizing your county commissioners to make a special levy for the maintenance of the Lucas County Children's Home, or for the payment of the principal and interest on the public debt.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CORONER'S AUTHORITY TO HOLD INQUEST.

November 7, 1904.

HON. C. C. LEMERT, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your communication, dated November 5, 1904, concerning the holding of an inquest by the coroner of your county, is received. In reply I beg leave to say that the coroner's authority to hold an inquest is provided for in Section 1221, Revised Statutes. This section provides that:

> "When information is given to any coroner that the body of a person, *whose death is supposed to have been caused by violence has been found within his county,* he shall appear forthwith at the place where such body is, shall issue subpœnas for such witnesses as he deems necessary, and administer to them the usual oath, and proceed to inquire how the deceased came to his death; if by violence of any other person or persons, by whom, whether as principals or as accessories before or after the fact, together with all the circumstances relating thereto;" etc.

Under this provision I am of the opinion that your coroner would not be authorized to hold an inquest in the case referred to in your letter, unless the circumstances are such as to create the probability that death was caused by the violence of some other person or persons. If there is ground for such belief, an inquest should be held.

Very truly yours,
WADE H. ELLIS,
Attorney General.

COMPENSATION OF PROSECUTING ATTORNEY UNDER SECTION 1297 R. S.

November 7, 1904.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Your communication dated November 2, 1904, relative to your compensation under Section 1297, Revised Statutes of Ohio, is received. In reply I beg leave to say that, under the provision of Section 1297, the compensation is to be paid at such times and in such instalments as the county commissioners may direct. I am of the opinion that, notwithstanding the fact that a resolution has been passed by the county commissioners providing that the salary shall be paid in twelve monthly instalments, it is necessary that the monthly instalment be passed upon and allowed by the county commissioners.

Very truly yours,

WADE H. ELLIS,

Attorney General

EMPLOYMENT OF TEACHERS.

November 10, 1904.

HON. WILLIAM G. ULERY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication bearing date of November 9, 1904, concerning the action of the Board of Education in one of your township districts in the employment of teachers for the current school year is received. You say that,

> "Some time in July the Board of Education passed a resolution employing a young teacher for two months and a half, and later passed another resolution employing another person to teach the balance of the school year in one of the districts of the township. The teacher first employed took possession of the school under said resolution, and has continued teaching to the present time, but her two months and a half will be up Friday of this week. The Board of Education say they expect her to give up possession of the key to the building and the records, and that the person employed under the second resolution is to take charge of the school next Monday."

Sec. 4017 of the School Code provides for the appointment of teachers by boards of education, and contains this provision:

> "But no person shall be appointed as a teacher for a longer term than four school years, nor for a less term than one year, except to fill an unexpired term, the term to begin within four months of the date of the appointment, provided that in making appointments teachers in the actual employ of the Board shall be first considered before new teachers are chosen in their stead."

This Department has given an opinion to the State Commissioner of Common Schools holding that this provision is mandatory. Under this construction neither of the teachers were legally employed.

You also submit the following questions:

> "First. Can the teacher who was first employed hold the school for the full school year?

"Second. If she is forcibly ejected or refused permission to teach the balance of the year, can she collect her compensation for the full year?

"Third. Has the person employed under the second resolution any claim against the Board of such a nature that she can compel them to permit her to teach?

"Fourth. If she is refused permission to teach, can she hold the Board for her compensation for the school year?"

In answering these questions I would say that neither of the persons claiming employment under the resolutions passed by this board of education have any rights that are enforceible at law. The teacher who has been teaching for two and one-half months is entitled to compensation for the services rendered, not by reason of the resolution passed, but under the rule of *quantum meruit.* It is the duty of the board of education to employ at once a teacher for the remainder of the current school year in accordance with Sec. 4017, Revised Statutes of Ohio.

Very truly yours,

WADE H. ELLIS,

Attorney General.

TREASURER HAS NO RIGHT TO CHANGE DUPLICATE FURNISHED BY COUNTY AUDITOR.

November 14, 1904.

HON. A. L. STEVENS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Your communication, dated November 14, 1904, is received. You say that your county board of equalization has, under Section 2792a of the Revised Statutes of Ohio, apportioned the valuation of certain coal lands in your county, and in accordance with such apportionment the Auditor's books show a reduction of $450 from the surface and $1,250 from the coal of the original valuation. You say the Treasurer refuses to accept this reduction, claiming the same to be unjust. You inquire "Can the Treasurer ignore the Auditor's duplicate, and place said coal lands on at the old valuation?"

I am not clear as to the meaning of your inquiry. Certainly the Treasurer has no right to make any alterations or changes on the duplicate furnished him by the Auditor, nor can he in making up his receipts make any variation from the taxes charged on the duplicate. The Treasurer is not concerned as to whether or not the taxes to be collected are just and fair. He is to be guided entirely by the tax duplicate furnished him by the Auditor.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CONCERNING SCHOOL FUNDS.

November 16, 1904.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication dated November 15, 1904, is received. You inquire if the treasurer of a village is to act as treasurer of the school funds in a special school district where it is annexed to a village. I take it that the village

referred to in your letter is an incorporated village; if so, the school district is no longer a special school district, but becomes, by operation of Section 3888, a village school district, and under the provisions of Section 4042 the village treasurer becomes the treasurer of the school funds.

Very truly yours,
WADE H. ELLIS,
Attorney General.

ELECTION OF TOWNSHIP TREASURER.

November 21, 1904.

HON. JAMES S. MARTIN, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication dated November 17, 1904, is received. You say that a township treasurer was elected at the April election, 1903, and that his term of office will expire on the first day of September, 1905; that his successor was elected at the election held on the 8th day of November last. You inquire if the person elected at the last November election shall take office on the first Monday in January, 1905? In reply I beg leave to say that the Secretary of State has held that in all cases where the township treasurer's term does not expire until the 1st of September, 1905, his successor is not to be elected until the November election of 1905, and will not take office until the first Monday in January, 1906. This department has approved this holding.

The person elected at the April election, 1903, will hold office until the first Monday in January, 1906. The electioin of a township treasurer on the 8th of November last is a void election. The successor to the present treasurer will be elected at the November election, 1905.

You also inquire as to when justices of the peace, elected at the last November election, shall take office? Justices of the peace are not classed as township fficers, and therefore do not begin their term of office on the first Monday of January. But a justice of the peace elected at the last November election will assume the duties of the office on the expiration of his predecessor's term.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RIGHT OF ONE PERSON TO ACT AS TOWNSHIP CLERK AND TOWNSHIP TRUSTEE AT THE SAME TIME.

November 21, 1904.

HON. LEE STROUP, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication dated November 19, 1904, is received. You inquire, can a person act as township clerk and as one of the township trustees at the same time?

In reply I beg leave to say that, in my opinion, the same person cannot hold the two offices. It is the statutory duty of the township trustees to pass upon and approve the bond of the township clerk, and should the same person hold the office of township clerk and township trustee he would be compelled, as trustee, to pass upon and approve his own bond as township clerk. This requirement alone is sufficient to make the offices incompatible.

You also inquire, when a person who is elected at this fall election to fill a vacancy in the office of township trustee shall take his office?

Section 1452 of the Revised Statutes of Ohio, provides:

> "When there is a vacancy in the board of trustees of a township, the justice of the peace of such township holding the oldest commission, or in case the commissions of two or more justices of the peace bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of an elector in such township to fill the vacancy or vacancies until a successor is elected and qualified, and such successor shall be chosen for the unexpired term at the first annual township election that occurs more than ten days after the vacancy shall have happened," etc.

Under the provisions of this section, the person elected at this fall election to fill the vacancy, will take the office as soon as qualified and hold office for the unexpired term.

Very truly yours,
WADE H. ELLIS,
Attorney General.

EMPLOYMENT OF PROSECUTING ATTORNEYS UNDER SECTION 845, REVISED STATUTES.

December 14, 1904

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: — Your communication dated December 1, 1904, relative to the effect of Section 845 on prosecuting attorneys, is received.

In reply I beg leave to say that under Section 845, as amended, it is necessary that the prosecuting attorneys have a contract of employment with the county commissioners before they can appear for any boards or officers enumerated in said section as counsel in litigated cases. These contracts may also provide for compensation to the prosecuting attorneys for advice furnished all boards and officers enumerated in said section and not specifically provided for in Section 1274, R. S.

Very truly yours,
WADE H. ELLIS,
Attorney General.

CONCERNING SCHOOL DISTRICTS IN UNION TOWNSHIP, UNION COUNTY.

December 27, 1904.

HON. JAMES E. ROBINSON, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR: — Your communication dated December 20, 1904, relative to the inquiry submitted you by Mr. Zimmerman concerning the school districts in Union Township, under the Harrison School Code, is received. I take it from your communication that the only contention is as to the territory in sub-district No. 8, lying without the limits of Unionville Center, and the information desired is whether under Section 3888 said territory is a part of Unionville Center village school district or Union Township school district. Section 3888 provides that:

> "Each incorporated village now existing or hereafter created, 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 village school district."

Following the literal construction of this section the territory in sub-district No. 8, outside the corporate limits of Unionville Center was not attached to the village for school purposes prior to the enactment of the Harrison School Code, and, therefore, would not be a part of the village school district. While, on the other hand, this territory has been *connected* with the village for school purposes in the form of a sub-district and the electors in said territory, prior to the adoption of the Harrison School Code had participated with the electors of Unionville Center in the election of sub-directors for said sub-district, and, viewing the situation in this light and not adhering to a literal construction of Section 3888, it would seem that Unionville Center village school district should include all of the territory of what was formerly sub-district No. 8.

From information received from the State School Commissioner both of these views have been taken of this section in various parts of the State, resulting, in some places, in the retention of the territory outside of the corporation and, in others, in the exclusion of the territory. I am of the opinion that this question will not be satisfactorily determined except by the submission of the question to a court of competent jurisdiction. I would suggest, therefore, that such a suit as Mr. Zimmerman contemplates be instituted so that this question may be determined.

Very truly yours,
George H. Jones,
Ass't. Attorney General.

AS TO TIME TOWNSHIP SUPERVISORS ARE REQUIRED TO MAKE THEIR ANNUAL SETTLEMENT WITH THE TOWNSHIP TRUSTEES.

December 27, 1904.

Hon. Eugene Carlin, *Prosecuting Attorney, Wooster, Ohio.*

Dear Sir: — Your communication dated December 17, 1904, is received. You inquire as to the time township supervisors are required to make their annual settlement with the township trustees. In reply I beg leave to say that the annual settlement is to be made as provided for in Section 1458 of the Revised Statutes of Ohio.

While the last legislature changed the time for the beginning of terms of office of township officers yet no change was made as to the annual settlement required in Section 1458.

Very truly yours,
George H. Jones,
Ass't. Attorney General.

PUBLICATION OF COMMISSIONERS' REPORT.

December 31, 1904.

Hon. Peter J. Blosser, *Prosecuting Attorney, Chillicothe, Ohio.*

Dear Sir: — Your communication dated December 30, 1904, relative to the publication of the Commissioners' report is received.

Section 917 of the Revised Statutes, as amended, provides that "the county commissioners * * * shall make a detailed report in writing, itemizing as to amount, to whom paid and for what purpose, to the Court of Common Pleas of the county, of their financial transactions during the next year preceding the time of making such report, and *which report* shall be published immediately in a *compact* form one time in two newspapers of different political parties," etc.

Under this provision the commissioners are required to make a detailed report in writing, itemized as to amount, and the report thus made is to be published in a compact form. No provision is made for any change or abbreviation in the publication of this report.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

VILLAGE OF MILFORD CENTER UNDER HARRISON SCHOOL CODE.

December 30, 1904.

HON. JAMES E. ROBINSON, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR: — Your communication dated December 29, 1904, relative to Milford Center school district is received.

You say that prior to the enactment of the Harrison School Code, the village of Milford Center was a part of Union Township school district, and that it is now by virtue of said code a village school district, but is without sufficient funds to run its schools. You inquire if the boards of education of Milford Center village district and Union Township district can operate as one board and run both the township and village schools without a division of the funds.

In reply I beg leave to say that each of these boards can only exercise authority and jurisdiction over the district in which it was elected.

Section 3894 of the Harrison School Code, however, provides for the transferring of a part or the whole of any school district to an adjoining school district by the mutual consent of the boards of education having control of such district. Under this section Milford Center village school district could be absorbed by the Union Township school district, and by so doing the village of Milford Center would again be a part of the township school district, and your schools would be in the same condition as they were prior to the adoption of the Harrison School Code.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

(**Miscellaneous**)

STATE CANNOT BE GARNISHEED FOR WAGES OF EMPLOYES.

COLUMBUS, OHIO, January 4, 1904.

H. C. BARNES, ESQ., *Stewart Epileptic Hospital, Gallipolis, Ohio.*

MY DEAR SIR:—In response to your inquiry as to whether you should, as Steward of the Hospital for Epileptics, pay any attention to cases in which the wages of employes of that institution are garnisheed, I beg to state that you should not recognize garnishee process. The State is a sovereign, and is not subject to be sued or to the process of garnishment. No person has a right to receipt for wages except the employes themselves.

This proposition is of universal application, and I do not deem it necessary to cite authorities upon the subject. (See, however, 8 Am. & Eng. Enc. of Law, page 1135, et seq., where the subject is fully discussed.)

I am fully cognizant of the decision of the court in the case of Newark v. Funk, 15 O. S., 462, in which the court held that a municipality was not free from the process of garnishment. That case, however, does not militate in any particular against the principle above announced.

Very truly yours,

J. M. SHEETS,
Attorney General.

AS TO WHO SHALL PAY EXPENSES OF DEAF AND DUMB PUPILS IN GOING TO AND FROM INSTITUTION ON VACATION, WHERE NOT PAID BY PARENT.—SECTIONS 631 and 632.

COLUMBUS, OHIO, January 7, 1904.

A. E. EARHART, *Steward, Institution for Deaf and Dumb, Columbus, Ohio.*

MY DEAR SIR:—Yours of this day, making inquiry as to whether a county from which a deaf pupil is sent to your institution is liable for the railroad fare of the pupil to and from the institution, when sent to its parents or th county of its residence, during the summer vacation, duly received.

The answer to this inquiry depends upon whether, in contemplation of law, there should be any vacation in the school of your institutiion.

The purpose of creating the institution for the deaf and dumb, as expressed in the statute, is for their education. It is not an institution for the care, support and maintenance of the indigent deaf and dumb of the State, but it is an institution for the education of all deaf and dumb, be they rich or poor. And, as in all other schools of the State, there is a summer vacation, I see no reason why there should not be a summer vacation in the school for the education of the deaf and dumb. Indeed, Section 660 of the Revised Statutes seems to contemplate that the school shall not last throughout the entire year, but there shall be a vacation. For this section provides that, "No pupil admitted into said institution from any county infirmary, or who, after admission into said institution, shall become a county charge, shall be discharged from said institution upon vacation, and sent to the county infirmary of any county to remain during such vacation."

Section 639 of the Revised Statutes, which applies to all benevolent institutions of the State, provides that the board of trustees "shall establish such

rules and regulations as may be deemed expedient for the government and management of their several institutions."

Hence, under this provision, I am clearly of the opinion that the board of trustees of the Institution for the Deaf and Dumb may establish in the rules a provision for a summer vacation. And, as already suggested, the statute seems to contemplate that the pupils are not expected to remain during the vacation, as the institution is not one for the care and maintenance of the indigent, but for the education of these unfortunates.

What, then, shall be done with these pupils during the summer vacation? Why, clearly they shall be returned to their parents, or those having them in charge, there to remain until the beginning of the next term.

Sections 631 and 632, of the Revised Statutes, which apply to all benevolent institutions of the State, clearly provide that the traveling and other incidental expenses incurred in taking such pupils to and from such institutions shall be paid by those having them in charge, and, if not paid by them, shall be paid out of the county treasury. If I am right, then, in the above conclusions, it follows that when pupils are sent home on their summer vacation, if their parents or those having them in charge, fail to pay the expenses incident to such trip home, they shall be paid out of the county treasury.

Very truly yours,

J. M. SHEETS,
Attorney General.

WHO SHALL PAY DOCTOR BILL, INCURRED FOR INMATE OF GIRLS' INDUSTRIAL HOME. SECTIONS 631 AND 632.

COLUMBUS, OHIO, January 9, 1904.

HON. E. J. BROWN, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

MY DEAR SIR:—You inquire whether a doctor bill that is necessary to be incurred on behalf of an inmate of your institution should be classed as a part of the incidental expenses under the provisions of Sections 631 and 632, of the Revised Statutes, to be paid by the persons having the inmate in charge, or, upon failure so to do, to be paid by the county. In my opinion, it is. Section 631, which applies to all charitable, corrective and benevolent institutions of the State, requires that the inmates shall be maintained at the expense of the State, subject only to the requirement that they shall be neatly and comfortably clothed and their traveling and incidental expenses paid by those having them in charge.

Section 632 provides that, upon the failure of those having the inmate in charge, to pay these expenses they should be paid by the county from which the inmate was sent. The maintenance, which, under the provisions of this section, the State must furnish, includes merely a home where these inmates shall be kept and housed and the necessary food furnished them. An incidental expense is an expense which may be incurred for one of the inmates or which may not, depending upon the circumstances. Where, then, one of the inmates becomes ill and requires medical attendance, that, in my opinion, would be included within the term "incidental expense," to be paid, as already suggested, by the person having the inmate in charge or by the county.

Very truly yours,

J. M. SHEETS,
Attorney General.

POWERS OF THE DEPARTMENT OF WORKSHOPS AND FACTORIES.

COLUMBUS, OHIO, January 20, 1904.

HON. J. H. MORGAN, *Chief Inspector, Department of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—Answering the inquiry submitted to me in yours of the 15th inst., I beg to say, that by inspection of the statutes governing the departments of workshops and factories, also those in which the right of inspection is given to the mayor and other officials of cities, it is apparent that the inspection of certain public buildings provided to be made by such municipal officers, is not exclusive of the work which is also to be performed by your department. The power and authority is still left to you to make inspection of such buildings as often as you may deem necessary, or upon the written demand of the agent or owner of such structure, or upon the written request of five or more citizens of the municipal corporation, county or township wherein such structure is located. And the requirements of the statute are not fully complied with by your department even if the inspection by the municipal officers has been otherwise made, if you deem it necessary to have further inspection, or if the written demand provided in Section 2572-B Revised Statutes, has been made upon your department.

The inquiry contained in the second paragraph of your letter presents a more difficult question. If your department, in pursuance of the authority vested in it, issues an order for a fireescape consisting of iron stairway running to the ground, and if it be in conflict with an ordinance of the city and the municipal authorities undertake to prevent the department enforcing such order, I should attempt to adjust such difficulty by a fair understanding with the city authorities, or construct the fireescape as has been done in many cities, by terminating at a sufficient distance above the ground, so as to obviate the criticism that it might be construed an obstruction.

Yours truly,

WADE H. ELLIS,

Attorney General.

AS TO DUTY OF SECRETARY BOARD OF PHARMACY UNDER SECTION 4412, ALSO 95 O. L., 145 and 280.

COLUMBUS, OHIO, January 30, 1904.

HON. WM. R. OGIER, *Secretary of Ohio Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Your letter of January 28 is received. You make two inquiries.

> First: "Whether the Secretary of the Ohio Board of Pharmacy is charged by virtue of Section 4412, R. S., with the enforcement of an act entitled 'An Act to restrict the selling or giving away of cocaine' (95 O. L., 145), and of an act entitled 'An Act to regulate the sale of poisons' (95 O. L., 280).
>
> Second: "Whether the fines assessed and collected under prosecutions begun or caused to be begun by the Ohio Board of Pharmacy under the two acts referred to are payable to the Treasurer of the Board of Pharmacy, to be by him covered into the State Treasury?"

In answer to the first inquiry I would say, that Section 4412, R. S., either in express terms or by reference to other sections defines and points out the laws

with the enforcement of which the Secretary of the Board of Pharmacy is charged. The later acts, found at pages 145 and 280, 95 O. L., do not impose any duty on the Secretary of the Board of Pharmacy as such, and he is, therefore, not charged with the enforcement of such laws.

Your second inquiry is practically disposed of by the answer to your first inquiry. The general law provides for the disposition of fines; and, there being no provision in the two acts found in Volume 95, O. L., for the disposition of such fines, the general law must govern.

The two acts, therefore, passed by the Seventy-fifth General Assembly, found in Volume 95, O. L., already referred to, neither make it the duty of the Secretary of the Board of Pharmacy to enforce the provisions thereof nor do they provide that the fines collected thereunder shall be payable to the Treasurer of the Board of Pharmacy.

Very respectfully,

WADE H. ELLIS,
Attorney General.

WHETHER BOARD OF MANAGERS OF OHIO REFORMATORY MAY TAKE BOND FOR 10% OF CONTRACT PRICE RETAINED.

COLUMBUS, OHIO, February 29, 1904.

MR. FREDERICK S. MARQUIS, *Secretary Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your letter of February 23d received. You inquire whether it would be right and legal for the managers of the Board of the Ohio State Reformatory to pay to the contractor the 10% of the contract price, which under the terms of the contract, was to be retained by the Board until the heating system had been thoroughly tested as to results in zero weather, and whether the Board could accept in lieu of such per centage a bond from the contractor?

In reply I would say that under the provisions of the Statutes of this state, the letting of contracts for the erecting or improvement of public buildings must be upon competitive bidding. Section 786 R. S., provides when and in what manner changes may be made in the plans.

The situation as shown by your letter is not within either the letter or spirit of this section. I am therefore of the opinion that it is neither legal nor right that the 10% now in the hands of the managers should be paid to the contractors under any circumstances until the terms of the contract have been fully complied with.

Very respectfully,

WADE H. ELLIS,
Attorney General.

MEMBERS OF FIRE DEPARTMENT OF THE CITY OF ATHENS NOT LIABLE TO ROAD TAX.

COLUMBUS, OHIO, April 8, 1904.

HON. S. D. HOLLENBECK, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I have yours containing letter of Mr. Frank S. Roach, of Athens, Ohio, relative to the members of the fire department of that city being subject to the payment of the road tax, provided for in Section 2664-1 to -4, Revised Statutes.

From the character of the department, as mentioned by him in his letter, I am of the opinion that the members are not liable for the tax.

Very truly yours,

WADE H. ELLIS,
Attorney General.

AMENDMENTS TO STATUTE FIXING CHEESE STANDARDS.

COLUMBUS, OHIO, May 10, 1904.

HON. HORACE ANKENY, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:— I have received your request of May 10, 1904, for an opinion upon certain amendments to the Statute fixing cheese standards made by the last General Assembly.

It appears that the act referred to attempted to amend certain sections of an act passed March 3, 1896, overlooking the fact that these same sections had been amended April 7, 1898, and that both title and enacting clause referred to the act of 1896, to the exclusion of the amendments of 1898.

You inquire whether these circumstances affect the validity of the amending act of 1904.

In my opinion, these irregularities have no effect upon the validity of the act. The constitutional provisions as to the title of acts of the General Assembly have been repeatedly held to be directory only. There is no question of the legislative intent to amend these two certain sections of the existing law in the single particular indicated, and while it is suggested that the repealing clause of the act of 1904 only serves to repeal the non-existing sections of 1896 and not the sections of 1898, still the manifest repugnancy of the sections of 1898 and 1904 will impliedly repeal the former.

Further, the question seems to be placed beyond all doubt by the fact that both the title and the enacting clause involved, refer to the sections under consideration by the proper sectional numbering in Bates' Annotated Ohio Statutes. The Third Edition of Bates' Annotated Ohio Statutes is by the act of April 23, 1902, (Section 5244*a*-1) approved by the General Assembly of Ohio, and the said edition of said statutes is declared to be prima facie evidence of the laws of the state. The fact that the remainder of this Section (5244*a*-1) only relates to the 75th General Assembly does not limit the approval and recognition of this edition of the Statutes nor destroy the proposition that the act under consideration relates to these sections of Bates' numbered respectively (4200-21) and 4200-23). Of the identity of the section sought to be amended and of the intent of the legislature there is no question and the objections suggested are of no consequence.

Very respectfully,

WADE H. ELLIS,
Attorney General.

CONSTRUCTION OF SECTION 218-32, AWARDING DAMAGES UNDER SAID SECTION.

COLUMBUS, OHIO, June 23, 1904.

To the Ohio Board of Public Works, Columbus, Ohio.

GENTLEMEN:—In answer to your inquiry for a construction of Section 218-32, R. S., and particularly of that portion of it which refers to the findings of the com-

missioners selected to assess damages, I would say that before a claimant is entitled to be awarded any damages whatever under such section it is necessary for the commissioners to find, by legal testimony, therein that the injury, if any, occurred from a defective construction of the canal, and that such defect, if any, might have been avoided by the use of ordinary care and skill on the part of the State officers or agents. The commissioners would not be justified, under the law, in awarding any damages to the claimant if the injury complained of has been occasioned by any extraordinary circumstances, such as a reasonable man would not ordinarily be called upon to provide against. In other words, the State officers are only charged with the duty of using ordinary care and diligence in looking after the public works of the State, just as an individual is only required to use ordinary care and prudence in his dealings with his fellowman. And if, in any case, the injury is occasioned by a cause unusual in its nature, such that an ordinary, prudent man could not forsee, then there could be no legal award made against the State.

Very respectfully,

GEORGE H. JONES,
Ass't Attorney General.

AUTHORITY TO MAKE RULES AND REGULATIONS FOR GOVERNMENT OF SOLDIERS' HOME.

COLUMBUS, OHIO, June 24, 1904.

COL. J. L. CAMERON, *Pres. Board of Trustees O. S. and S. H., Marysville, Ohio*

MY DEAR COLONEL:—Yours of the 11th inst. has remained unanswered because of my absence from the city, and I trust that the failure to receive a reply to your letter has not caused you serious inconvenience.

You seem to be in doubt as to your authority to make rules and regulations for the government of the Home, so as to comply with the Federal Act of March 3, 1883 (22d Statutes, 564), and thereby receive the support accorded such Soldiers' Homes which have complied with such act, by adopting rules and regulations respecting the pensions of its inmates.

Considering the authority vested in the Board of Trustees by Section 674-11 of the Revised Statutes of Ohio, I do not see how that could be construed so as to negative the power conferred upon the trustees of such homes by the Federal Statute referred to. That act merely provides that "the pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution."

This originally applied to National Homes. The law which provided for the apportionment of the appropriation in aid of State or Territorial Homes required that no part of the appropriation should be apportioned to any such home until its laws, rules and regulations respecting the pension of the inmates be made to conform to the provisions aforesaid.

In my opinion a few simple rules governing the treasurer of the Home in relation to such fund (which only includes such as have not been assigned by the pensioner) are all that are required. The adoption of such rules cannot be urged to be in excess of authority although it may not be specially authorized by the statutes of Ohio, but in order to get the benefit of the appropriation for

the Home, certain duties are imposed upon the trustees of such homes by the Federal Act, and it is in obedience to the requirements of the Federal Act that the trustees of the Home enact rules and regulations governing the treasurer in the receiving and holding of such funds of which he is made trustee, and I do not consider it would be a violation of your duties or in excess of the authority conferred upon you.

Very truly yours,

WADE H. ELLIS,

Attorney General.

LEGALITY OF SALE OF "MAPLECANE" IN OHIO.

COLUMBUS, OHIO, June 30, 1904.

HON. HORACE ANKENEY, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I have received your request, under date of June 29, 1904, for an opinion as to the legality of a sale in Ohio of a syrup composed of maple syrup, cane syrup and glucose, under the name "Maplecane."

The legality of a sale of such a syrup under this name, so far as the general Pure Food Law, as amended April 20, 1904, is concerned depends upon facts not appearing in your communication. If the syrup contains only inconsiderable quantities of any of the constituents suggested by the word "Maplecane," the eighth clause of Paragraph B of this act would be violated by a sale of such article. Whether this is the case or not, however, is not important in view of the provisions of Section 5 of the act regulating the sale of maple syrup, approved March 24, 1904. This section prohibits the sale of any adulteration of maple syrup or maple sugar in any box, can, bottle or other package having the word "maple," or any compounding of this word, as the name or part of the name of the syrup or sugar, etc. Under Section 1 of the same act, maple syrup is so defined, and under Section 2 thereof the adulteration of maple syrup is so defined as to leave no doubt that the syrup described by you would come within the purview of this act, and that its sale in a container with the name "Maplecane" thereon would be illegal.

Very respectfully,

WADE H. ELLIS,

Attorney General.

AUTHORITY OF BOARD OF MANAGERS OF OHIO PENITENTIARY.

COLUMBUS, OHIO, July 1, 1904.

HON. A. WAGNER, *President Board of Managers, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your letter of June 10, enclosing a copy of charges filed with the Board of Managers by Mr. John S. Wagenhals, is received.

You ask for advice as to the duties of the Board in regard to such charges. In reply to your request, I would say that the Board of Managers of the Ohio Penitentiary have general supervision over the conduct of affairs, employes and officers of such institution, and no doubt they have full authority to make such investigation as they, in their judgment, deem necessary to the discharge of their supervisory duties referred to. They are the judges as to when and to what extent they will make inquiry and investigation.

I believe these suggestions are a compliance with your request, as stated in your letter.

Very truly yours,
GEORGE H. JONES,
Ass't Attorney General.

CONTRACTS AND SURETY BONDS OF THE BOARD OF TRUSTEES OF THE COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY.

COLUMBUS, OHIO, July 13, 1904.

DR. WILLIAM GALLOWAY, *Xenia, Ohio.*

DEAR SIR:—I have examined the several contracts and surety bonds submitted by you for approval and beg to point out to you the several defects therein as they appear to me.

1. Each of the contracts is defective in that they fail to mention the party of the first part in the language of the statute, that is, the trustees should be mentioned as "The Board of Trustees of the Combined Normal and Industrial Department at Wilberforce University."

2. The drawings and specifications prepared for the work should be attached to the contract and made a part thereof, or otherwise identified in such a way that no dispute can arise thereon.

3. I do not approve of the practice of permitting written specifications to be modified by any other instruments or by parol. This contract attempts to permit the modification of the specifications by making the explanations of the engineer a part of the contract.

4. The contract provides that changes involving an addition of labor and material shall be performed or furnished and "shall be paid for at the rate herein specified," and that any diminution thereof shall be made in the same way. I desire to call your attention to the fact that the contract does not furnish any method of computing compensation for such additions or diminutions. This whole clause should be stricken out, the succeeding clause being the proper one to govern.

As to the several bonds submitted I call your attention to the facts:

1. That there is nothing to show that the person signing the bond for the trustees of the Stillwell-Bierce & Smith-Vaile Company was authorized so to do by the trustees and that you will have to satisfy yourselves of such authority before the acceptance of such a bond.

2. I am informed by the superintendent of insurance that the surety company offered by the Buffalo Forge Co. is not authorized to do business in the State of Ohio.

3. Your attention is called to the fact that the bond offered by the Akron Electrical Mfg. Co. contains a condition limiting suits thereon to such as are brought within one year. In view of the fact that delays caused by strikes and numerous other causes do not render the principal nor surety liable and, in view of the fact that defects in construction may not appear until after one year, it is doubtful whether a bond with such a limitation should be accepted.

Not only should all contracts have attached thereto the specifications but such specifications should be attached to the bonds and made part of the bonds by specific terms.

Very truly yours,
WADE H. ELLIS,
Attorney General.

WHETHER CONTRACTOR FOR CONSTRUCTION OF PUBLIC BUILDING AT DAYTON STATE HOSPITAL IS REQUIRED TO GIVE SURETY COMPANY BOND.

July 18, 1904

A. F. SHEPHERD, M. D., *Superintendent Dayton State Hospital, Dayton, Ohio.*

DEAR SIR:—Your inquiry concerning a bond by the contractor for the construction of a public building at your institution received. There is no provision in said law requiring a contractor to furnish a surety company bond. Section 785 of the Revised Statutes of Ohio provides that a good and sufficient bond shall be given.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RIGHT OF BOARD OF TRUSTEES OF TOLEDO HOSPITAL TO ENTER INTO CONTRACT WITH THE STREET RY. CO., FOR OCCUPANCY OF CERTAIN LANDS BELONGING TO THE STATE, ETC.

COLUMBUS, OHIO, July 19, 1904.

The Board of Trustees of the Toledo State Hospital, Toledo, Ohio.

GENTLEMEN:—Mr. J. C. Campbell of this city, a member of your board, has submitted to me your inquiry concerning your power to enter into a contract with a street railway or traction company for the occupancy of certain lands belonging to the state and used in connection with the Toledo State Hospital.

Chapter 9, of Title 5 of the Revised Statutes, beginning with Section 698, governs all the asylums for the insane within the state. The powers of the trustees of such institutions are contained within Chapters 1 and 2 of Title 5, R. S., beginning with Section 623.

Upon a careful examination of these sections, and the opinion of the Supreme Court expressed thereon, I am of the opinion that your board is without authority to make or enter into any such contract or agreement as is contemplated in the foregoing question. Section 629 R. S., provides:

> "No streets, alleys or roads shall be laid out or established through or over the lands belonging to any of the public institutions of the state, without the special permission of the General Assembly."

The word "road" therein used, may be sufficiently broad in meaning to include railroads of all kinds. At least it is indicative of the intention of the legislature to forbid the construction of any public way or easement over the lands belonging to any of the public institutions, so as to support the view, that the power to make any such contract is not vested in your board. This power was denied to the Board of Public Works of the State in the case of State ex rel. Attorney General v. The Cincinnati Central Railway Co., 37 O. S., 157. The Supreme Court of the state, in that case said:

> "The Board of Public Works possess no powers, except such as are expressly conferred by law, or as are necessarily implied. * * * It possesses no power to grant rights, easements or privileges for private advantage, unless expressly authorized by law. * * * It posseses no implied power to grant rights and privileges, or create easements or burdens upon this public property in favor of individuals or corporations."

The powers of the Board of Public Works, in that respect, are more ample than those conferred upon your board, and yet as to it, the power was denied.

It is my opinion that your board possesses no such power, and a contract of such a nature made and entered into by you, would be null and void.

Very truly yours,

WADE H. ELLIS,
Attorney General.

AS TO PRIVATE EMPLOYMENT AGENCIES, ETC., IN RECENT ACT HAVING REFERENCE TO BUSINESS COLLEGES, ETC.

July 23, 1904.

HON. M. D. RATCHFORD, *Commissioner Labor Statistics, Columbus, Ohio.*

DEAR SIR:—Your inquiry, under date of July 22, 1904, as to whether or not the law enacted by the recent legislature, regulating private employment agencies, has application to business schools or colleges or typewriting agencies, received.

In reply I beg to advise you that, while under Section 3 of said act a private employment agency is defined and interpreted to mean any person, firm or corporation furnishing employment or help, or who shall display any employment sign or bulletin, or through the medium of any card, circular or pamphlet, offering employment or help, shall be deemed an employment agency,' etc., it would seem to include business schools and typewriting agencies, yet the purpose of such schools and agencies is not primarily to furnish employment or help, and the advertisement for any of such schools and agencies offering positions to their pupils is only for the purpose of increasing the attendance upon such schools and not primarily to secure positions for pupils.

I am therefore of the opinion that the schools and agencies to which you refer in your inquiry should not be subject to the license provided for in said act.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONTRACT AND BOND OF THE JOHN ROUZER COMPANY WITH THE TRUSTEES OF THE BOYS' INDUSTRIAL SCHOOL.

July 26, 1904.

MR. C. E. RICHARDS, *The Ruggery, Columbus, Ohio.*

DEAR SIR:— The contract of The John Rouzer Company with the trustees of the Boys' Industrial School and the bond for the faithful execution thereof have been submitted to me for approval. Before approving the same I call attention to the following:

1. The board should be named in the contract, as it is on the bond as "The Board of Trustees of the Boys' Industrial School."
2. The bond should identify the proposal by referring to the latter as attached to the bond, or otherwise removing any question as to the identity of the proposal.
3. The last sentence in the condition of the bond is unintelligible. If I understand the condition that it is desired to cover in the bond, it would be more clearly expressed in this way: "Now should the said The

John Rouzer Company, within ten days after receiving notice of the award of said work, enter into contract for the execution of the work and thereafter execute the contract faithfully and fulfill all the terms and conditions of said contract, then this obligation," etc.

Proofs of publication, as required by law, have not yet been submitted, but I presume that proper publication has been had. Other than as to these particulars, the form of contract and bond are approved.

Very truly yours,
WADE H. ELLIS,
Attorney General.

COMMITMENT PAPERS OF IVA ECKLER FROM THE JUVENILE COURT OF HAMILTON COUNTY.

August 10, 1904.

HON. T. F. DYE, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—Replying to your inquiry bearing date of August 8, 1904, concerning commitment papers from the Juvenile Court of Hamilton County, I have this to say, that after the examination of the law as enacted by the recent legislature, I am of the opinion that the enclosed commitment papers are, in all respects, regular. This law makes no provision for a medical certificate or for a statement of the residence and occupation of the girl's parents.

Very truly yours,
WADE H. ELLIS,
Attorney General.

P. S.—I have requested the Secretary of State to send you a copy of the last session's laws. You will find the law referred to at page 561.

SOLDIER WHO HAS BECOME WEAK MINDED MAY BE TRANSFERRED FROM STATE SOLDIERS' HOME TO INSANE HOSPITAL.

Aug. 25, 1904.

COL. J. L. CAMERON, *Marysville, Ohio.*

DEAR SIR:—Your letter of August 22nd received. You inquire whether an inmate of the State Soldiers' Home who becomes an imbecile may be transferred or sent to an insane or imbecile hospital.

If the inmate has become of weak mind he is not technically an imbecile, but is afflicted with senile dementia. An imbecile, as I understand the term, is a person who is weak minded from his birth. But an old soldier, who was capable of performing services for his country, and who becomes weak minded is not an imbecile within the meaning of that term. Senile dementia is a species of insanity, at least to the extent that such person, upon proper application, may be received into the insane hospital in the district from whence he came.

Very truly yours,
GEORGE H. JONES,
Ass't. Attorney General.

LICENSE FEE ON COMMERCIAL FERTILIZER.

September 13, 1904.

Hon. W. W. Miller, *Secretary of Department of Agriculture, Columbus, Ohio.*

Dear Sir: — Your communication dated September 13th, 1904 enclosing a letter from the Lackawanna Animal Product Company under date of September 8th, 1904, is recelved.

You request a construction of Sections 4446a, 4446b and 4446c of the Revised Statutes of Ohio relative to the sale of commercial fertilizer within this State.

Section 4446a provides that:

> "Any person or company who shall offer, sell or expose for sale in this State, any commercial fertilizer, shall affix to every package, in a conspicuous place on the outside thereof, a plainly printed certificate stating the number of net pounds in the package sold or offered for sale, the name or trade mark under which the article is sold, the name of the manufacturer and the place of manufacture, and a chemical analysis stating the percentage of nitrogen, or its equivalent in ammonia, in an available form, of potash soluble in water, and of phosphoric acid, in an available form (soluble or reverted) as well as the total phosphoric acid."

The language expressed in this section is so clear as to need no legal construction. It simply provides that every package of fertilizer sold or offered for sale in this State shall have placed upon the outside thereof in a conspicuous place such certificate.

Section 4446b provides that the manufacturer, importer or party who causes fertilizer to be sold or offered for sale within the State of Ohio shall file with the Secretary of the Ohio State Board of Agriculture a certified copy of such certificate, and shall also deposit with said secretary a sealed glass jar containing not less than one pound of the fertilizer, accompanied with an affidavit that it is a fair average sample.

The provisions of this section must be complied with previous to the sale or offering for sale of commercial fertilizers within this State.

Section 4446c provides that:

> "The manufacturer, importer or agent of any commercial fertilizer, shall pay *annually*, on or beforee the first day of May, a license fee of twenty dollars on each brand, for the privilege *of selling or offering for sale* within the State, said fee to be paid to the Secretary of the Ohio Board of Agriculture; provided, that whenever the manufacturer or importer shall have paid the license fee herein required, for any person acting as agent for such manufacturer or importer, such agent shall not be required to pay the fee named in this section."

The contention contained in the letter from the Lackawanna Animal Product Company, enclosed, seems to arise from the construction placed upon this section.

This section expressly provides that a fee of twenty dollars on each brand of fertilizer shall be paid to the Secretary of the Ohio State Board of Agriculture *annually* for the privilege of *selling* or *offering for sale* said fertilizer within this State.

The plain construction of this section is that this fee is to be paid once a year not only for the privilege of selling but also for the privilege of offering for sale, and it is no defense, as against the operation of this section, that fertilizer offered

for sale one year in which the license fee has been paid is the same fertilizer offered for sale in any succeeding year. It may be unfortunate for the manufacturer or the dealer that he is compelled to carry his product over, but if he does he cannot, under the provisions of this section offer it for sale until the annual license fee is paid. The manufacturer, importer or agent is given until the first day of May in each year to pay this fee and secure his license for the current year, and if you are in possession of information that any fertilizer is being sold or offered for sale within this State without the manufacturer, importer or agent having complied with the provisions of this section you are authorized, and it is your duty, after the first day of May, 1904, to report such violations to this department.

Very truly yours,
WADE H. ELLIS,
Attorney General.

P. S.— I herewith return the letter addressed to you by the Lackawanna Animal Product Company.

FILLING VACANCY IN OFFICE OF MAYOR.

October 17, 1904.

HON. C. M. RAY, *Huron, Ohio.*

DEAR SIR: — Answering the question proposed in yours of the 13th inst., I refer you to Section 200 of the Municipal Code, within which it is provided, that,

> "In case of the death, resignation or removal of the mayor, the president pro tem of the council shall become the mayor, and serve for the unexpired term, and until the successor is elected and qualified," etc.

Under this section, when Hermes was elected mayor on the first Monday of April, 1903, his term would have expired in two years thereafter, and his successor would have begun his term of office on the first Monday of May, 1905, but by the amendment to Section 222 of the Municipal Code it was provided that,

> "The officers elected at each subsequent election, beginning with the year 1904, shall commence their respective terms on the first Monday of January after their election. The election of the successors of all elective municipal officers whose terms now expire on the first Monday of May, shall be held on the first Tuesday after the first Monday of November next following the expiration of such terms, and all elective municipal officers whose terms, would otherwise expire on the first Monday of May previous to the election of their successors shall hold their offices until their successors are elected and qualified."

By this section the election of municipal officers takes place in November instead of in April, as provided by the code, and instead of taking office on the first Monday of May, the provision now is that municipal officers take office on the first Monday of January after their election.

When Heyman assumed the duties of the office of mayor pursuant to Section 200 of the Municipal Code, he was entitled to serve for the unexpired term, *and until the successor is elected and qualified.* The successor should be elected in November, 1905, under the provisions of Section 222 above cited, and should take his office on the first Monday of January, 1906, to which time Heyman's term has been extended by the operation of the sections above cited.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RIGHT OF PROBATE JUDGE TO ISSUE CERTIFICATES AUTHORIZING PRACTICE OF MID-WIFERY.

October 31, 1904.

DR. FRANK WINDERS, *Sec'y State Board of Medical Registration and Examination, Columbus, Ohio.*

DEAR SIR:—Complying with your request for my opinion concerning the authority of Probate Judges to issue certificates authorizing the practice of mid-wifery, I beg to say to you that the law governing the issuing of certificates authorizing the practice of mid-wifery is contained in Sec. 4403e of the Revised Statutes of Ohio. According to the terms of this section Probate Judges have had no authority to issue certificates entitling the holders thereof to practice mid-wifery in the State of Ohio since 90 days after the date of the last amendment to said section, to-wit, April 21st, 1902, except to such persons as may have filed within said 90 days with the Probate Judge of the county wherein they resided an affidavit, such as is described in the first sentence of Sec. 4403e. Under no other circumstances or conditions have Probate Judges had the authority to issue certificates entitling the holders thereof to practice mid-wifery since 90 days after April 21st, 1902; and the State Board of Medical Registration and Examination has no authority to issue a certificate authorizing the practice of mid-wifery to the holder thereof, to any person who has not appeared before it and submitted to an examination, as required of applicants for a certificate authorizing the practice of mid-wifery.

Very truly yours,
WADE H. ELLIS,
Attorney General.

RIGHT OF BOARD OF MEDICAL EXAMINATION AND REGISTRATION TO CONDUCT PARTIAL EXAMINATION AT END OF SECOND YEAR OF MEDICAL COURSE.

October 31, 1904.

DR. FRANK WINDERS, *Sec'y State Board of Medical Registration and Examination, Columbus, Ohio.*

DEAR SIR:—In reply to your question as to whether the State Board of Medical Examination and Registration may legally conduct a partial examination at the end of the second year of the regular medical course and permit applicants who take such examination to complete their examination after graduation from a medical college, I beg to advise you as follows:

Section 4403c of the act regulating the practice of medicine in the State of Ohio prescribes certain requirements and conditions on the part of an applicant for the examination by the State Board, part of said section reading as follows:

> "The applicant shall file with the Secretary of the Board a written application on a form prescribed by the Board, verified by oath, and furnish satisfactory proof that he is more than twenty-one years of age, and is of good moral character. *In the application as a condition of admission to the examination,* he shall produce either of the following credentials: a diploma from a reputable college granting the degree of A. B., B. S., or equivalent degree; a diploma from a normal school, high school or seminary, legally constituted, issued after four years of study;

a student's certificate of examination for admission to the freshman class of a reputable literary or scientific college, or a certificate of his having passed an examination conducted under the direction of the State Board of Medical Registration and Examination by certified examiners, none of whom shall be either directly or indirectly connected with a medical college * * * * and has either received a diploma from some legally chartered medical institution in the United States in good standing at the time of issuing such diploma, as defined by the board; or a diploma or license approved by the board, which has conferred the full right to practice all branches of medicine and surgery in some foreign country. With the application the applicant shall present his diploma or license, as above defined, and accompanying the same shall file his affidavit duly attested, stating that he is the person named in the diploma or license, and is the lawful possessor of the same, and giving his age, résidence, the college or colleges at which he obtained his medical education, the time spent in each college, the time spent in the study of medicine and such other facts as the Board may require; if engaged in the practice of medicine the applicant shall state the period during which, and the place at which, he has been engaged in the practice of medicine or surgery. If the board shall find that the applicant has obtained any one of the credentials heretofore defined as a condition of his admission to the examination, and shall find his diploma to be genuine, and from a legally chartered medical institution in the United States in good standing as determined by the board, or shall find the license to be genuine, and such as to confer upon the applicant the full right to practice all branches of medicine or surgery in the foreign country in which he obtained it, and of a standard approved by the Board; and shall find the person named in the diploma or license is the person holding and presenting the same, and is of good moral character, the board shall admit such applicant to an examination."

These statutory conditions and requirements of applicants for admission to the examination of the Board may not be modified or enlarged by any regulations adopted by the Board, and a careful examination of other parts of the act in question does not disclose to me any language which might authorize the Board to make any departure from or change in the requirements made of or conditions imposed upon applicants for examination by Section 4403c.

In the absence of any authority to modify or enlarge the terms of Section 4403c, I am of the opinion that the Board may not admit to its examination any person who is unable to respond to the conditions and requirements imposed by this section of the Statutes.

It is manifest that a student of a medical college who has not completed its course of study and received its diploma could not meet the requirements of this section, and, therefore, the Board has no authority to admit such person to its examination.

Very truly yours,

WADE H. ELLIS,

Attorney General.

CONCERNING STEPS TO BE TAKEN IN THE TRANSFER OF PRISONERS FROM THE OHIO STATE REFORMATORY TO THE PENITENTIARY.

COLUMBUS, OHIO, December 9, 1904.

The Board of Managers of the Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—You have submitted several inquiries to me with reference to the steps to be taken in the transfer of prisoners from the Ohio State Reformatory to the Ohio Penitentiary, under Section 7388-28 R. S.

In reply I would say that the board of managers in a case coming within the terms of Section 7388-28 R. S. should find, as a fact, either that the prisoner at the time of his conviction was more than thirty years of age or that he had been previously convicted of crime or that he was an incorrigible prisoner whose continued presence in the Ohio State Reformatory would be seriously detrimental to the well-being of the institution.

The finding of the board should be placed upon its record; a certified copy of this record, together with a copy of the original commitment to the Ohio State Reformatory, should be presented to the Governor of the State. The written consent of the governor should be procured to such transfer; then the certified copy of the record of the Board of Managers of the Reformatory, a copy of the original commitment to the Reformatory and the written consent of the Governor constitute the commitment papers to be delivered to the warden at the penitentiary.

The above steps complete the transfer. The warden of the penitentiary must, of course, receipt to the Ohio State Reformatory for the prisoner.

Very truly yours,

WADE H. ELLIS,

Attorney General.

WHETHER CHARLES KLINE IS SUCH A PRISONER AS COULD SECURE THE PRIVILEGES OF PAROLE LAW.

December 13, 1904.

THE BOARD OF MANAGERS, *The Ohio Penitentiary, Columbus, Ohio.*

GENTLEMEN: — I beg to acknowledge the receipt of yours of the 10th, referring to the case of Charles Kline, requesting an opinion from this department as to whether he is such a prisoner as could secure the privileges of the parole law. According to the facts set forth in your letter he was an habitual criminal as defined by the habitual criminal act; but, by action of Governor Herrick on August 16, 1904, his sentence was commuted from that of an habitual, for life, to a term of twenty-five years.

In an opinion rendered by this department under date of August 5, 1904, addressed to Governor Herrick, I expressed the view that the commuting of the term of Kline from that of life to twenty-five years, brought him within the class cognizable by the Board of Managers and thereby made him a subject of parole, if the facts warranted such action by you.

I understand you have a copy of the opinion rendered to the governor as governing this and similar cases.

Very truly yours,

WADE H. ELLIS,

Attorney General.

AS TO RECEIVING APPLICANTS FOR ADMISSION TO INSTITUTION FOR FEEBLE MINDED YOUTH.

December 16, 1904.

The Board of Trustees of the Institution For Feeble Minded Youth, and DR. G. A. DOREN, *Superintendent, Columbus, Ohio.*

GENTLEMEN:—Your communication has received my careful consideration. I recognize that it was impossible to formulate contents thereof in categorical questions which would present fully the matters treated of therein, although by presenting it in the form of the statement which you have made, by the presentation of the "typical cases" included in the statement, the importance of its consideration is thereby emphasized and the application of the principles involved are made more direct and personal.

The communication first presents an inquiry as to the kind or character of persons embraced within the operation of the law governing your institution, its board and its officers, that under the law can be properly admitted thereto.

This is governed by the original act found in 75 O. L. 541 and in the supplemental act found in 93 O. L. 209, and the acts amendatory thereof and supplementary thereto. By these respective acts the Institution for Feeble Minded Youth has two separate departments, the one formed under the original act cited, and which relates to that part of the Institution familiarly called the "schools"; and the other found under the supplemental act which establishes the custodial department, and which comprehends a further and distinct class of inmates or subjects than those comprehended by the original act.

The original act by section 5 thereof provides that "all imbecile or idiotic youth who have been residents of the state for one year, and are not over fifteen years of age, and who are incapable of receiving instructions in the common schools, shall be received," etc. The words "imbecile" and "idiotic" include the classes which could be admitted, under proper limitation and restrictions, to the "school" department of this institution. These terms are further limited by the phrases "residents of the state for one year,"—"not over fifteen years of age,"—"and who are incapable of receiving instructions in the common schools."

The board of trustees are directed by section 6 of the original act to "prescribe and publish instructions and forms for the admission of pupils, and may include in them such interrogatories as they shall think necessary or useful to have answered."

By Section 7 of the act under consideration permission is granted to admit persons of greater age than 15 and persons not residents in the state, if the capacity of the institution allows.

The terms "imbecile and idiotic" do not of themselves describe all varying conditions of mental weakness included therein, but are in a measure more accurately interpreted by reading in connection therewith the descriptive phrase applying thereto, "who are incapable of receiving instructions in the common schools." Even with this additional distinction of the classes an accurate description is not given of the stage of idiocy or imbeciliity which could proprely be accepted as a standard for admssion to the institution, and further as a continuing condition to warrant the retention of such persons therein. Provision was thus made by the law for discovering such condition and of attendant facts relating to the environment, family, effects of heredity, etc., and to the individual, by vesting in the board of trustees the power to include in their published instructions and forms, "such interrogatories as it thinks necessary or useful to have answered." The institution must be regarded in this department, both primarily and ultimately, as exclusively for the benefit of the class described in the laws establishing it.

The inclusion of certain classes of persons described by their mental state, as above referred to, exclude all others as do not come within this fundamental classification. There may be a class of persons in which idiocy or imbecility may be apparent, and still such individuals may not be proper subjects to be admitted to the institution. In such cases the law has given to the board a discretion in determining the right to be admitted, which is to be exercised by its best judgment and the judgment of those who are appointed by the board, and have the active charge of such institution.

I am of the opinion that the correct interpretation of the law, under which the institution was originally created, and the law under which it is at present governed, is that the helplessly deformed, the crippled, the hopeless paralytics, epilpetics, insane and those of such character included within the object and purposes of the state in the creation of other institutions, provided for certain classes of dementia, epilepsy, blindness, deafness and other infirmities, are not to be included within the classes to be accepted by your institution.

This institution is not furnished with equipments and facilities, classification or discipline of general hospitals, hospitals for the insane or epileptics, prisons or reformatories, but only has the equipments and facilities for the education, training and custody of the idiotic, imbecile or feeble minded. Manifestly this extreme care in the law in designating the classes embraced within the objects of this institution, operates to the exclusion of cases from classes plainly provided for in other institutions. The custody of habitually vicious or violent, or those inclined to criminal conduct, so as to require the constant, unceasing restraints of watchmen, is wholly inconsistent with the objects of, as well as the facilities, provided for the institution.

In the exercise of your best judgment, the law will protect you in the admission of those who are brought within the comprehension of the statutes governing your institution, and will further protect you in the rejection of those who are not embraced within such class or classes.

Second: The "custodial" department of the institution, so called, embraces still another class than those comprehended within the act above cited.

By Section 674a R. S., being Section 1 of the act found in 93 O. L. 209, there is defined who may be admitted to the "custodial" department as follows: "Said departments shall be entirely and especially devoted to the reception, detention, care and training of idiotic and feeble minded children, and adults, regardless of sex or color, and shall be so planned in the beginning and constructed, as shall provide separate classifications of the numerous groups embraced under the term idiocy, imbecility or feeble minded. Cases afflicted with paralysis shall have a due proportion of space and care in the custodial department."

By Section 674e R. S., being Section 5 of the act cited above, it is further provided as follows: "Said board shall receive as inmates of said custodial department feeble minded children, residents of this state, under the age of 15, who shall be incapable of receiving instructions in the common schools of this state, and adults of the same class over this age who are public charges."

By Section 674f R. S., which is Section 6 of the act cited, it is further provided that, "Adults who may be determined to be feeble minded and who are of such inoffensive habits as to make them proper subjects for classification and discipline in an institution for the feeble minded, can be admitted, on pursuing the same course of legal commitment as govern admissions to the state hospitals for the insane."

The principal distinction between "custodial" department and "school" department is to be found in the age of those who may be admitted thereto, and in the provision made for their permanent detention therein, unless subsequent alteration in their condition makes it improper to longer detain them.

Provision is thus made for original admission to the "custodial" department by application made as above provided, but this does not forbid the right to transfer from the "school" department to the "custodial" department those who the experience of the officers of the institution have demonstrated to be beyond assistance, help and instruction contemplated to be given them by their admission to the "school" department. In such cases I do not consider it necessary if the preliminary requisites for admission to the institution generally, have been complied with, that there should be a further application made to have such persons transferred to the "custodial" department.

Third: The power conferred upon the board of trustees of the institution to prescribe and publish instructions and proper interrogatories such as it thinks necessary or useful to have answered, is a broad authority conferred upon the Board, vesting in it the right to determine the form thereof, the interrogatories propounded, to which answers may be required, all to effecuate the objects and purposes contemplated by the institution, and further to protect the institution against the admission of improper persons therein. After admission to the institution it may be discovered that the person so admitted does not come within the class or classes embraced within the acts governing this institution, and if so such persons may be returned to their families or to the authorities committing the individual thereto. The board cannot be compelled to keep within such institution those who are not embraced within this class, or who by error, mistake or misrepresentation have been admitted thereto. In case demand is made upon your board for the custody of any inmate of your institution where your judgment is opposed to the discharge of such inmate, you should deny their release or discharge to be made upon such demand, without first securing the judgment of a court in habeas corpus or other proper proceeding.

Fourth: Protection of the law will be afforded you and the officers having charge of such institution by insisting upon all applications to such institution being judicially inquired into and proper certificate thereof made by the probate court of the proper county. The record which such courts would make in passing upon the application of the applicants for admission will be your justification for their admission to your institution and fully protect you against actions for damages for false imprisonment. I am of the opinion that you are fully protected when you have exercised your best judgment in view of all the circumstances, even though no judicial inquiry be held upon the applicant's fitness for admission.

The reasoning of the Supreme Court of Ohio in the case of The House of Refuge v. Ryan, 37 O. S. 197, leads me to this conclusion. The language of the court in that case, which was a commitment to the House of Refuge without any notice given to the parent, guardian or next friend, was as follows:

> "The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison. While no provision is made for a notice to those interested, if such there be, of the pendency of the proceeding, yet it would doubtless be proper for the examining officer, where it is practicable, before making the order, to require such notice, but the state does not seem to require it as essential to the exercise of this power. As was said in Prescott v. State, 19 O. S. 188, where a similar question arose, 'neither the infant, nor any person who would in the absence of such commitment be entitled to his custody and services, will be without a remedy.'"

It is only out of an abundance of caution, and because of the adverse decision in the case of Fleming v. Doren, in the Court of Common Pleas of Franklin County, that I advise requiring a judicial inquiry in all cases before admitting them to your institution.

The questions presented by your communication, I think, have been fully covered herein.

Very truly yours,
WADE H. ELLIS,
Attorney General.

POWERS OF BOARD OF TRUSTEES OF NORMAL DEPARTMENT OF WILBERFORCE UNIVERSITY.

COLUMBUS, OHIO, November 30, 1903.

REV. JAMES POINDEXTER, *Columbus, Ohio.*

DEAR SIR:—In accordance with your request for an opinion as to the relative powers and rights of the board of trustees of the combined normal and industrial department of Wilberforce University, I beg to state that each of the nine trustees has the same rights, authority and power as each of the other eight, and no more. It must always be borne in mind that this department is separate, distinct and independent from Wilberforce University. The statute makes it so, and indeed, were it not for this provision of the statute, the act providing for state aid to this department of Wilberforce University would be unconstitutional. The Constitution of Ohio expressly prohibits any state aid to any sectarian institution. Wilberforce University, as I understand it, is a denominational college, under the control of the A. M. E. Church. That being the case, as already stated, the State could not in any manner give financial aid to Wilberforce University. This normal department is separate, distinct and independent from the University, and must be so managed in order to carry out the provisions of the law.

Very truly,
J. M SHEETS,
Attorney General.

CONSTRUCTION 7246, R. S.

COLUMBUS, OHIO, February 2, 1904.

JUDGE A. R. WEBBER, *Elyria, Ohio.*

DEAR SIR:—Your letter of January 31 received. You ask for a construction of Section 7246, R. S., under the circumstances following: two defendants are upon trial at the same time, each has had an attorney assigned to him, but the trial is joint. You ask whether the court is authorized to allow not to exceed $50 to each attorney. From an examination of the section referred to I am of the opinion that you may allow not to exceed $50 to each counsel.

Very respectfully,
WADE H. ELLIS,
Attorney General.

AS TO SAVINGS AND LOAN COMPANY TAKING ON POWERS OF SAFE DEPOSIT AND TRUST COMPANY BY AMENDMENT TO ITS CHARTER.

COLUMBUS, OHIO, February 3, 1904.

MR. WM. O. MATHEWS, *Att'y-at-Law, 326 Citizens' Building, Cleveland, Ohio.*

DEAR SIR:—Yours of the 29 ult., addressed to the Secretary of State, has been handed to me for reply. The Lakewood Savings & Banking Company, it appears, was incorporated under the savings and loan laws, with a capital stock of $100,000. Its powers, as I understand it, would be thus contained in Chapter 16, of Title 2, beginning with Section 3797, R. S. Your inquiry is as to the power of such company to take on by amendment to its charter the powers of safe deposit and trust companies, which are such powers as are contained in Section 3821a and Section 3821gg, R. S.

By a former opinion of this department, under date of February 18, 1901, this question was resolved against the power contended for, but following that opinion the consolidation of Saving & Loan Associations with Safe Deposit & Trust Companies was authorized by act of May 10, 1902, and that seemed to announce a new legislative policy regarding the employment of these various powers by the same corporations, and this department, being again appealed to for an opinion upon the question, under date of November 19, 1902, held that a Savings & Loan Association "may so amend its articles as to include the purpose of doing a Safe Deposit & Trust Company business." In the latter opinion I fully concur. As to the observation made by you, "that Trust Companies in cities are required to have paid-up capital of $200,000, and to make a deposit with the Secretary of State of $100,000 or a less amount, where the city is of a lower grade," yesterday the Supreme Court handed down the case of Schumacher against McCallip, 8291, holding that the sections of the law attempting to qualify such companies and confer powers upon them in certain counties not conferred on all, is unconstitutional, and therefore no distinction in such powers is permissible.

Respectfully,

WADE H. ELLIS,
Attorney General.

AS TO SEWER ASSESSMENT ORDINANCE.

COLUMBUS, OHIO, February 3, 1904.

HON. NEWTON D. BAKER, *City Solicitor, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of yours of the 30th ult., and have considered the questions therein suggested. I am of the opinion that it is not obligatory upon municipal corporations, by the terms of the code, in the construction of sewers to postpone an assessment ordinance until the entire completion of the work, as the assessment may be based upon the engineer's estimates, as is evidenced by consideration of Sections 50 to 58 of the municipal code.

The council of any municipal corporation may borrow money at a rate not exceeding 6 per cent per annum to pay the cost and expense of constructing sewers, and may, under the latter part of Section 95, have power to issue bonds in anticipation of special assessments for such purpose. I consider that either plan may be followed, in the discretion of council.

Yours truly,

WADE H. ELLIS,
Attorney General.

WHERE TWO ATTORNEYS APPOINTED TO DEFEND INDIGENT PRISONERS, FEE OF $50 MAY BE ALLOWED, BOTH UNDER SECTIONS 7245 AND 7246.

COLUMBUS, OHIO, February 5, 1904.

HON. A. R. WEBBER, *Judge Common Pleas Court, Elyria, Ohio.*

DEAR SIR:—Replying to your letter of February 3, I beg to advise you that one of my assistants, to whom was referred your two letters of January 30 and 31, respectively, seems to have thought that but one question was asked in both letters, and this accounts for the answer of this office, dated February 2. I hope you will thus understand why the first question you asked has not been answered sooner, for it is a pleasure always to extend any courtesy in the power of this department to the judges of the courts, although you will observe by a reference to Sections 206, 207 and 208, of the Revised Statutes, that the Attorney General is neither authorized nor required to submit opinions to common pleas or other judges in matters pending before them and demanding the exercise of their individual judgment and knowledge of the law.

As to the question you ask, whether or not, where two attorneys are appointed to defend one indigent prisoner a fee may be allowed to each such attorney not exceeding $50, I beg to say that, in my judgment, a reading of the two sections, 7245 and 7246, justifies the conclusion that separate allowances may be made to each attorney in such case, provided neither is given more than $50. One of the objects, it seems to me, which is sought to be attained by the provision in Section 7245 that the court may assign such prisoner counsel "not exceeding two," is to limit the expense to the county. There would be no need for such limitation as to number (except as a matter of convenience in the conduct of the trial) if the total amount of $50 could be divided among the attorneys assigned to the work. More than this there is no suggestion in Section 7246 that the word "counsel" is used either in a singular or plural sense, whereas the phrase in such section that the counsel so assigned "shall be paid for their services" would seem to indicate that they were to be paid separately for their separate services. My only experience is that, as a matter of practice, such attorneys may be and frequently have been allowed, each for his own services, the full amount authorized by statute, if the work done was fairly worth such sum. I believe this to be reasonable, just and lawful.

Very truly yours.

WADE H. ELLIS,
Attorney General

WHAT OFFICERS COME UP FOR ELECTION, UNDER NEW MUNICIPAL CODE, APRIL, 1904.

COLUMBUS, OHIO, February 29, 1904.

MR. JOHN L. MEANS, *Clerk of Board of Elections, Steubenville, Ohio.*

DEAR SIR:—Answering your inquiry of the 24th inst., under Section 138 of the new municipal code the members of the Board of Public Service are elected for a term of two years, and therefore there will be none to elect at the coming spring election. In cities having seven councilmen, four elected from wards and three at large, there will be elected the coming April the two members being from the odd wards and one member at large.

Yours truly,

WADE H. ELLIS,
Attorney General.

LATTER PART OF SECTION 1129 RELATING TO DUTIES OF TREASURY INSPECTORS NO LONGER OPERATIVE.

COLUMBUS, OHIO, March 11, 1904.

HON. JOHN COONROD, *Probate Judge, Fremont, Ohio.*

DEAR SIR:—It is my opinion that the duties of the inspectors appointed by the Probate Judge to examine the condition of the county treasury fully perform their duties when they make examination, as required by Section 1129 R. S. of the funds held by him as county treasurer, as investigation of city funds is provided for by other methods, and the latter part of Section 1129 is not now operative because the city treasurer is now an elective officer and the county treasurer is no longer city treasurer by virtue of his office.

Very truly yours,

WADE H. ELLIS,
Attorney General.

AS TO WHETHER COUNTY TREASURERS ARE REQUIRED TO GIVE SURETY BOND UNDER SECTION 3641c, R. S., AS AMENDED, AND WHETHER SECTION 1080, R. S., HAS BEEN REPEALED.

COLUMUBS, OHIO, May 20, 1904.

HON. EUGENE GARLIN, *Wooster, Ohio.*

DEAR SIR:—Your letter of May 11 received. You inquire whether, under the recent act of the legislature amending Section 3641c, of the Revised Statutes, county treasurers are required to give a surety bond; also, whether Section 1080, R. S., has been repealed?

The recent act referred to, amendatory of Section 3641c, R. S., is entirely prospective in its operation and would affect county treasurers who are required to give bond after the passage and approval of said act.

Section 1080, R. S., has not been repealed, but is in full force, except in so far as the amendatory act, above referred to, changes the kind of bond to be given by such county treasurer.

Very truly yours,

WADE H. ELLIS,
Attorney General.

EXPENSES OF COUNTY COMMISSIONERS.

COLUMBUS, OHIO, May 23, 1904.

HON. SAMUEL E. KEMP, *Dayton, Ohio.*

DEAR SIR:—Your letter of May 20 is received. You inquire about an opinion given by this department to the Auditor of State, to the effect that county commissioners cannot now draw money from the county treasury to reimburse themselves for money paid for traveling and other necessary expenses.

In order that you may get the full scope of the opinion referred to, I enclose you a copy of the same.

I note what you say in regard to the history of the new act, and particularly to the fact that Section 897-5, R. S., is not in terms repealed by the new act.

Section 897-5, R. S., as you are aware, provides, when expenses may be allowed county commissioners. I call your attention to the fact that by the very terms of such section in all counties where the compensation of county commissioners is now or hereafter may be fixed at a stated salary, no allowance for expenses may be made to county commissioners. Inasmuch as the present act fixes the compensation of all county commissioners at a stated salary, no allowance for expenses to county commissioners can be lawfully made.

Yours very truly,

WADE H. ELLIS,
Attorney General.

CONSTRUCTION OF THE WORD "BLIND" COVERED BY H. B. NO. 211.

COLUMBUS, OHIO, June 9, 1904.

HON. ALFRED N. PAXTON, *Probate Juage, Batavia, Ohio.*

DEAR SIR:—Your communication of June 7th asking construction of H. B. No. 211, received. In reply beg to say that, in my opinion, in the construction of the word "blind" it is not material whether it be a total or partial blindness. The evident intent of the legislature in the passage of this act was to provide for the worthy blind, who, by reason of that disability were incapacitated from earning a livelihood. In my judgment a court should be guided by this rule: Is the applicant, whether totally or partially blind, incapable of self-support by reason of said disability?

Very truly yours,

WADE H. ELLIS,
Attorney General.

COMPENSATION TO PROBATE JUDGE OR WITNESSES UNDER THE NEW LAW PROVIDING FOR INDIGENT BLIND.

July 18, 1904.

HON. W. C. KIESS, *Probate Judge, Bucyrus, Ohio.*

DEAR SIR:—In reply to your communication, under date of July 16, 1904, will say that under the new law providing for indigent blind no provision is made for compensation to either the Probate Judge or the witnesses. Our courts have held that where no compensation is provided by statute for a duty to be performed by a public officer such duty is presumed to be performed gratuitously.

I am of the opinion that the witnesses can be compensated under Section 5251, R. S. While this law took effect upon its passage and approval, it is necessary that a fund be created by the county commissioners before it can be enforced. The general practice in the various counties is to exhaust the fund provided by the township trustees under the old law. In the meantime, the Probate Judge will certify to the county commissioners the amount required and the county commissioners will, in their next annual levy, make provision for said fund.

Very truly yours,

WADE H. ELLIS,
Attorney General.

RELATIVE TO POWERS AND DUTIES OF PROBATE JUDGE IN THE APPOINTMENT OF JAIL MATRONS.

July 22, 1904.

HON. E . MARTIN, *Probate Judge, Logan, Ohio.*

] SIR:—Your communication dated July 21, 1904, relative to the powers and d s of the probate judge in the appointment of jail matrons under Section 7388a, as amended by the last General Assembly, received. That section, as amended, is as follows:

> "The sheriff of any county may appoint not more than three jail matrons, whose duties shall be to have charge over and to care for the insane and for all female and minor persons who may be confined in the jail of such county, and the county commissioners shall provide suitable quarters in said jail for the use and convenience of said matrons, while on duty, but no such appointment shall be made except on the approval of the probate judge, and the probate judge shall fix the compensation of such matron, which shall not exceed sixty ($60.00) dollars per month, and the same shall be payable monthly out of the general fund of said county, upon the warrant of the county auditor upon the certificate of the sheriff. No matron shall be removed except for cause, and then only after hearing before the probate judge."

This section first provides that "the sheriff of any county may appoint not more than three jail matrons," etc. This provision, of course, pertains to the power and duty of the sheriff in such appointment, but *this* language contained in the section "but no appointment shall be made, except on the *approval* of the probate judge," etc., in my opinion, qualifies and restricts the authority of the sheriff, and places upon the probate judge the authority not only to approve the appointment when made by the sheriff but to determine, in the first instance, whether any appointment is at all necessary. Very truly yours,

WADE H. ELLIS,
Attorney General.

RELATIVE TO APPROVAL OF COUNTY COMMISSIONERS' ITEMIZED STATEMENT FOR DITCH WORK.

August 1, 1904.

HON. MARCUS SHOUP, *Probate Judge, Xenia, Ohio.*

DEAR SIR:— Your communication bearing date of July 28, 1904, relative to your approval of the county commissioners' itemized account for ditch work, received. In reply I beg leave to advise you that county commissioners, under this law, are only entitled to pay when "actually employed" in ditch work. Under the statement of fact contained in your letter you would be warranted in refusing to approve their account for work upon a ditch when an injunction is in force restraining them from such work. It is the duty of the county commissioners to await the decision of the court as to the injunction. This law makes no provision for furnishing any information or data to the probate court as to the actual employment in ditch work. I presume it to be the duty of the probate judge to determine that matter for himself before he approves the account.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COUNTY IS CHARGEABLE WITH CERTAIN EXPENSES INCURRED ON BEHALF OF INMATES OF BOYS' INDUSTRIAL SCHOOL.

August 2, 1904.

MR. E. P. CHAMBERLAIN, *Bellefontaine, Ohio.*

DEAR SIR:—Your letter of July 25 received. You ask for information as to whether the county is chargeable with the payment of bills incurred on behalf of the inmates of the Boys' Industrial School. In reply I would call your attention to Section 631, R. S., which provides generally that the expense of maintenance of such inmates is to be borne by the State, but that the traveling and incidental expenses of taking such inmate to the institution, together with the clothing for such inmate, are properly chargeable against the county. Such incidental expenses, however, do not include medical attendance, school books, postage, etc.

Very respectfully,

GEORGE H. JONES,

Ass't Attorney General.

AS TO DIVISION OF SCHOOL FUNDS UNDER SECTION 3929, R. S.

August 10, 1904.

HON. M. W. SPEAR, *Probate Judge, Mt. Gilead, Ohio.*

DEAR SIR:—Your letter bearing date of August 9, 1904, relative to the division of school funds, under Section 3929 of the Revised Statutes of Ohio, received. In reply I beg to advise you that Section 3929, R. S., provides no basis for the guidance of the court in the division of the school funds further than this:

> "The probate judge * * * shall fix and determine the amount of money due and payable to said special district from the surplus money in the treasury or in process of collection in the district or districts from which it was formed."

In fixing and determining this amount the court can only be guided by sound discretion. I would suggest that a division, on the basis of enumeration, would be just and fair.

Very truly yours,

WADE H. ELLIS,

Attorney General.

IN REGARD TO AN APPLICATION TO THE EMERGENCY BOARD, ON ACCOUNT OF THE STATE HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, August 12, 1904.

HON. M. N. [illegible], *Steubenville, Ohio.*

DEAR SIR:—Your letter of August 2, addressed to the Attorney General in regard to an application to the Emergency Board on account of the State Highway Department, has been referred to me by him.

On examination of the statute, Sections 17-1 -2 and 3, I am inclined to the opinion that the situation presented is not such a one that may be relieved by the Emergency Board. The appropriation made for the Highway Department is not available until February 15, 1905. It is questionable whether an emergency can be said to exist, from the fact that the legislature did not see fit to appropriate any money for the Highway Department which should be immediately available.

Had the department been a standing one, that is, one created by prior legislature, and subsequent to appropriations made, it became necessary to contract liabilities, then the Emergency Board might be authorized to act, but in the case supposed an emergency such as is contemplated by Section 17-2 has not arisen

Very respectfully,

GEORGE H. JONES,

Ass't Attorney General.

JURISDICTION OF DEPARTMENT INSPECTOR OF MINES BEYOND LOW WATER MARK ON OHIO SIDE OF THE OHIO RIVER.

August 15, 1904.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your letter of July 28 received. You make two inquiries. First:

> "Has this department any jurisdiction beyond the low water mark on the Ohio side of the river?"

The jurisdiction of your department is co-extensive with the territorial limits of the state. From the early decisions of the Supreme Court of the United States, reported in 5th Wheaton, down to this time, it has been practically settled that the territorial limits of the State of Ohio are bounded on the south and east by low water mark of the Ohio river.

Second:

> "If this department has no jurisdiction beyond that limit can we co-operate with the West Virginia Mining Department and act jointly in the exercise of our respective duties there?"

In answer to this inquiry I would say that in the situation you propose co-operation between your department and that of West Virginia is absolutely essential. Consultation and agreement between the two departments would no doubt result in a great benefit to all parties concerned. The only restriction at all on such co-operation should be this, that orders made or directions given by the respective departments within the limits of their respective jurisdictions should be promulgated separately by each department and not jointly.

Very truly yours,

GEORGE H. JONES,

Assistant Attorney General.

IN REGARD TO THE ELECTION OF A CITY AUDITOR AT SPRINGFIELD.

September 6, 1904.

HON. STEWART L. TATUM, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—Yours of the 2d inst. received. The questions suggested for answer contained therein are of such a nature that we do not feel that this department could properly answer to you as city solicitor, and thereby assume to advise you of your duties in the premises, for, as you know, the Attorney General is not made the adviser of city solicitors, and I would not wish to trespass upon the authority conferred upon them by the Municipal Code; but as the matter contained

in your letter has also reached this office through the Secretary of State, who, as such officer, is the chief supervisor of elections, I feel that I can state to you my conclusions thereon as expressed to the Secretary of State without in any way assuming the duties devolving upon city solicitors.

Your statement of facts informs me that Mecklenborg was elected city auditor in April, 1903, to serve for three years from and after the first Monday in May of that year, and, if he had not died or resigned, his term would have expired on the first Monday of May, 1906. But Mecklenborg died in the fall of 1903, and Bauer was appointed auditor by the mayor of the city, by virtue of Section 228 of the Municipal Code, otherwise known as the act of October 22, 1902. This act only gave to the mayor power to appoint a successor to serve "until the next municipal election," which would have been the first Monday of April, 1904, but the act known as the "Chapman Law," changed municipal elections from April to November. This law (97 O. L., 39, Section 222) was enacted March 17, 1904, and at that time Bauer was serving as city auditor by appointment as the successor of Mecklenborg. That section served to extend Bauer's term under his appointment until the first Monday of January, 1904. Section 228, above referred to, was afterwards amended April 7, 1904 (97 O. L., 78), by which it was provided that in case of death, resignation, etc., of any municipal officer, the mayor shall fill the vacancy by appointment, which appointment shall be for *the unexpired term, and until a successor shall be duly elected and qualified.*

After this amendment Bauer resigned, and the mayor reappointed him as auditor. The question arises as to the length of the term of Bauer under the reappointment. When the mayor appointed Bauer to fill the vacancy caused by the death of Mecklenborg, by operation of the law as it then stood, and by the amendment thereto, known as the "Chapman law," his term would expire on the first Monday of January, 1905. This appointment filled that vacancy caused by the death of Mecklenborg. When Bauer afterwards resigned, there arose a vancacy in the office of auditor which could be filled by again appointing a proper person thereto under Section 228 (97 O. L., 78), but the appointment that could be made thereunder would be to fill the vacancy caused by the resignation of Bauer and not the vacancy caused by the death of Mecklenborg, because that vacancy had been filled by the first appointment of Bauer. The appointment when made under Section 228, as amended, could only continue, by the terms of the statute, "for the unexpired term and until a successor shall be duly elected and qualified." Plainly this could not be for the unexpired term caused by the death of Mecklenborg, for that vacancy, as I have stated, had been filled by the first appointment of Bauer, and the method of filling that vacancy was under Section 228 of the Municipal Code, as it existed prior to the amendment. The vacancy that could be filled under the amended law (97 O. L., 78) was that caused by the resignation of Bauer, and the "unexpired term" referred to in that section is the unexpired term of Bauer, the appointee, and not that of Mecklenborg, the elected officer.

Therefore the reappointment of Bauer as city auditor only conferred upon him the same length of term as that created by his first appointment and the extension of his term by the Chapman law, which was until the first Monday of January, 1905. His successor should, therefore, be elected at the November election of this year, and should commence his term on the first Monday of January, 1905.

Very truly yours,

WADE H. ELLIS,

Attorney General.

NOTE.—Subsequent to the date of the above this opinion has been sustained by the Supreme Court of Ohio, in State ex rel. Harris v. Chas. C. Bauer, city auditor of the city of Springfield, Ohio.

DIRECTION OF PROBATE JUDGE TO EXAMINERS TO EXAMINE AUDITOR'S OFFICE.

September 12, 1904.

Hon. John E. Coonrod, *Probate Judge, Fremont, Ohio.*

Dear Sir: — Your letter dated September 9th, 1904, relative to the duty of the Probate Judge to direct examiners appointed to examine the county treasury to also make an examination of the Auditor's office is received. In reply I beg to advise you that the provision for the appointment of the examiners to make an examination of the treasurer's office is mandatory. The language is:

> "* * * The probate judge *shall,* once every six months, or oftener, if he deems it necessary, etc., appoint examiners to examine the county treasury."

While the language referring to the examination of the Auditor's office is that,

> "Said probate judge is further *authorized* to direct said examiners at least once a year, or oftener, if he deems it necessary, to make an examination of the auditor's office."

I am therefore of the opinion that the direction of the Probate Judge to the examiners to examine the Auditor's office rests entirely in the discretion of the Probate Judge.

Very truly yours,
Wade H. Ellis,
Attorney General.

CHANGE OF CORPORATE CAPACITY OF VILLAGE OF CLARKSBURG, O.

September 26, 1904.

Hon. E. A. Tinker, *Chillicothe, Ohio.*

Dear Sir:—I beg to acknowledge the receipt of yours of the 17th inst., addressed to Hon. Lewis C. Laylin, Secretary of State, and by him handed to this department for answer.

I gain from your letter that Clarksburg, in your county, has taken the preliminary steps required by the statute for the change of corporate capacity from that of a hamlet, as it existed under the old law, to that of a village under the new Municipal Code, and that the village thus created has failed to elect its necessary officers within the time prescribed by Sec. 1565, R. S. I am of the opinion that, although the village has not proceeded within the statutory time to elect its officers, nevertheless the duty is imposed upon it, and, while it cannot proceed under the latter part of that section and hold a special election, yet it should proceed at the coming fall election in accordance with the change provided in the Chapman law to elect the necessary officers thereof. As to what constitutes the necessary officers I refer you to Sections 193 and 199 of the new Municipal Code, and in case the village owns a water works, electric light plant, artificial or natural gas plants or other similar utility, or owns a village cemetery, it would be necessary to establish a Board of Trustees of Public Affairs for such village, as provided by Sec. 205 of the same Code. Thinking this is sufficiently definite for the purpose required, I am,

Sincerely yours,
Wade H. Ellis,
Attorney General.

CHANGING INCORPORATION OF HAMLET OF CLARKSBURG TO A VILLAGE.

September 29, 1904.

CHARLES E. CAPPLE, ESQ., *Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of yours of the 28th inst., referring to the status of the village of Clarksburg, in your county.

On the 26th inst., a letter was written by Mr. Bennett, of this department, addressed to Mr. E. A. Tinker, of the Board of Deputy State Supervisors of your county, referring in part to the same subject matter. The opinion therein expressed I approve, but it appears from your letter that there is some difference as to the facts with regard to this hamlet, which I find by comparing your statement with that of Mr. Tinker. His letter represented that Clarksburg had taken the preliminary steps required by the statutes for the incorporation of a village, and that the corporation, thus created, had failed to elect its first officers within the time prescribed by statute (Section 1565), and inquired whether they could proceed to the election of officers at the coming November election. That was answered in the affirmative. Your letter now states that Clarksburg is a hamlet, and you inquire whether the adoption of the code was sufficient to change it from a hamlet to a village.

You will thus note the difference in the statement with regard to the facts, as given by the letter of Mr. Tinker, and as contained in yours of the 28th.

The hamlet of Clarksburg by the enactment of the Municipal Code and the proclamation therein required by the Secretary of State, became *a village,* and while its hamlet officers might and did continue to perform their duties until their successors were elected and qualified, it is now a village *in name* and must proceed to the election of its village officers, which should be done at the November election.

Yours truly,

WADE H. ELLIS,

Attorney General

JUSTICES OF THE PEACE COST BILL.

November 2, 1904.

HON. Z. D. FISHER, *Justice of the Peace, Mt. Sterling, Ohio.*

DEAR SIR:—Your communication bearing date of October 31st, 1904, relative to the certificate of insolvency of the defendant to be placed upon criminal cost bills, is received. Section 1309 of the Revised Statutes of Ohio provides that *county commissioners* may, at any regular session, make an allowance to the justice of the peace in lieu of fees in causes of felonies wherein the State fails and any misdemeanor wherein the defendant *proves insolvent,* but the aggregate amount of such allowance shall not exceed, any one year, the sum of $100.00. Under this section it is necessary, in all cases of misdemeanors, that the magistrate certify on the cost bill that the defendant is insolvent.

Very truly yours,

WADE H. ELLIS,

Attorney General.