their possession as investments in order to raise funds for the purpose of other investments, but definitely authorizes the investment of moneys in their possession not already invested.

It would seem, therefore, that the selling of the securities representing the invested funds of the sinking fund trustees, in order to obtain funds for the purchase of municipal bonds by such trustees, as well as the selling of both the securities in their hands and also those purchased from the municipality below par, is an act clearly unauthorized by law, and beyond the powers conferred upon the sinking fund trustees to consummate, and for which such trustees would be liable to the municipality for any loss or damage occasioned by reason of the illegal transaction.

Your question further asks, can the trustees of the sinking fund who have acted as stated above be held liable for the difference between the amount received for the bonds sold to complete such a transaction and the par value thereof?

While it is believed that such an amount as you indicate might generally be considered as prima facie evidence of the amount or measure of damages in the instances quoted, yet it might not in all cases represent the true measure of damages recoverable by the municipality, since the bonds in question may never have brought par value, or never may have been sold in the first instance. It would rather seem in such cases that the actual damage or loss sustained by the municipality would, no doubt, be such as might be determined by the court or jury as the circumstances in the particular case should warrant, and would as such more properly represent the true measure of damages recoverable from officials whose negligence or breach of official duty had occasioned the loss or damage to the municipality.

In specific answer to your question, and in view of the facts stated in your communication, it is the opinion of this department that the bureau would be warranted in making a finding for recovery against the sinking fund trustees in the instances cited.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2323.

TAXES AND TAXATION—WHERE PERSON TAKES UP RESIDENCE IN THIS STATE LESS THAN SIX MONTHS NEXT PRECEDING DAY BEFORE SECOND MONDAY OF APRIL IN GIVEN YEAR WITH BONA FIDE INTENTION OF REMAINING HERE PERMANENTLY—MONEYS, CREDITS AND INVESTMENTS OF SAID PERSON TAXABLE.

A person who takes up his residence in this state less than six months next preceding the day before the second Monday of April in a given year, with a bona fide intention of remaining here permanently, is subject to taxation in this state in respect of his moneys, credits and investments held on that day.

COLUMBUS, OHIO, August 12, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department upon the following question:

"Mr. A took up his residence in this state January 15, 1921, with the intention of remaining here permanently. On April 10, 1921, he was the owner of certain personal property in the form of the taxable stock of a foreign corporation.

Is he required to make any tax return in Ohio for the current year?"

The following provisions of the General Code may be quoted:

"Section 5373. A person who has his actual or habitual place of abode in this state for the larger portion of the twelve months next preceding the day before the second Monday of April in each year, shall be a resident of this state for the purpose of taxation, and the personal property which he is required by law to list shall be taxable therein, unless, on or before that day he has changed his place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state. The fact that a person who has so changed his actual place of abode, within six months from so doing, again abides within this state, shall be prima facie evidence that he did not intend permanently to have his actual place of abode without this state. Such person, so changing his actual place of abode and not intending permanently to continue it without this state and not having listed his property for taxation as a resident of this state, for the purpose of having his property listed for taxation within this state, shall be deemed to have resided on the day when such property should have been listed, at his last actual or habitual place of abode within this state. The fact that a person whose actual or habitual place of abode during the greater portion of such twelve months has been within this state, does not claim or exercise the right to vote at public elections within this state, shall not of itself constitute him a non-resident of this state within the meaning of this section."

"Section 5374. A person or property subject to taxation within this state, shall not be relieved therefrom by the next preceding section nor shall any provision thereof repeal any statute now in force as to the taxation of personal property."

"Section 5374-1. The personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise of persons moving into this state from another state between the day preceding the second Monday of April and the first day of October, in any year, shall be listed for taxation for such year in all respects agreeably to the provisions of this chapter; unless the person required to list the same shows to the assessor, under oath, and by producing a copy of the assessment duly certified to by the proper officer of the state or sub-division thereof in which said property was assessed, that the same property has been listed and assessed for taxation for that year in such other state, or that such property has been received by him in exchange for property so listed or assessed."

"Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this

state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. * * *."

The only question to be considered is whether the first clause of section 5373 is to be construed as requiring residence in this state for the larger portion of the twelve months next preceding the day before the second Monday of April, in order to subject a person to taxation on his moneys, credits and investments. Literally it seems to have this import; but when sections 5374 and 5374-1 are taken into account this literal import is negatived. Section 5374, for example, says that nothing in section 5373 shall relieve a person from taxation in this state; whereas the effect of reading the six months' requirement in the way suggested would be to relieve from taxation in this state a person who is an actual resident of Ohio on the day preceding the second Monday of April. This section was a part of the same original section with what is now section 5373 of the General Code, namely, section 2735a of the Revised Statutes. Section 5374-1 is of more recent enactment (106 O. L. 248); it is therefore perhaps not entitled to great weight in the construction of section 5373. It assumes, however, that a person actually residing in Ohio on the day preceding the second Monday of April is subject to taxation, for it provides that if a person comes into Ohio after that date and before the first day of October, he shall be taxed in respect of his intangibles, etc., in Ohio, unless he can show that he was taxed in the state from which he came.

A very careful consideration of the first two of the above quoted sections was given by Clarke, D. J., in *Rockefeller* vs. *O'Brien*, 224 Fed., 541. In that case it was sought to apply the literal import of section 5373 to a person who had actually had his place of abode in Ohio for the six months next preceding the second Monday of April, but without the intention of remaining permanently in this state, and indeed at a time when he still retained a legal domicile in the state of New York. Lengthy quotation from that opinion will not be made herein. The following analysis made by the learned judge, at pp. 551 et seq. of the opinion is sufficient:

"(1) That if a man shall make his actual place of abode within the state for more than 6 months of any year, as the year is divided by the act for taxing purposes, this fact, unexplained and unrebutted, shall render him a resident of the state, so that he may be taxed as a citizen is taxed; but such residence may be explained and shown by evidence to have been temporary in its character, without any intention on the part of the person to make Ohio his permanent abode or residence, and, when this is proved, he shall not be subject to such taxation.

(2) That if, after such a person shall have resided in the state the required period, he shall remove from the state before tax listing day, with the purpose, in good faith, to establish his permanent home elsewhere, then he shall not be taxed under its terms. Whether such removal from the state was with the bona fide intention of permanently abiding without it is plainly a question of fact to be determined by a court upon the evidence that may be adduced bearing upon the question.

(3) But if the person so removing from the state shall return to it within 6 months of such removal, this return is made by the statute 'prima facie evidence' to be considered by a court that he did not intend when he left the state to permanently have his place of abode

without the state, and he shall be taxed as if he had remained in the state until the tax listing day.

(4) The fact that such a person may renounce his right to vote in the state, while evidence of his non-residence, shall not be conclusive of his really being a non-resident, as it might be if the statute had not been enacted.

Thus plainly the statute contemplates that a man may have his place of abode within Ohio for the required 6 months, and yet be a non-resident of the state all the time within the meaning of the tax laws of Ohio, and so not taxable in the state on his intangible property, and whether he is such a non-resident or not is for the courts to determine upon the evidence introduced in each case. In the case under consideration, it is admitted that Mr. Rockefeller, all of the time he was in Ohio in the year 1913 and 1914, was a citizen of the state of New York; that he was a voter of that state; that he was taxed there, presumably upon this very property; that he had his permanent home there; and it cannot be doubted on the testimony introduced on this trial that he came to Ohio in June, 1913, as he had often done before, simply for a summer visit, which was continued longer than usual because of the illness of members of his family. Neither can it be doubted that when he left the state he left it with the purpose of permanently residing in the state of New York, which had been his home for more than 30 years.

With these facts before us, in the opinion of this court, there can be no doubt at all that, notwithstanding the provisions of the act of April 14, 1900, Mr. Rockefeller was a non-resident of Ohio when the tax return in dispute was made, and that he could not properly be taxed upon his intangible property under the terms of that statute."

It thus appears that the Federal court construed the statute as having the effect of attaching certain legal inferences to certain facts. It is to regarded not as an exclusive means of arriving at the legal conclusion that a person is a resident of Ohio, but as an effort to solve this ofttimes difficult question by creating certain presumptions. In the case stated by the commission no necessity exists for raising any presumption. It is stated that the person in question was actually living in Ohio on tax listing day with the intention of remaining here permanently. That being the case he has acquired legal domicile and residence for the purpose of taxation in this state. Section 5373 is no more to be construed as excusing him from taxation than it was construed by the Federal court as subjecting to taxation a person whose outward conduct conformed to its terms, but whose actual intention was not such as to make him a legal resident of this state.

A former opinion of this department contains an intimation contrary to the conclusion reached in this opinion. See Opinions of Attorney-General for 1917, Vol. II, p. 1027, wherein, after quoting section 5373, supra, it was said:

"It will be observed that by the provisions of this section the legislative policy of this state as embodied therein does not go so far as to tax the personal property of all persons who reside within the state on tax listing day, but that residence therein for the larger portion of the twelve months next preceding the day before the second Monday of April is required in order to establish what might be called a tax domicile herein."

The facts then before the Attorney-General did not make necessary any conclusion on this point, however, as it was apparent that the person in question there had actually resided in Ohio for a period of between seven and eight months next preceding the second Monday of April, 1917. The remark above quoted was not carried into the syllabus of the opinion, and this department does not now concur therein.

It is accordingly the opinion of this department that a person who takes up his residence in this state less than six months next preceding the day before the second Monday of April in a given year, with a bona fide intention of remaining here permanently, is subject to taxation in this state in respect of his moneys, credits and investments held on that day.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2324.

BOARD OF EDUCATION (RURAL)—WITHOUT AUTHORITY TO ELECT SUPERINTENDENT OF SCHOOLS UNDER SECTION 7690 G. C.

A rural board of education is without authority to elect a superintendent of schools under the general language of section 7690 G. C., since the General Assembly has provided for county supervision of schools by a county superintendent and such assistant county superintendents as may be elected by the county board of education.

COLUMBUS, OHIO, August 12, 1921.

HON. J. KENNETH WILLIAMSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of June 21, in which you request my opinion on the following statement of facts:

> "Section 7690 G. C., recently enacted by the 84th general assembly, found on page 49 advance sheets of school laws, is as follows:
>
> 'Each city, village or rural board of education shall have the management and control of all the public schools of whatever name or character in the district, except as provided in laws relating to county normal schools. It may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and may fix their salaries.'
>
> I have construed this to mean that this section permits a rural board of education to elect a superintendent of schools.
>
> 1st. Is this construction sound?
>
> 2nd. Will it permit two or more township boards of education to each employ the same superintendent providing each board can make a suitable agreement with said superintendent in reference to salary each board shall pay and to the amount of time each township district is to receive from said superintendent?"

In analyzing your statement furnished and the questions submitted, it appears that the real question before us is whether the general assembly at its recent session passed any law, the intent of which was to bring back