public utility or corporation by law. Such charge shall be without prejudice to the collection of any penalty authorized by law."

Said corporation reports that it transacts no business but is engaged in the business of holding the capital stock of the Occo Realty Company, which capital stock has been by the Commission determined to have a valuation of $285,000. It must follow that for determining the value of the shares of the holding company, the shares of the subsidiary company represent capital, surplus, undivided profits or reserve of the holding company, and are subject to the tax as provided in Section 5499, General Code, which provides that:

"On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of * * * one-tenth of one per cent for each year * * * upon such value so certified, and shall immediately certify the same to the treasurer of state. * * * "

As stated in your letter this seems to be taxing the same assets twice; however, under the present status of the law, there seems to be no other course. I may add, however, that Senate Bill No. 57, entitled, A Bill to amend Sections 5495, 5497, 5498, 5499, 5506 and 5509, and to repeal Section 5521 of the General Code, relative to the imposition and collection of corporate franchise taxes is pending in the Legislature. In Section 10 of said bill provision is made that whenever one corporation, domestic or foreign, owns fifty-five per cent or more of the outstanding shares of another corporation or other corporations, such corporations may, at their option, file a consolidated report as though their property and their business were owned and transacted by a single corporation; and the tax may be determined and collected as a single tax. This evidently is an attempt to correct any inequality in the requirement of the present statutes. However, the provisions of said bill if enacted into law will not be available for the current year.

In view of the foregoing discussion and statutes quoted, I am of the opinion that the Commission should continue to follow its present rule of determining the value of the shares of the capital stock of said holding companies as described in your communication.

Respectfully,
GILBERT BETTMAN,
Attorney General.

349.

JAIL MATRON—APPOINTMENT BY SHERIFF WITHOUT PROBATE JUDGE APPROVING AND FIXING COMPENSATION—NO FINDING—ILLEGALITY OF CONTRACTING TO FEED PRISONERS—NO CURING OF IRREGULARITIES.

SYLLABUS:

1. *Where a sheriff, under provisions of Section* 3178, *General Code, apoints a jail matron and said appointment is approved by the probate judge who does not fix the compensation of said matron, but the county commissioners appropriate six hundred dollars for the salary of said matron, which was paid to her in monthly installments of fifty dollars each, there should be no finding for recovery made against said jail*

matron in the absence of evidence of fraud, collusion or excess payments for services performed.

2. *Where the daughter of the sheriff is appointed jail matron, and the appointment is not approved by the probate judge, said probate judge did not fix the salary of said jail matron, but the county commissioners appropriated six hundred dollars for the salary of said matron, which was paid to her in monthly installments of fifty dollars each, there should be no finding for recovery made against said jail matron, in the absence of evidence of fraud, collusion or excess payments for services performed.*

3. *A jail matron, while acting as such, has no right to receive compensation for furnishing meals for prisoners under contract during the period for which she was acting as jail matron.*

Whether said jail matron was serving as such at the time of entering into a contract for furnishing meals to prisoners, is a question of fact to be determined in each particular case.

4. *Section* 3178, *General Code, provides that the appointment of jail matrons shall not be made except on the approval of the probate judge, and that said probate judge shall fix the compensation of such matrons. Where such order or orders are not made by the probate judge at the time of the appointment of jail matrons, the irregularity of said appointment can not be cured at a later date by orders made by said probate judge.*

COLUMBUS, OHIO, April 25, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
>
> Section 3178, General Code, provides for the appointment of a jail matron by the sheriff. It further provides that such appointment shall not be made except on the approval of the probate judge who shall fix the compensation of such matrons at not to exceed one hundred dollars per month. In a certain county in this state the sheriff appointed his wife as the jail matron; the probate judge approved the appointment but did not fix her compensation; the commissioners appropriated $600.00 for the salary of the matron, which was paid to her in monthly installments of $50.00 each. Sometime during the term of the sheriff, the sheriff appointed his minor (16 year old) daughter as matron but such appointment was never approved by the Probate Court nor was any amount fixed for such compensation by such judge. The county commissioners made the same appropriation and the minor daughter drew $50.00 per month during the remainder of the term.
>
> Question 1. Should finding for recovery be made against the wife of the sheriff for compensation received as matron, by reason of the fact that the probate judge did not fix the compensation?
>
> Question 2. Should findings be made against the minor daughter of the sheriff for the amount received as jail matron by reason of the fact that the probate judge did not approve the appointment and did not fix the salary?
>
> Question 3. As there is no further evidence of the wife discontinuing her services as matron, has she a right to receive compensation for furnishing meals to prisoners under contract during the period for which the minor daughter pretended to act as matron, although the probate judge did not fix the wife's compensation as matron?

Question 4. Could the irregularity be now cured by the probate judge fixing the compensation of the wife as jail matron and approving the appointment of the minor daughter and fixing her compensation as jail matron?"

Section 3178, General Code, reads as follows:

"The sheriff may appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use and convenience of such matrons while on duty. Such appointment shall not be made, except on the approval of the probate judge, who shall fix the compensation of such matrons not exceeding one hundred dollars per month, payable monthly from the general fund of such 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 such probate judge."

Authority is given by this section to the sheriff to appoint jail matrons, not exceeding three. Such appointments shall not be made, however, except on the approval of the probate judge. It is the duty of the probate judge to fix the compensation of the jail matrons, and such compensation shall not exceed one hundred dollars per month. The compensation is payable monthly upon the warrant of the county auditor and said warrant is issued upon the certificate of the sheriff.

The provision relating to the power and duty of the probate judge was formerly contained in Section 7388a, R. S., and read as follows:

"No such appointment shall be made, except on the approval of the probate judge and the probate judge shall fix the compensation of said matrons, which shall not exceed sixty dollars per month."

In the case of *State ex rel. Smith* vs. *Donovan Robeson,* Prob. Judge, O. D. Volume XV, page 471, Allread, Judge, stated:

"It is contended by the relator that the power of making the appointment under this act vests solely in the sheriff, and that the discretion of the probate judge is limited to an approval or disapproval of the personal fitness or acceptable character of the appointee.

A fair and reasonable construction of the act sustains a broader view of the discretion of the probate judge. Not merely the personal fitness of the appointee, but the appointment itself is subject to his approval. This interpretation is in harmony with the spirit and reason of the law as reflected from its history and the causes leading to its enactment. Special laws have been passed for the more populous counties under which jail matrons have been appointed. By recent decisions of the Supreme Court such special acts were invalidated. The Legislature deemed it necessary to meet these conditions by general laws. To prevent abuse of the general power so granted, and as a check against its unnecessary use, the approval of the appointment by the probate judge was required. Both the sheriff and probate judge must concur in the necessity and propriety of the appointment before it has any validity.

This view is amply supported by law writers and adjudicated cases.

Mechem, Pub. Off. Sec. 124, says:

'Where' the appointing power 'can be exercised only by and with the con-

sent and approval of the senate or other similar body, its exercise has no effect unless such consent or approval be given.'

Chief Justice Marshall in the famous case of *Marbury* vs. *Madison*, 5 U. S. (1 Cranch) 137 (2 L. Ed. 60) declares that the delivery of the commission to an appointee is merely clerical and subject to judicial control. But that the nomination by the president and the appointment with the advice and consent of the senate are discretionary and political acts which are not subject to judicial control, and that an application to the court to control, in any respect, such discretion would be rejected without hesitation."

It seems clear that the appointment of the jail matrons in order to comply with the provisions of this section must be approved by the probate judge. It is also clear that the sole power to fix the compensation of such matrons, within the limit prescribed, rests with the probate judge.

While the appointment, in the instant case, of the wife of the sheriff was made by said sheriff and approved by the probate judge, her compensation was not fixed by the probate judge. It is concluded that the appointment of the minor daughter of the sheriff was not a legal appointment because said appointment was not approved by the probate judge, neither was the compensation of the minor daughter fixed by the probate judge. It is necessarily assumed that the wife entered upon and performed her duties as a jail matron. It is noted that the county commissioners appropriated six hundred dollars for her salary and that the same was paid to her in monthly installments of fifty dollars each during her performance of said duties.

Your first question, however, is as to whether a finding should be made against the wife of the sheriff for the compensation paid her as jail matron by reason of the fact that her compensation was not fixed by the probate judge. She was appointed by the sheriff as jail matron; the appointment was approved by the probate judge; she was, therefore, duly appointed as jail matron. The county commissioners appropriated six hundred dollars for the salary, which salary within the limits defined by Section 3178, General Code, was paid to her for the performance of her duties. It is evident that should a finding and recovery be made against said wife for the compensation received by her, she could not now be placed in statu quo; her services have been performed and the county has received the benefit of the same.

The courts have uniformly held that, in the absence of fraud, collusion, or excess payments for the services performed, or materials furnished, recovery cannot be had.

Commissioners vs. *Arnold*, 65 O. S. 479;
Buchanan Bridge Co. vs. *Campbell*, 60 O. S. 406;
State ex rel. vs. *Fronizer*, 77 O. S. 7;
Keenon vs. *Adams*, 176 Ky. 618;
Flowers vs. *Logan*, 138 Ky. 59;
Cleveland vs. *Legal News Pub. Co.*, 110 O. S. 360.

In an opinion, number 3138, rendered January 14th, 1929, to the Bureau of Inspection and Supervision of Public Offices, the syllabus reads:

"Where an attorney is engaged to assist the prosecuting attorney in the trial of pending cases, upon request of the prosecuting attorney, which employment is known to the Court of Common Pleas in which said cases are tried, and through an inadvertence, the common pleas judge did not authorize said employment until after the services were rendered and after payment had been made therefor, in pursuance to a resolution of the board of county

commissioners, under such circumstances, in the absence of fraud or collusion, said payments may not be recovered from said attorney."

In an opinion of this department, number 2996, issued on December 10, 1928, to the Bureau of Inspection and Supervision of Public Offices, the syllabus reads as follows:

"1. The driver of a school wagon or motor van who does not give a satisfactory and sufficient bond and who has not received a certificate of good moral character as provided by Section 7731-3, General Code, can not recover for his services as such driver.

2. When the driver of a school wagon or motor van is employed by a board of education otherwise than in strict conformity with the provisions of Section 7731-3, General Code, and renders satisfactory service as such driver in reliance upon such contract and is paid therefor, in the absence of a showing of fraud or collusion in the transaction, no recovery can be had on behalf of the school district for the moneys so paid."

It is, therefore, concluded, in answer to your first question, that in the absence of evidence showing fraud, collusion or excess payments for the services performed, no finding for recovery should be made against the wife of the sheriff.

You next inquire as to whether findings shall be made against the minor daughter of the sheriff for the money received by said minor daughter as jail matron, as the probate judge did not approve the appointment and did not fix the salary. The position of jail matron is not a public office within the meaning of the Constitution or statutes of Ohio. Such matron is an assistant to the sheriff and sustains the relation of an employee similar to that of deputy sheriff. 12 O. N. P. (N. S.) 659.

As the position of jail matron is not a public office within the meaning of the Constitution or statutes of Ohio, the appointment by the sheriff of his minor daughter to said position, did not conflict with the inhibition of Section 4 of Article 15 of the Constitution, that:

"No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector." *Warwich* vs. *State of Ohio,* 25 O. S. 21.

It is, therefore, believed that although the probate judge did not approve the appointment of said minor daughter, and did not fix her salary, the same reasoning will apply in regard to her as was applied in the answer to your first question in regard to the wife of the sheriff, and it is, therefore, concluded, in answering your second question that, in the absence of fraud, collusion or excess payments for the services performed by the daughter, no finding for recovery should be made against said daughter.

In your third question, you inquire as to whether the wife has a right to receive compensation for furnishing meals to prisoners under contract during the period for which the minor daughter pretended to act as matron of the jail. Consideration will be given first as to whether the wife, while acting as jail matron, could receive compensation for furnishing meals to prisoners under contract. This matter was under consideration by my predecessor, and in an opinion dated October 21, 1927, Opinions of the Attorney General 1927, Vol. III, page 2089, it was held, in the third paragraph of the syllabus, that:

"A contract made by the matron of a county jail whereby she agrees to

furnish meals for the prisoners in the county jail, is in violation of Section 12910, General Code, and therefore illegal."

Section 12910, General Code, reads as follows:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year, nor more than ten years."

In construing this section, said former opinion at page 2092 states:

"While Section 12910, General Code, is a penal section and must therefore be strictly construed, it seems clear to me that even though we apply the rules of strict construction to the statute, it must be said that anyone agreeing to furnish meals for prisoners in the county jail, would be 'interested in the contract for the purchase of supplies for the county' which is clearly prohibited by Section 12910, supra, and as a jail matron is an agent or servant or employe of the sheriff, a jail matron who did so contract, would be amenable to the provisions of the statute."

It is, therefore, evident that a contract made by the matron of the county jail with the county sheriff whereby she agrees to furnish meals to prisoners in the county jail is illegal, and she would not be entitled to compensation under said contract. However, there apparently is no reason why said wife could not discontinue her services as jail matron and later contract with the sheriff for furnishing meals to prisoners in the county jail.

In the opinion of my predecessor last referred to herein, the first paragraph of the syllabus reads as follows:

"The relation of husband and wife is such that the relation alone does not engender an interest of the husband in the contracts of the wife, and where a county sheriff contracts with his wife for the furnishing of meals to the prisoners in the county jail, to be paid for from county funds, he does not thereby become interested in a contract for the purchase of supplies for the use of the county, in violation of Section 12910, General Code. Nor can he be said thereby to secure a private personal profit out of the feeding of the prisoners confined in the jail."

It is apparent that the answer to your third question will depend upon the facts. The wife of the sheriff cannot during her incumbency as matron of the county jail contract with the sheriff for furnishing meals to the prisoners in said county jail. However, if she severed her connection as matron of the county jail, there is no inhibition to her contracting with the sheriff for feeding the prisoners in said county jail.

In your fourth question you inquire as to whether the irregularity could now be cured by the probate judge fixing the compensation of the wife as jail matron and approving the appointment of the minor daughter and fixing her compensation as jail matron. In view of the answers herein to questions number one and two, it is believed that the answer to question number four is immaterial in this instance. However, it is not believed that the probate judge could now make the orders which should

have been made before said wife and daughter entered upon their duties as jail matrons.

Section 3178, General Code, supra, provides that the appointment of jail matrons shall not be made except on the approval of the probate judge and that said probate judge shall fix the compensation of such matrons.

It is stated in the opinion in the case of *State ex rel. Smith* vs. *Donovan, supra,* in considering the power and authorities of the probate judge, that not only the personal fitness of the appointee, but the appointment itself is subject to the approval of the probate judge.

As neither an order fixing the compensation of the wife of the sheriff, nor orders approving the appointment of the daughter and fixing her compensation were made, previous to the time that said wife and daughter entered upon their duties as jail matrons, no order may now be made as of the date of the appointment. Had the orders in fact been made by the probate judge and, through inadvertence, not entered upon the journal, they could now be entered thereon by an entry nunc pro tunc, but no order was in fact made and none can be made now as of the date of the appointment.

In the case of *The Huber Manufacturing Company* vs. *Sweny et al, assignee,* 57 O. S. 169, in considering a case where through inadvertence no entry of an order which had been made was entered upon the journal, the opinion states at page 175, that:

> "If the order were in fact made—and the court finds that it was—it then became the duty of the clerk to make a proper entry of it on the journal. If he failed in this duty, the least reprehensible reason to be assigned for such failure is inadvertence, as, in practice, it is found to be the most common cause for such failures. The remedy for such inadvertence is an order *nunc pro tunc,* for the proper office of a *nunc pro tunc* order is to correct the record so as to cause it to show an act of the court which, though actually done at a former term, was not entered on the journal."

As no orders were in fact made, the probate judge could not now cure the irregularity by making said orders.

Summarizing and specifically answering your questions, it is, therefore, my opinion, that:

1. Where a sheriff, under provisions of Section 3178, General Code, appoints a jail matron and said appointment is approved by the probate judge who does not fix the compensation of said matron, but the county commissioners appropriate six hundred dollars for the salary of said matron, which was paid to her in monthly installments of fifty dollars each, there should be no finding for recovery made against said jail matron in the absence of evidence of fraud, collusion or excess payments for services performed.

2. Where the daughter of the sheriff is appointed jail matron, and the appointment is not approved by the probate judge, said probate judge did not fix the salary of said jail matron, but the county commissioners appropriated six hundred dollars for the salary of said matron, which was paid to her in monthly installments of fifty dollars each, there should be no finding for recovery made against said jail matron, in the absence of evidence of fraud, collusion or excess payments for services performed.

3. A jail matron, while acting as such, has no right to receive compensation for furnishing meals for prisoners under contract during the period for which she was acting as jail matron.

Whether said jail matron was serving as such at the time of entering into a con-

tract for furnishing meals to prisoners, is a question of fact to be determined in each particular case.

4. Section 3178, General Code, provides that the appointment of jail matrons shall not be made except on the approval of the probate judge, and that said probate judge shall fix the compensation of such matrons. Where such order or orders are not made by the probate judge at the time of the appointment of jail matrons, the irregularity of said appointment can not be cured at a later date by orders made by said probate judge.

Respectfully,
GILBERT BETTMAN,
Attorney General.

350.

APPROVAL, NOTES OF WADSWORTH VILLAGE SCHOOL DISTRICT, MEDINA COUNTY, OHIO—$8,000.00.

COLUMBUS, OHIO, April 25, 1929.

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

351.

APPROVAL, THREE GAME REFUGE LEASES.

COLUMBUS, OHIO, April 25, 1929.

HON. J. W. THOMPSON, *Chief, Division of Fish and Game, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval as to form, the following leases which describe lands to be used for State Game Refuge purposes, as authorized under the provisions of Section 1435 of the General Code:

No.	*Name.*	*Acres.*
1195	Roy E. Ring, Ashtabula County, Conneaut Township----------	86¼
1196	Roy E. Ring, Ashtabula County, Kingsville Township---------	70½
1197	Ignac and Mary Wrublawski, Ashtabula County, Kingsville Twp.	51.47

Upon examination I have found said leases in proper legal form, and have endorsed thereon my approval as to form, and return them to you herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.