supra, expressly provided that the judge must certify that the applicant has never been convicted of crime, but only that "he *is* of good moral character."

Whether or not Mr. Doe is a person of good moral character is a question of fact and it must be left to the wisdom and good conscience of the judge of the proper court to determine whether in view of all the circumstances, including the conviction and imprisonment, he can truly so certify.

Specifically answering your inquiry I am of the opinion that under the law as it stands today, if a judge of the proper court is *satisfied from his personal knowledge* that the applicant possesses the necessary qualifications, (which term includes good moral character) and so certifies, Mr. Doe will be eligible for appointment as a Notary Public. However, I am of the further opinion that the matter of appointment will still rest in the discretion of the Governor. If the Governor should refuse to make the appointment mandamus will not lie.

Respectfully,
EDWARD C. TURNER,
Attorney General.

243.

THIRD OFFENSE—CRABBE ACT—WHEN PROSECUTION MAY BE INSTITUTED AND MAINTAINED.

SYLLABUS:

A prosecution for a third offense, for violation of Sections 6212-13 *to* 6212-20, *General Code, may be instituted and maintained against a defendant when the first offense and second offense upon which the present prosecution is predicated were judgments upon pleas of guilty entered before a mayor's court.*

COLUMBUS, OHIO, March 28, 1927.

HON. HARRY K. FORSYTH, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of March 14, 1927, which reads as follows:

> "Since the rendering of the recent opinion by the Supreme Court of the United States affecting the jurisdiction of Mayors' Courts in this state, I desire your opinion as to the status of the defendant in the following case.
>
> The recent grand jury returned an indictment against one, Wiscal, charging a third offense under the Crabbe Act for selling liquor, said defendant having twice before pleaded guilty to the unlawful selling and possession of intoxicating liquors, having been fined in each of the prior cases $100.00 and costs. The first offense was committed in Logan county, the defendant having been arraigned before the mayor of Lakeview, Ohio, and there entered a plea of guilty to unlawful possession and transporting of liquors and having been fined $100.00 and costs. The second offense was committed in Shelby county, he having been arraigned in the mayor's court of Sidney, entered a plea of guilty and was fined $100.00 and costs. The last offense was committed in Sidney some time in February of this year and formed the basis of the third offense."

The question you present is whether or not a prosecution for a third offense, for violation of Sections 6212-13 to 6212-20, General Code, may be instituted and main-

tained against a defendant where the first offense and second offense, upon which the third offense is predicated, were pleas of guilty before a mayor's court.

As stated in 8 Ruling Case Law, p. 96;

> "In order that a case may be prosecuted and judgment given, it is necessary that the trial court have jurisdiction of the subject matter, that is, of the offense, and of the person of the defendant * * *. The jurisdiction of inferior courts is usually limited by statute and therefore may be consulted in any case where a question of jurisdiction arises."

In the case of Heininger vs. Davis, Mayor, 96 O. S., 205, it was held that a mayor's court is an inferior court of record. By statute mayors in cities not having a police court and mayors in villages have final jurisdiction to hear and determine any prosecution for violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment; final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the constitution, entitled to a trial by jury, and their jurisdiction in such cases is co-extensive with the county. See Sections 4527, 4528, 4535, 4536 and 4549, General Code. In felony and other criminal proceedings not herein provided for, mayors have jurisdiction and power throughout the county concurrent with justices of the peace.

In the more populous counties the jurisdiction of mayors has been abrogated by the various municipal court acts. In 1921 (109 O. L., 144) their county-wide jurisdiction was revived as regards prosecutions instituted under Sections 6212-13 to 6212-20, General Code.

By the provisions of Section 6212-18, any mayor within the county before whom an affidavit is filed charging a violation of any of the provisions of Sections 6212-13 to 6212-20, General Code, when the offense is alleged to have been committed in the county in which the municipality, of which the mayor is the chief officer, is situated, has final jurisdiction to try such cases upon such affidavits without a jury unless imprisonment be part of the penalty.

It is the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. While there is some conflict of authority whether at common law there existed any disqualification of a judge by force of constitutional or statutory provisions, judges may be disqualified by interest, bias or prejudice, such as having acted as counsel, relationship, etc. As stated in 33 Corpus Juris, 990, this rule of disqualification on account of interest in the subject matter or result of litigation extends to every person or tribunal exercising judicial functions, whether the jurisdiction be superior or inferior.

Mayors of villages functioning as judges have been left free of statutory grounds of disqualification. They cannot by authority of any statute be "sworn off the bench".

Section 1687, General Code, applies to judges of the courts of common pleas and has no application whatever to mayors. See Carey vs. State, 70 O. S., 121.

As stated in 33 Corpus Juris, 1012:

> "Where the judge does not disqualify himself *sua sponte* in order that his disqualification may be available, it is necessary duly to object to it. The objection should be timely and seasonably made promptly upon its discovery, otherwise it is generally held that the right is lost. In order to invoke the jurisdiction of the court to pass upon the disqualification, the objection should be made by petition or motion. * * *"

In the case that you present as regards the first offense and second offense, the defendant voluntarily submitted himself to the jurisdiction of the mayor's court and entered pleas of guilty to the charges made and affidavits filed against him.

As said in 8 Ruling Case Law, 116:

> "A plea of guilty, accepted and entered by the court, is a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law."

The defendant raised no objection or question as to the disqualification of the judge to hear his case which may have existed both because of his direct pecuniary interest in the outcome and because of any notice he might have possessed to convict and to graduate the fine to help the financial needs of the village. Having failed timely and seasonably to make such an objection, the right is now lost to question the interest the trial court may have had.

The judgments of the prior convictions, having been rendered by a court which had jurisdiction of the party and the subject matter, not having been reversed or annulled in a proper proceeding, are not now open to contradiction or impeachment, in respect to their validity, verity or binding effect, in any collateral action or proceeding, except for fraud in their procurement.

Granting the judgments were voidable, that is, so irregular or defective that they could have been set aside or annulled in a proper proceeding for that purpose, it is well settled that such judgments are not now subject to collateral impeachment so long as they stand unreversed and in force.

A careful examination of the decision of the opinion of Mr. Chief Justice Taft in the case of Tumey vs. State of Ohio (decided March 7, 1927), shows that Tumey was arrested and brought before a village mayor charged with unlawfully possessing intoxicating liquor; that he moved for his dismissal because of the disqualification of the mayor to try him under the Fourteenth Amendment; that the mayor denied the motion, proceeded to trial and convicted the defendant. Mr. Chief Justice Taft used the following language in his opinion:

> "No matter what the evidence was against him, he had the right to have an impartial judge. *He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial matters of the village. There were thus presented at the outset both features of the disqualification. The judgment of the Supreme Court of Ohio must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.*" (Italics the writer's.)

The judgment of the Supreme Court of Ohio referred to is its judgment of May 4, 1926, when it dismissed Tumey's petition in error for the reason that no debatable constitutional question was involved.

It is my opinion that as regards the first and second convictions, the defendant, having entered pleas of guilty and failed seasonably to object to whatever disqualification the judge of the court may have labored under, cannot now collaterally impeach the final judgments heretofore entered against him. The prior convictions upon pleas of guilty are convictions of the highest order and being final judgments they are now immune from collateral attack. It is further my opinion, therefore, that a prosecution for a third offense, for violation of Sections 6212-13 to 6212-20, General Code, may be instituted and maintained against a defendant where the first offense and second offense upon which the present prosecution is predicated were judgments upon pleas of guilty entered before a mayor's court.

Respectfully,
EDWARD C. TURNER,
Attorney General.