vs. *Baldwin*, 101 O. S. 65, 67. In this connection Section 3329, General Code, provides that when by death, removal, resignation or non-acceptance of the person elected, a vacancy occurs in the office of constable, or "when there is a failure to elect", the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified.

By way of specific answer to your second question, therefore, I am of the opinion that such constable should be appointed by the trustees of the township as provided for in said Section 3329, General Code, although, of course, he cannot serve longer than December 31, 1929.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1307.

APPROVAL, BONDS OF THE VILLAGE OF PENINSULA, SUMMIT COUNTY—$3,500.00.

COLUMBUS, OHIO, November 28, 1927.

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

1308.

APPROVAL, BONDS OF BOLIVAR VILLAGE SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO—$69,000.00.

COLUMBUS, OHIO, November 28, 1927.

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

1309.

RAPE—SECTIONS 12413, 12414, 12423-1 AND 13023, GENRAL CODE, DISCUSSED—RAPE OF STEP-DAUGHTER BY STEP-FATHER—INCEST —PROSECUTION FOR "SAME OFFENSE", DISCUSSED.

SYLLABUS:

1. *A male person of fifty-five years of age who commits rape upon his step-daughter, aged thirteen years, if the act was committed forcibly and against the will of such female.*

may be prosecuted under Sections 12413, 12423-1 *and* 13023, *General Code. If the act was committed with her consent he may be prosecuted under Sections* 12414, 12423-1 *and* 13023, *General Code.*

2. *A conviction upon an indictment charging a violation of either Section* 12413 *or Section* 12414, *General Code, would not preclude a prosecution upon an indictment charging a violation of either Sections* 12423-1 *or* 13023, *General Code, or both, inasmuch as these several sections do not charge the "same offense" as those words are used in Article I, Section* 10 *of the Constitution of Ohio.*

COLUMBUS, OHIO, November 28, 1927.

HON. FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated November 21, 1927, which reads as follows:

> "We have for consideration in this county, a person fifty-five years of age charged with the crime of rape upon a female child of the age of thirteen.
>
> The child is the step-daughter of the accused by reason of his marriage with her mother.
>
> First, is he guilty of two offenses under Section 12413, G. C., or one offense, having in mind the fact that she is a step-daughter of the accused and also is such relation of step-child sufficient to charge incest under Section No. 13023. Also, can he be charged legally under both sections for the same offense, 12413 and 13023 as two separate crimes?"

Section 12413, General Code, to which you refer, provides:

> "Whoever, has carnal knowledge of his daughter, sister, or a female person under twelve years of age, forcibly and against her will, shall be imprisoned in the penitentiary during life; and whoever has carnal knowledge of any other female person forcibly and against her will shall be imprisoned in the penitentiary not less than three years nor more than twenty years."

This section defines three separate crimes, viz.:

1. Rape of a daughter or sister.
2. Rape of a female person under twelve years of age.
3. Rape of any other female person.

(See *Howard* vs. *State*, 11 O. S. 328.)

The several elements of proof which the state must prove beyond a reasonable doubt in order to systain a conviction thereunder may be summarized as follows:

1. Venue.
2. That the accused had carnal knowledge of the person alleged in the indictment.
3. That the female was either the daughter or sister of the accused, or a female person under twelve years of age, or any other female person.
4. That the act was committed forcibly and against the victim's will.

You fail to state whether the act complained of was committed forcibly and against the will of the prosecutrix or with her consent. If done with her consent no prosecution could be maintained under Section 12413, supra, inasmuch as the prosecutrix

is neither the daughter or sister of the accused nor a female person under twelve years of age. If the act was committed forcibly and against the will of the prosecutrix a prosecution would lie upon an indictment drawn under that portion of Section 12413, supra, which provides:

> "* * * and whoever has carnal knowledge of any other female person forcibly and against her will, etc."

You refer also to Section 13023, General Code, which provides:

> "Whoever, being nearer of kin by consanguinity or affinity than cousins, having knowledge of such relationship, commit adultery or fornication together, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Affinity, as that term is used in Section 13023, supra, is the relationship which marriage occasions between the husband and the blood relatives of the wife, and between the wife and the blood relations of the husband. Consanguinity, as used in Section 13023, supra, means relationship by blood, as affinity is relationship by marriage. Obviously the relationship that exists between step-father and step-daughter is "nearer of kin by affinity than cousins."

The several elements of proof which the state must prove beyond a reasonable doubt in order to sustain a conviction thereunder may be summarized as follows:

1. Venue.
2. That the accused was nearer of kin by consanguinity or affinity than cousins with regard to the prosecutrix.
3. That the accused had knowledge of such relationship.
4. That unlawful sexual intercourse took place.

Your attention is directed to the case of *State* vs. *Robinson*, 83 O. S. 136, the first paragraph of the syllabus of which reads:

> "Under Section 7019, Revised Statutes, making it incest for persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, to commit adultery or fornication together, the crime may be committed with or without the consent of the woman, and it is not prejudicial error for the court to charge the jury that if they find beyond a reasonable doubt that an act of sexual intercourse took place that consent on the part of the female is presumed."

On page 139 the court used the following language:

> "In some states it is held that to constitute the crime of incest the consent of both parties is essential, that it is a joint offense, and that both parties must be guilty. This conclusion is based upon the use of the words 'with each other,' 'together,' or similar words in defining the crime. But in the great majority of states it is held that the consent of both parties is not essential and that a defendant may be convicted of incest though he use such force as makes it rape. We think the better reason is with the majority. The essence of the crime of fornication, adultery, incest and rape, is unlawful sexual intercourse. In fornication it is unlawful because the marriage relation does not exist between the parties, in adultery because the offender is married to another, in incest because the parties are too near of kin. The act is made

criminal because of the status of the parties, or of the force used to accomplish it. The act can not be accomplished by one person, hence the use of the words 'with each other,' or as in our statute 'together' and the offense is committed when the act is accomplished between persons within the prescribed status, by the party who, knowing it, participated in the act whether the other consented or not."

In the case that you present all the material elemants to sustain a conviction therefor are present and it is my opinion that a prosecution could be successfully maintained under this section of the General Code. In this connection your attention is directed to the cases of *Stewart* vs. *State*, 39 O. S. 152 and *Noble* vs. *State*, 22 O. S. 541.

Your attention is further directed to Section 12414, General Code, which provides:

"Whoever, being eighteen years of age, carnally knows and abuses a female person under the age of sixteen years with her consent shall be imprisoned in the penitentiary not less than one year nor more than twenty years, or six months in the county jail or workhouse. The court is authorized to hear testimony in mitigation or aggravation of such sentence."

and to Section 12423-1, General Code, which provides:

"Whoever, being a male person over the age of eighteen years shall assault a female child under the age of fourteen years, and shall wilfully take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, or wilfully make improper exposures of his person in the presence of such child, shall be deemed guilty of felonious assault, and on conviction thereof shall be fined not more than one thousand dollars, or imprisoned in the penitentiary not more than ten years, or both, such fine and imprisonment, in the discretion of the court."

The application of these two sections is discussed in answer to your second inquiry.

2. The question presented by your second inquiry is whether or not a defendant may be indicted under Sections 12413 and 13023, General Code, for the same act. In other words, does an indictment charging a violation of Section 12413, General Code, charge the "same offense" as an indictment charging a violation of Section 13023, General Code.

Your attention is directed to the case of *State* vs. *Rose*, 89 O. S. 383, wherein, at page 386, the court used the following language:

"The words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation."

As stated on page 387 thereof:

"It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the constitutional provision requires that it shall be the 'same offense'. The usual test accepted by the text-writers on criminal law and procedure is this: If the defendant upon the first charge could have been convicted of the offense in the second, then he has been in jeopardy.

Some courts have greatly expanded the natural and ordinary meaning of the words 'same offense' to include all lesser degrees that may be fairly

included within the major charge. * * * This doctrine, however, has not favor in the decisions of the Supreme Court of this state."

To the same effect see *State* vs. *Billotto*, 104 O. S. 13; *State* vs. *Corwin*, 106 O. S. 638 and *Duvall* vs. *State*, 111 O. S. 657.

If the alleged act was committed forcibly and against the will of the prosecutrix the usual form of indictment contains two counts, in one of which the offense is charged to have been committed forcibly and against the will of the prosecutrix and in the other to have been done with her consent. With regard to an indictment so drawn the state need not elect upon which count of the indictment it will rely. To this effect see *State* vs. *Hensley*, 75 O. S. 255.

Answering your second question specifically it is my opinion that, if the facts warrant, indictments will lie in the case that you present charging the defendant with a violation of Sections 12413, 12414, 12423-1 and 13023, General Code. A conviction upon an indictment charging a violation of Section 12413, General Code, would preclude a prosecution upon an indictment charging a violation of Section 12414, and vice versa. Obviously, if the act was committed forcibly and against the will of the prosecutrix, it was not done with her consent. However, a conviction upon an indictment charging a violation of either Section 12413 or Section 12414, General Code, would not preclude a prosecution upon an indictment charging a violation of either Sections 12423-1 or 13023, General Code, or both, inasmuch as these several sections do not charge the "same offense" as those words are used in Article I, Section 10 of the Constitution of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1310.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND IN THE VILLAGE OF POINT PLEASANT, CLERMONT COUNTY, OHIO.

COLUMBUS, OHIO, November 29, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Pursuant to an opinion of this department, bearing number 1155 and dated October 15, 1927, relative to certain real estate in the Village of Point Pleasant, Clermont County, Ohio, standing in the name of Carl E. Hostetter, you have now furnished a copy of the action of the Controlling Board approving the purchase of said real estate.

You have also submitted a deed from Elsie Hostetter, wife of Carl E. Hostetter, in which she conveys her dower interest in said real estate. This deed I find to be in proper legal form and properly executed and therefore approve the same.

You have also submitted copy of a letter from Mr. Allen B. Nichols of Batavia, Ohio, stating that Dr. Hostetter refuses to deliver his deed until he gets his money. No deed, either executed or unexecuted, from Carl E. Hostetter to the State of Ohio