occurred". Thus the term of office of an appointee to fill a vacancy in the office of county treasurer is not for the unexpired term, but only until a successor is elected and qualified.

Likewise, Article IV, Section 13, Ohio Constitution, provides that if "the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, *until a successor is elected and qualified*".

It was held in Opinions of the Attorney General, 1929, Vol. I, page 464, that under Article IV, Section 13, Ohio Constitution, and Section 10, General Code, the election of a successor to an appointee who is filling a vacancy in the office of probate judge, shall be held at the first general election for state and county officers, and that the term of office of the successor is for the remainder of the unexpired term. Hence the term of office of an appointee, filling a vacancy in the office of probate judge, is only until his successor is elected and qualified and not for the unexpired term.

From the above discussion it would appear that the probate judge and county treasurer involved in your communication, started a new *term* within the meaning of Article II, Section 20, Ohio Constitution, when they were elected and qualified.

Hence it now remains to be determined at what date the 1930 census was completed so as to change salaries based on county population; for if the census was published before the date of the qualification of the county treasurer and probate judge after their election, it is obvious that their salaries will be based on the 1930 census.

In my Opinion No. 3020, rendered March 5, 1931, it was held in the first paragraph of the syllabus as follows:

> "1. The 1930 federal census was officially certified and announced for the purpose of determining salaries payable from county treasuries on August 22, 1930."

Therefore, since the probate judge and county treasurer were elected on November 4th, 1930, qualifying shortly thereafter, sometime after August 22nd, 1930, I am of the opinion that their salaries will be based on the 1930 population, from the time of their qualification till the end of their terms.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3493.

CIGARETTE LAW—WHOLESALE AND RETAIL DEALERS—REFUND OF UNEARNED PORTION OF MONEYS PAID FOR LICENSES, AFTER JULY 9, 1931—HOW TAX ASSESSED BEFORE BUT COLLECTED AFTER EFFECTIVE DATE OF S. B. 324, 89TH G. A. APPORTIONED—VENDING MACHINE OWNER'S DUTY TO OBTAIN LICENSE—SPECIFIC FACTS.

SYLLABUS:

1. *Persons who voluntarily discontinue the wholesale or retail business of dealing in cigarettes after July 9, 1931, are not entitled to any refund for the unearned portion of their license fees.*

2. *Persons who took out wholesale and retail licenses to sell cigarettes at the*

same place prior to July 9, 1931, are entitled to a refund on giving up either of the wholesale or retail licenses, as required by section 7 of S. B. No. 324, 89th General Assembly. However, inasmuch as there is now no machinery for issuing refunds, such refund may not be collected until legislation providing machinery for refunds is enacted or an appropriation made by law to pay the refunds.

3. *The cigarette tax fees assessed before July 9, 1931, but not collected until after July 9, 1931, must be apportioned and distributed under the provisions of repealed sections 5900 and 5901, General Code.*

4. *Where a cigarette vending machine is placed in a place of business, and the owner of the vending machine furnishes the cigarettes for said machine, but gives the owner of the business a portion of the receipts from the sales, the retail license should be taken out by the vending machine owner.*

COLUMBUS, OHIO, August 8, 1931.

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

DEAR SIR:—This acknowledges receipt of a communication over the signature of C. E. Brotton, Deputy Auditor of State, which reads as follows:

> "Please advise me if, since the effective date of Amended Senate Bill No. 324, any refunds can be given, and under what circumstances, to dealers who discontinue the business of trafficking in cigarettes.
>
> Also, should all cigarette tax collected after the effective date of Amended Senate Bill No. 324 be apportioned under the provisions thereof or should that which was assessed prior thereto and collected later be apportioned under the provisions of the former Sections 5900 and 5901?
>
> Also, where a cigarette vending machine is placed in a place of business, should the owner of such business, which may be other than trafficking in cigarettes, take out the cigarette license or the owner of the vending machine when the owner of the machine furnishes the cigarettes and gives the owner of the business a portion of the receipts from the sales?"

Amended Senate Bill No. 324 was signed by the Governor on July 9, 1931, and, since it is a law providing for a tax levy and as section 24 of the act states that "this act shall go into immediate effect", its provisions have been effective as law since July 9, 1931. However, the tax levied on the sale of cigarettes does not become operative until September 1, 1931, by special provision of said section 24 of the act.

In connection with your first question, it is to be observed that former section 5896, General Code, expressly repealed by the above act, provided that when a wholesale or retail dealer in cigarettes discontinued business after having paid the annual assessment, the county auditor was required to issue a refunding order to such dealer for a proportionate amount of such annual assessment. Thus the legislature had authorized and provided machinery for the refunding of part of the license money to a cigarette dealer when such dealer voluntarily discontinued his business.

A careful reading of the act under consideration discloses that the legislature, when it repealed section 5896, did not re-enact in any form whatever the provisions contained therein. In other words, the legislature eliminated the subject matter contained in former section 5896 entirely. In this situation two questions are presented; First, as to whether dealers who paid the annual assessment before the new act becomes effective are entitled to a refund if they voluntarily discon-

tinue business after July 9, 1931; second, as to whether dealers who take out licenses after July 9, 1931, are entitled to a refund if they voluntarily discontinue business in the future.

The general rule of law with respect to the right of the refund or recovery of license fees paid is well stated in 37 C. J., 255, section 130, under the title "Licenses," sub-heading "Refunding or Recovering Fees Paid":

> *"The unearned portion of the money paid for a license may be recovered by the licensee where the license has become inoperative by acts or circumstances over which he has no control and without his volition,* as where he is deprived of his license by a statute or ordinance which prohibits the occupation for which the license was obtained, and in some jurisdictions this rule is prescribed by statute. *But this rule does not apply* where the license becomes ineffective through the licensee's act in voluntarily abandoning the only place where it could be lawfully exercised, or, *in the absence of statute, in voluntarily surrendering the license,* or where the license has been rightfully and properly revoked or canceled." (Italics the writer's.)

From the above statement of the law, you will note that, in the absence of statute, a licensee is not entitled to receive a refund on voluntary abandonment of his business. There is strong reason for this rule. The court in the case of *Simcho* v. *School District of Omaha,* 96 Nebr. 339; 148 N. W. 77, well stated the reason, saying at page 78 of 148 N. W.:

> "Can he, after thus voluntarily abandoning the place of business named in the license as the only place where he could lawfully sell liquors recover from the school district what he has voluntarily paid and as voluntarily rendered unproductive? This presents an entirely different question from those presented in the cases cited by appellee. In each one of those cases the license was canceled without the procurement of consent of the licensee, and we have uniformly held that, where he is deprived of his license by the acts or circumstances over which he has no control and without his volition, he could recover back what he has paid for a privilege which had been denied him. To this we adhere. But this rule can have no application where the licensee retains his license, voluntarily vacates his place of business, thus rendering his license ineffective, owing to his own act in withdrawing from the premises. If such were the law, a person could procure a license, enter upon the business, and, if, the volume of trade was not satisfactory, vacate the place where he is allowed to sell and recover back such portion of the money paid as the unexpired term of the license year bore to the whole year, which would, in effect, render the school district the insurer of the success of the business venture. This is not the policy of the law."

Further on this same subject, it was held in the third paragraph of the syllabus in the case of *Noumer* v. *Jackson County,* 271 Mo., 594; 197 S. W. 139:

> "A dramshop licensee upon the voluntary surrender of license is not, in the absence of statute, entitled to a rebate for the unexpired portion of the license."

The court in this case succintly stated the law at page 140, as follows:

> "The only other theory which might be urged as a basis of recovery

is that a dramshop licensee upon the surrender of his license is entitled to a rebate for the unexpired portion of the license. It would appear, however, that the great weight of authority is to the effect that a recovery cannot be had under those conditions, in the absence of a statute so authorizing.

The rule here applicable is stated in 15 R. C. L., 315, as follows:

'It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of his license, become entitled to the return of the license fee, in proportion to the unexpired term, in the absence of statutory enactment to the contrary.'

To the same effect are the following authorities: Joyce on Intoxicating liquors, §330; 1 Woollen & Thornton on the Law of Intoxicating Liquors, §500; case note in 16 L. R. A. (n. s.) loc. cit. 555, and cases therein cited."

It appears from the above authorities that the right to a refund after voluntary discontinuance of business by the licensee is dependent on whether or not the legislature allows it by the enactment of a statute. The legislature may or may not provide for a refund. If it does provide for a refund, there is nothing to prevent it from taking the right away at any time. In other words, there can be no vested right to a refunder of a portion of license money which has been paid in advance if the dealer voluntarily discontinues business. Hence, answering the two questions suggested by me in a preceding paragraph, I am of the opinion that no refunder may be given to dealers in cigarettes who took out licenses either before or after July 9, 1931, and voluntarily discontinued business after July 9, 1931.

The above discussion is predicated upon the assumption that the discontinuance of business by a wholesale or retail dealer of cigarettes is in all cases voluntary. However, there is a provision in the new act which will probably cause the involuntary discontinuance of business by some wholesale and retail dealers in cigarettes after July 9, 1931. I refer to the first sentence of section 7 of the act, which provides that "No person in this state shall sell any cigarettes both as a retail dealer and as a wholesale dealer at the same time of business." Section 18 of the act provides a penalty for violation of this provision, reading:

"Whoever violates any of the provisions of this act or any lawful rule or regulation promulgated by the commission under authority of this act, for the violation of which no penalty is provided by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

It is probable that there are several instances where a person or corporation took out both wholesale and retail licenses to sell cigarettes at the same place before July 9, 1931. By the terms of the new provision in section 7 of the act, such person, firm or corporation would be compelled to discontinue either the wholesale or retail selling of cigarettes at that place after July 9, 1931. Hence, it is apparent that the giving up of either the wholesale or retail business under such conditions would be because of acts or circumstances over which the licensee had no control and without his volition. From the general statement of the law quoted from Corpus Juris, above, you will note that "the unearned portion of the money paid for a license may be recovered by the licensee, where the license has become inoperative by acts or circumstances over which he has no control and without his volition." Hence, I am of the opinion that the person, firm or corporation giving up the retail or wholesale sale of cigarettes under such cir-

cumstances, is entitled to a refund of the unearned portion of money paid for the license. However, there is no machinery now provided by law for paying any refunds, section 5896 having been repealed. Until some legislation is enacted or appropriation made by law to take care of these refunds, there is no way that the licensee may collect these refunds.

Coming now to your second question, I may say that sections 5900 and 5901, General Code, which provided for the distribution of the revenues and fines collected under Part II, Title II, Chapter VI of the General Code, and the penal laws relating to cigarettes, were repealed by Amended Senate Bill No. 324. Said sections 5900 and 5901 had provided as follows:

> Sec. 5900. "The revenues and fines collected under the provisions of this chapter and the penal laws relating to cigarettes, shall be distributed as follows, to-wit: In each county, three-fourths of the money paid into the county treasury on account of such business in a city, village or township therein, shall be placed to the credit of the general revenue fund of the state, and paid into the state treasury by the county treasury as provided in other cases."
>
> Sec. 5901. "One eighth of the money paid into the county treasury on account of such business in a municipal corporation shall be paid, upon the warrant of the county auditor, into the treasury of such corporation to the credit of the police fund, or in a corporation having no police fund, to the credit of the general revenue fund. The remaining one-eighth thereof shall be credited to the poor fund of such county; but in counties having no county infirmary it shall be credited to the infirmary fund or poor fund of the township, or city in which it was collected. In counties where such money is paid on account of such business conducted in a township outside of a city, one-eighth shall be credited to the poor fund of the township; but in counties not having a poor fund, the last named two-eighths shall be credited to the poor fund of the township."

Section 5 of Amended Senate Bill No. 324, provides in part as follows:

> "* * * The revenues and fines collected under the provisions of this section and the penal laws relating to cigarettees shall be distributed as follows: One-half thereof shall be paid into the state treasury as provided in other cases; one-fourth thereof shall be paid upon the warrant of the county auditor into the treasury of the municipal corporation or township in which the place of business, on account of which the same was received, is located; and the remaining one-fourth thereof shall be credited to the general fund of the county."

In connection with part of section 5 quoted above, it is well to note the first sentence of section II of the act, which provides that *"The moneys received into the state treasury under the provisions of this act shall be credited to the cigarette tax fund."* In other words, the one-half portion of the moneys arising from the cigarette licensing is to be paid into the cigarette tax fund.

It is obvious that the revenues assessed and collected under the new act are to be distributed in different proportions, and in all cases to different funds of the respective subdivisions than was the case under the old sections. There is a section of the Constitution which compels the conclusion that the cigarette tax assessed under the old law must be collected and distributed according to the

provisions of the old law. I refer to Article XII, Section 5, Ohio Constitution, which provides as follows:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied."

Obviously, the above constitutional provision requires that the proceeds of a tax shall be applied to the objects for which it is levied or assessed.

In Opinions of the Attorney General for 1919, Volume II, page 1628, it was held in the syllabus:

> "1. It is the duty of the township trustees to furnish 'outside' relief to the poor residing in a city within the township when they have poor funds by reason of levies made prior to the taking effect of section 3476 G. C., as amended, 108 O. L. 272.
>
> 2. The act amending section 3476, G. C., was filed in the office of the secretary of state May 16, 1919, and did not become effective until ninety days thereafter. Under its provisions the city shall furnish all the temporary relief to be given to the poor residing in the city, and it is the duty of the city officials to provide for same in making future levies. However, poor relief funds collected or in process of collection by the township shall be expended in accordance with the law in force at the time the levies were made."

The facts in the above opinion disclose that previous to 1919 townships were required to levy a tax for poor relief and were required to furnish outside relief to people residing in cities in the township. In 1919 the law was amended so that cities were thereafter required to levy a tax and pay for relief of indigent people residing within their limits. It appears that the townships had levied a tax under the old law but that all the money had not been collected at the time of the amendment, and the question therefore arose as to whether the money when collected could be used for furnishing relief to indigent people in the cities. The opinion held that the money which was in the process of collection when the new law became effective could be used for furnishing relief to residents of cities. The following language is quoted from the body of the opinion:

> "It is the view of this department that when taxes have been levied and collected or are in the process of collection by the trustees of the township for a given purpose as provided by law, it is the duty of said trustees to expend said funds in accordance with the provisions of law in force at the time said levies were made. Art. XII, Sec. 5, of the Constitution, provides:
>
> 'No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.'
>
> Construing the constitutional provision in connection with the present statement of facts, it seems clear that the poor funds under control of the township trustees should be expended in the manner provided by the law in force at the time said levies were made."

In another perintent opinion, appearing in Opinions of the Attorney General for 1928, Volume I, page 526, it was held in the syllabus:

"The proceeds of tax levies upon the 1927 duplicate made in pursuance of former section 1222, General Code, must be applied only to the objects set forth in said statute."

It is thus apparent that under the authority of the constitutional provision and opinions of the Attorney General, the cigarette tax assessed prior to July 9, 1931, but not collected until after said date, must be apportioned in accordance with the provisions of repealed sections 5900 and 5901, General Code.

With respect to your third question, I call your attention to the title of Amended Senate Bill No. 324, which is as follows:

"Providing for the levy of an excise tax on sales of cigarettes in the state of Ohio for and during the years 1931, 1932 and 1933, and in aid of such purpose, the substitution for the present tax on the business of trafficking in cigarettes, cigarette wrappers or substitutes therefor, *of a license tax on the business of dealing in cigarettes;* and enacting supplemental sections 2624-1 and 2685-2 of the General Code and repealing sections 5894, 5895, 5896, 5897, 5898, 5899, 5900, 5901, 5902 and 12680-1 of the General Code." (Italics the writer's.)

You will note that the license tax is on the "business of dealing in cigarettes."

Furthermore, section 1 of the act defines the terms used in the act and provides in part as follows:

Section 1. "As used in this act:

'Person' includes firms and corporations;

'Retail dealer' includes *every person* other than a wholesale dealer *engaged in the business of selling cigarettes in this state,* irrespctive of quantity or amount or number of sales threof;

'Sale' includes exchange, barter, gift, *offer for sale and distribution,* and excludes transactions in interstate or foreign commerce;

* * *" (Italics the writer's.)

Also section 5 of the act provides in part:

"No person shall engage in the wholesale or retail business of trafficking in cigarettes within this sale without having a license therefor. * * *" (Italics the writer's.)

Under the facts disclosed by your communication, it is apparent that the owner of the vending machine is the person who should take out the license. It is he who is engaged in the business of offering for sale and distribution the cigarettes. The fact that the proceeds of the sales may be divided and a portion given to the owner of the building or business does not affect the question. Apparently the distribution of a part of the proceeds to the owner of the business is the consideration for allowing the vending machine to be placed on the premises of the owner of the building and business. Of course, if the person who is conducting the business in the building has a key to the vending machine and is permitted to stock the machine at times and collect the coins from the box, it is probable that he would be regarded as providing for the sale and distribution of cigarettes at that place and would be required to take out the license. From the facts as disclosed in your communication, however, it does not appear that the owner of the business has any control over the vending machine, but only receives from the machine owner a part of the proceeds.

Therefore, I am of the opinion that, under the facts disclosed by you, the owner of the cigarette vending machine should take out the cigarette license.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3494.

APPROVAL, BONDS OF VILLAGE OF NEW CONCORD, MUSKINGUM COUNTY, OHIO—$5,275.00.

COLUMBUS, OHIO, August 8, 1931.

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

3495.

LEGAL ADVERTISEMENT—NOTICE OF SALE OF REALTY FOR DELINQUENT TAXES—EXPENSES PAYABLE, AS COSTS IN CASE, FROM PROCEEDS OF SALE.

SYLLABUS:

The expenses of publishing the notice of the sale of real property in proceedings for the foreclosure of delinquent land tax certificates on said property under the provisions of Section 5718, *General Code, are to be paid as costs in the case out of the proceeds of the sale of said property.*

COLUMBUS, OHIO, August 10, 1931.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from your office over the signature of Mr. George S. Tenesy, Assistant Proescuting Attorney, which communication reads as follows:

> "Some time during the early part of 1930 I wrote your office for an opinion regarding the payment of legal advertising in foreclosure actions under General Code Section 5718 (sale of real estate for delinquent taxes), to which I received a reply, being your opinion No. 1483.
>
> I neglected, however, in my first question to include the question as to how, by whom and from what fund the advertising which the sheriff must insert in the legal news for the sale of this property is paid.
>
> Thanking you in advance for giving us your opinion on this point, I beg to remain"

The former opinion of this office, referred to in your communication, was addressed to the question as to how and in what manner expenses incurred in securing service by publication on parties defendant in actions to foreclose delinquent tax certificates under the provisions of section 5718, General Code, should be paid. In said opinion, after reference was made therein to the provisions of sections 5713, 5718, 5719 and of other sections of the General Code relating to the question there presented, the conclusion was reached that the expenses in-