ordinarily be expected to pay for same, yet, considering the condition of the grant and in view of the very emphatic pronouncement of our own courts above mentioned on the subject, especially in the case of Louis H. Poock, Treasurer, etc., v. Joseph Ely et al., trustees of original survey township No. 1, reported in 4 O. C. R. at page 401, as well as the decisions of the courts of last resort of our neighboring jurisdictions above referred to, I am inclined to express very grave doubts as to the constitutionality of the above mentioned act of the General Assembly of Ohio (108 O. L., Part I, page 612), and I am inclined to the opinion that you are justified in withholding payment of said assessment out of the rentals of said premises until authorized by a court of competent jurisdiction.

Respectfully,

C. C. CRABBE,
Attorney General.

240.

MAYOR—SUSPENDED FROM OFFICE PENDING INVESTIGATION UNDER SECTION 4268 G. C., IF PERMANENTLY REMOVED NOT ENTITLED TO SALARY DURING SUCH SUSPENSION—IS ENTITLED TO SALARY IF WRONGFULLY REMOVED.

SYLLABUS:

A mayor suspended from office pending investigation under section 4268, General Code, and permanently removed, is not entitled to salary during the period of such suspension.

However, should it ultimately be decided by a court of competent jurisdiction that he was wrongfully removed, then and in that event he will be so entitled to his salary.

COLUMBUS, OHIO, June 13, 1923.

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

GENTLEMEN:—Relative to my opinion No. 240, heretofore rendered to your department in answer to your request of March 14th, regarding the right of Mayor Herbert H. Vogt to draw his salary as Mayor for the period of thirty days during which time he was suspended by the Governor, beg to say that I desire to modify my said former opinion No. 240, not in the conclusion reached that he was not entitled to the salary upon the facts as stated in your letter, and at the date of your letter, March 14, 1923 at which time he had been permanently removed by the Governor.

However, on March 17th Herbert H. Vogt commenced an action in mandamus against the Governor and on March 26th another action in quo warranto against his successor in office, to obtain reinstatement to the office as such Mayor, and both said actions are now pending in the Supreme Court of this state.

I therefore desire to substitute the following as my opinion No. 240, to-wit:

No. 240.

OPINION.

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

GENTLEMEN:—This will acknowledge receipt of your letter of March 14th, requesting the opinion of this department, as follows:

> "We are in receipt of a letter from Mr. L. S. Lash, City Auditor of Massillon, Ohio, relative to payment of salary to Mayor Herbert H. Vogt for the period during which he was suspended by the Governor, that is, from January 18th to February 18th, 1923. On the 19th day of February, 1923, Mr. Vogt assumed his office as mayor and held same until March 1st, 1923, when he was permanently removed.
>
> "Question: Is said mayor entitled to the compensation provided by ordinance of council for the office of mayor for the period of thirty days during which he was suspended by the Governor?"

Section 4268 of the General Code provides for the suspension of a mayor for a period of thirty days pending an investigation of charges of misconduct in office, etc.

Section 4274 of the General Code provides the method of filling the vacancy "in case of the death, resignation or removal of the mayor", etc.

Mechem on Public Offices and Officers, says:

> "A public office is the right, authority and duty, created and conferred by law, by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

Dillon in his work on Municipal Corporations, Vol. 1, section 429, says:

> "It is a general rule, which is asserted with practical unanimity, that if an officer of a municipal corporation * * * be *wrongfully* removed by the * * * removing authority, he is entitled to recover, providing the city has not paid any other person for the performance of the duties of the office. But for reasons of public policy, and recognizing payment to a *de facto* officer while he is holding the office and discharging its duties as a defense to an action brought by the *de jure* officer to recover the same salary, it is held in many jurisdictions that an officer or employe who has been wrongfully removed, or otherwise wrongfully excluded from office, *cannot recover against the city* for salary during the period when his office was filled and *his salary paid to another appointee.*"

In the case of Luttner v. Cleveland, reported in Vol 15 O. N. P. (N. S) at page 524 the Court uses this language:

> "There is a great line of authorities from almost all the states which hold that where the duties of an office have been performed by one appointed or elected and inducted into office, even though it should afterwards be held that his occupation of such office was illegal, still he was a *de facto* officer, and his acts were legal and would bind the public which he represented, and that if his acts were legal, he was in fact an officer or a *de facto* officer, and the disbursing officer, he who will be charged with the duty of paying the salary, will be perfectly safe in paying the salary attached to that office to the incumbent who is performing the duties of the office and that he will be protected in thus paying."

The Supreme Court, in 92 O. S. 493, in reviewing the above case, with four others, entitled The City of Cleveland v. Luttner, The City of Cleveland v. Yoos, The City of Cleveland v. Lange, The City of Cleveland v. Cottrill, and The City of Cleveland v. Esper, Office and Officers—Policemen wrongfully discharged—But reinstated by court decree—Entitled to salaries, less earnings, when—Notwithstanding substitute policemen employed—Section 16, Article I, Constitution—Of redress in Courts, stated the law in Ohio to be as follows:

> "By the Court. The foregoing cases involve the same questions, and therefore were submitted and considered together.
>
> "The defendants in error were formerly policemen of the City of Cleveland. They were ousted from office. Action was subsequently brought by them, whereby they were restored to their former positions as police officers. Thereafter demand was made upon the city of Cleveland for their salaries as police officers for the time during which they had been wrongfully ousted from office. The common pleas court found that, owing to the fact that other policemen had been appointed in their stead through the interval and had drawn substantially the same salary, the police officers so wrongfully ousted could not recover.
>
> "The case was appealed to the court of appeals, which held a contrary doctrine, to-wit, that they could recover the full salary for the interval in question, and that such salary was not subject to be reduced by any earnings of said policemen during said interval. To the judgment of the court of appeals error is now prosecuted to this court.
>
> "A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States. His candidacy for appointment or election, his commission, his oath, in connection with the law under which he serves, and the emoluments of his office constitute the contract between him and the public he serves.
>
> "The constitution of Ohio guarantees to everyone redress for any injury done him in his land, goods, person, reputation, etc., and assures him remedy by due course of law and that justice shall be administered without denial or delay. If the public servant, a policeman in this case, be wrongfully dismissed from public office, he should have the same remedy for such wrong as a private servant for any wrong done him in his employment. The theory in both cases should be to make the wronged party whole; that is, to reimburse him for his loss. The mere fact that

the wronging party employs or appoints some one else during the period of wrongful ouster should not excuse him for the full measure of his duty and liability.

"The defendants in error in the foregoing cases should, therefore, recover their salaries, less the respective amounts they have otherwise earned, in the exercise of due diligence, during the periods they were wrongfully ousted. Decrees accordingly."

In the case of Charles J. Barbour v. United States, reported in Vol. 17, Court of Claims Reports, p. 149, the fourth paragraph of the syllabus uses this language:

"An officer suspended under the Revised Statutes (Sec. 1768) is not entitled to the salary of the office during the period of suspension, though no person be nominated for the place or appointed to discharge its duties."

In 29 CYC., p. 1430, after reviewing and citing authorities from a number of states, the author sums up the authorities in the following language:

"The payment of the official salary to a *de facto* officer is, however, a defense to a claim against the public corporation or disbursing officer making such payment in an action brought against it or him by the *de jure* officer."

The controlling case in Ohio until the announcement in the 92 Ohio St. 493, and one that has been cited and followed elsewhere by the courts, is that of Steubenville v. Culp, 38 O. S. 18. In that case, Culp was wrongfully removed from office, or rather, suspended by the mayor, who had authority to appoint during vacancy, and that suspension would only be until the charges could be heard by the council. The council sustained the mayor, and then Culp was removed. Subsequently the council reversed itself and reinstated Culp. Culp brought suit for his salary during the time that he had been kept from his office, but it had been drawn by the man appointed to succeed him, and the Supreme Court of Ohio held that that being so, the City of Steubenville could not be made to pay him likewise; in other words, the salary was attached to the office, and if the duties of the office had been performed by a *de facto* officer, who had drawn the salary, the city had performed its full duty in paying for the services thus rendered, and could not be made to pay again.

It may be observed that in a very strong dissenting opinion by Jones, J., in 92 O. S. 503, in the Cleveland police cases, he says:

"It is a little remarkable that in placing a new rule of decision upon the laws of this state, the case of Steubenville v. Culp, supra, was neither overruled nor distinguished."

We understand the distinction to be made in the Cleveland police cases, 92 O. S. 493, in reversing what had been the settled law of the state up to that time, is to turn upon the question as to whether the officer was wrongfully removed. If so, he is entitled to his salary, regardless of whether or not it had been drawn by a *de facto* officer.

Proceeding to definitely answer your inquiry, after a careful consideration of the authorities mentioned and others, and upon the facts stated in your letter, I

am clearly of the opinion that under the law of Ohio the mayor is not entitled to the compensation or salary for the period of thirty days during which time he was suspended.

However, should it ultimately be determined that he was wrongfully removed, then under the decision in the 92 O. S. 493, he would be so entitled.

Respectfully,
C. C. CRABBE,
Attorney General.

241.

BOARD OF EDUCATION—SECTIONS 3751 TO 3761 G. C. CONSTRUED—AUTHORIZED TO CONTRACT FOR OILING STREETS—PAID OUT OF CONTINGENT FUND—SECTIONS DO NOT AUTHORIZE ASSESSMENT TO BE LEVIED AND COLLECTED.

SYLLABUS:

Under the provisions of section 3751 to 3761 G. C., the board of education is authorized to contract for the oiling of the streets upon which the school property abuts and pay for the same from its contingent fund. However, such sections do not authorize an assessment to be levied and collected against the school property to pay such costs.

COLUMBUS, OHIO, April 13, 1923.

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

GENTLEMEN:—In your recent communication you request the opinion of this department as follows:

> "Under the provisions of section 3753 G. C., oiling districts have been created in the City of Cincinnati by resolution of the Director of Public Service, within which districts property of the board of education abuts on streets which have been treated with oil and the cost of such oiling has been assessed against the abutting property of the streets in question, including the property of the board of education.
>
> Question: Can assessments for such oiling be legally assessed and collected from the board of education under the conditions described?
>
> We are enclosing herewith letter received from our examiner at Cincinnati, citing decisions of the courts, etc., in relation to street improvements.
>
> The City of Cincinnati is anxious to certify their 1922 delinquent oiling account for the 1923 duplicate and we would greatly appreciate an immediate or early reply, if possible."

The question of the authority to certify assessments against school property for street improvements, etc., has frequently been under consideration by the courts and this department. The law is definitely settled that a school board is not